REPORT FOR THE HEARING
delivered in Case 256/84 *

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* Language of the Case: French.

I — Law and facts

A — *Relevant regulations*

1. *Main provisions*

The anti-dumping rules of the Community are based on Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as 'the GATT').

The first agreement on the implementation of Article VI of the GATT (the Anti-Dumping Code of 1968) was transposed into Community law by Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (Official Journal, English Special Edition 1968 (I), p. 80), as amended by Council Regulation No 1681/79 of 1 August 1979 (Official Journal 1979, L 196, p. 1).

In 1979 the Community took part in multilateral trade negotiations in Tokyo which led to a new agreement on the implementation of Article VI of the GATT (the 1979 Anti-Dumping Code). The new agreement was transposed into Community law by Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1979, L 339, p. 1). Regulation No 3017/79 was amended by Council Regulation No 1580/82 of 14 June 1982 (Official Journal 1982, L 178, p. 9).

2. *Relevant provisions of Council Regulation No 3017/79 of 20 December 1979*

Article 2 A of Regulation No 3017/79 provides as follows:

'1. An anti-dumping duty may be applied to any dumped product whose entry for consumption in the Community causes injury.

2. A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product.'

(a) *Assessment of dumping*

The terms 'normal value', that is to say the price charged on the internal market of the exporting country, 'export price' and 'like product' are defined respectively in Article 2 B, C and E of Regulation No 3017/79.

According to Article 2 F (13) of Regulation No 3017/79:

'(a) "Dumping margin" means the amount by which the normal value exceeds the export price.

(b) Where prices vary, the dumping margin may be established on a transaction-by-transaction basis or by reference to the most frequently occurring, representative or weighted average prices.

(c) Where dumping margins vary, weighted averages may be established.'

Article 2 D (9) provides that:

'For the purposes of a fair comparison, the export price and the normal value shall be on a comparable basis as regards physical characteristics of the product, quantities, and conditions and terms of sale. They shall normally be compared at the same level of trade, preferably at the ex-factory level, and as nearly as possible at the same time.'

If the export price and the normal value are not on a comparable basis in respect of the factors mentioned in paragraph (9), they must be compared in accordance with the criteria laid down in Article 2 D (10).

(b) *Assessment of the injury suffered by the Community*

Article 4 (1) provides:

'A determination of injury shall be made only if the dumped or subsidized imports are, through the effects of dumping or subsidization, causing injury, i.e. causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry . . . '.

Article 4 (5) defines the term 'Community industry':

'The term "Community industry" shall be interpreted as referring to the Community producers as a whole of the like product or to those of them whose collective output of the products constitutes a major proportion of the total Community production of those products . . . '.

(c) *Termination of the anti-dumping proceeding*

(i) Offer of undertakings

Article 10 of Regulation No 3017/79 provides that:

'1. Where, during the course of a proceeding, undertakings are offered which the Commission after consultation considers acceptable, anti-dumping/anti-subsidy proceedings may be terminated without the imposition of provisional or definitive duties. Such termination shall be decided in conformity with the procedure laid down in Article 9 (1) and information shall be given and notice published in accordance with Article 9 (2). Such termination does not preclude the definitive collection of amounts secured by way of provisional duties pursuant to Article 12 (2).

. . .

4. If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the Commission, after consultation so decides or if request is made, in the case of dumping, by exporters representing a significant percentage of the trade involved or, in the case of subsidization, by the country of origin or export. In such a case, if the Commission, after consultation makes a determination of no injury, the undertaking shall automatically lapse. However, where a determination of no threat of injury is due mainly to the existence of an undertaking, the Commission may require that the undertaking be maintained.'

Article 7 (9) provides that:

'A proceeding is concluded either by its termination or by definitive action. Conclusion should normally take place within one year of initiation of the proceeding.'

(ii) Imposition of provisional and definitive duties

Article 11 (1) of Regulation No 3017/79 provides that:

'Where preliminary examination shows that dumping or a subsidy exists and that there is sufficient evidence of injury caused thereby and the interests of the Community call for intervention to prevent injury being caused during the proceeding, the Commission, acting at the request of a Member State or on its own initiative, shall impose a provisional anti-dumping or countervailing duty . . . '.

Article 11 (5) provides that provisional duties are to have a maximum period of validity of four months. They may, however, in certain circumstances be extended for a further period of two months.

Article 11 (6) provides that any proposal for definitive action, or for the extension of provisional measures, must be submitted to the Council by the Commission not later than one month before expiry of the period of validity of provisional duties.

Article 12 (1) of Regulation No 3017/79 reads as follows:

'Where the facts as finally established show that there is dumping or subsidization and injury caused thereby, and the interests of the Community call for Community intervention, a definitive anti-dumping or countervailing duty shall be imposed by the Council . . . '.

Article 13 (3) provides that the amount of such duties is not to exceed the dumping margin provisionally estimated or finally established or the amount of the subsidy provisionally estimated or finally established; it should be less if such lesser duty would be adequate to remove the injury.

B — *Origin and course of the proceedings*

On 28 February 1983 the Commission received a complaint, within the meaning of Article 5 of Regulation No 3017/79, lodged by the Federation of European Bearing Manufacturers' Associations (hereinafter referred to as 'Febma') on behalf of British, French, German and Italian producers of single-row deep-groove radial ball-bearings with greatest external diameter of not more than 30 mm (headings ex 84.62 of the Common Customs Tariff and ex 84.62-01 of the Nimexe Code of 1 January 1984). The collective output of the members of Febma constitutes the majority of Community production of the product in question.

After consultation the Commission decided that there was sufficient evidence to justify the initiation of a proceeding and decided to commence an investigation pursuant to Article 7 of Council Regulation No 3017/79 as amended (Official Journal 1983, C 188, p. 8).

In a fresh notice published on 15 November 1983 (Official Journal 1983, C 310, p. 3) the Commission stated that in so far as the proceeding constituted a review of undertakings accepted within the framework of a previous anti-dumping proceeding, the review was carried out on the initiative of the Commission pursuant to Article 14 of Regulation No 3017/79, as amended.

At the conclusion of the Commission's investigation carried out between 1 July 1982 and 30 June 1983 the Commission found that dumping existed in respect of, in particular, the applicant's exports and that the margin of dumping was equal to the amount by which the normal value as established exceeded the price for export to the Community.

By Regulation No 744/84 of 19 March 1984 (Official Journal 1984, L 79, p. 8) the Commission:

(i) repealed Commission Decision No 81/406/EEC of 4 June 1981 (Official Journal L 152, p. 44) accepting the undertakings given by, among others, Koyo Seiko in respect of the abovementioned ball-bearings;

(ii) imposed a provisional anti-dumping duty of 4.36% on imports of certain ball-bearings exported by the applicant.

Article 4 of Regulation No 744/84 provided that the regulation was applicable for a period of four months unless the Council adopted definitive measures before the expiry of that period. The parties concerned made known their views within the period of one month prescribed in Article 3.

However, the Commission made a proposal pursuant to Article 11 (6) of Regulation No 3017/79 that the Council should adopt a definitive anti-dumping duty. By Regulation No 2089/84 of 19 July 1984 the Council imposed a definitive anti-dumping duty of 4.03% on imports of certain ball-bearings by the applicant (Official Journal 1984, L 193, p. 1).

Article 2 of Regulation No 2089/84 provides that:

'The sums secured by way of provisional anti-dumping duty under Regulation (EEC) No 744/84 shall be definitively collected up to a maximum of the respective rates of the definitive anti-dumping duty.'

II — Proceedings before the Court

The present application was lodged at the Court Registry on 2 November 1984.

In a document lodged at the Court Registry on 11 December 1984 the Commission raised an objection under Article 91 of the Rules of Procedure contending that the action was inadmissible in so far as it was directed against the Commission since it sought only to have a Council regulation declared void.

In a document lodged at the Court Registry on 12 March 1985 the applicant referred to paragraph 34 of the judgment of 29 March 1979 in Case 120/77 *Koyo Seiko* v *Council and Commission* [1979] ECR 1337 and contended that the proceedings against the Commission were justified in view of the active part it played in the decision at issue.

By order dated 8 May 1985 the Court declared the application inadmissible in so far as it was directed against the Commission.

By application received at the Court Registry on 11 December 1984 the Commission requested leave to intervene in support of the conclusions of the Council in the event of its objection of inadmissibility being upheld. Its application to intervene was allowed by order of the Court of 8 May 1985.

By application received at the Court Registry on 20 December 1984 Febma sought leave to intervene in support of the conclusions of the Council. It was granted leave to intervene by order of the Court of 20 March 1985.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

By order dated 7 May 1986 made pursuant to Article 95 (1) and (2) of the Rules of Procedure the Court assigned the case to the Fifth Chamber.

III — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare void Council Regulation No 2089/84 of 19 July 1984 imposing a

definitive anti-dumping duty on imports of certain ball-bearings originating in Japan and Singapore;

2. Order the defendant to pay the costs.

The *Council* contends that the Court should:

1. Declare the application admissible only in so far as the contested regulation introduces anti-dumping duties on products of Japanese origin produced and exported by the applicant;

2. Dismiss the rest of the application;

3. Order the applicant to pay the costs.

The *Commission* submits that the Court should:

1. Dismiss the application;

2. Order the applicant to pay the costs, including its own costs.

Febma submits that the Court should:

1. Dismiss the application;

2. Order the applicant to pay the costs, including its own costs.

IV — Submissions and arguments of the parties

Admissibility

The *Council* has doubts as to whether the application is admissible in so far as it seeks to have the whole of Regulation No 2089/84 declared void. It refers in this regard to its observations appended to the rejoinder in Case 240/84 *NTN Toyo Bearing* v *Council* which is pending before the Court.

The applicant states that it does not understand the Council's argument since it has no knowledge of the observations it has made in other proceedings to which the applicant is not a party. In any event, it wishes to maintain its claim that the whole of Council Regulation No 2089/84 should be delared void.

The *Commission* has made no submissions on this point.

Febma, for the same reasons as the Council, contests the admissibility of the application in so far as it is directed against all the provisions of Regulation No 2089/84.

Substance

The applicant makes three submissions: infringement of rules of procedure and of the principle of protection of legitimate expectation; breach of the principle of business certainty and infringement of Council Regulation No 3017/79.

The submission alleging infringement of rules of procedure and of the principle of protection of legitimate expectation

The applicant contends that the investigation conducted against it by the Commission, namely the sending of a detailed questionnaire to be answered within a short period, was not justified since, apart from the mention of its name on the cover of Febma's complaint, that complaint did not concern the applicant. The Commission sought to put this right by stating in the notice published on 15 November 1983 that the purpose of the investigation was in fact to review, on the basis of Article 14 of Council Regulation No 3017/79, the undertakings previously given. That review, which concerned only the ball-bearings mentioned

by Febma, was even less justified since the undertakings given on 20 June 1977 related to all types of ball-bearings and were still in force since the Commission had never withdrawn its acceptance of them.

In the applicant's view, the Commission and the Council disregarded the principle laid down in particular in paragraph 43 of the judgment of 29 March 1979 in Case 120/77 *Koyo Seiko* v *Council and Commission* cited above, in which the Court stated that the Commission's anti-dumping rules required that provisional anti-dumping duties and *a fortiori* definitive anti-dumping duties 'should be adopted having regard to the situation caused by the failure to observe the undertaking'. After that judgment of the Court the applicant was entitled to assume that, so long as its undertakings and the reports which it regularly sent to the Commission were not called in question, no anti-dumping proceeding could be initiated against it.

Contrary to the Council's assertion, the applicant answered all the telex messages sent to it (see the letter of 10 August 1983 sent in reply to the Commission's telex message of 14 June 1983, Annex 7 to the application) and challenged the Commission's position. The applicant states once again that it still does not know the facts which led to the adoption of the measures in question.

According to the applicant, the anti-dumping proceeding could not in any event be based on the provisions of Council Regulation No 3017/79, which was not yet in force when its undertakings were given to the Commission. To support that argument it refers to an article entitled 'Le principe de la non-rétro-activité en droit communautaire à la lumière des arrêts isoglucose' which appeared in *Revue trimestrielle de droit européen* (No 3, 1983).

The applicant submits that the benefits of the situation created by the undertakings which it had signed and by the judgment of 29 March 1979 in Case 120/77 were nullified by the adoption and immediate application of Regulation No 3017/79. It takes the view that Council Regulation No 459/68 should continue to govern a legitimate situation which arose under that regulation.

It follows from the foregoing arguments that Regulation No 2089/84 was adopted in breach of rules of procedure and the principle of protection of legitimate expectation.

The *Council* has appended as Annex I to its defence the first page of Febma's complaint which shows that it was indeed directed against the applicant, although Febma's arguments mainly concerned the activities of the company Minebea.

The Council contends that the anti-dumping proceeding constituted, with regard to the applicant, a partial review of its undertakings, as was stated in the notice of 14 July 1983. It was only in order to avoid any misunderstanding that the Commission again stated the purpose of the proceedings in the notice published in November 1983. On 14 June 1983, a month before the proceeding officially started, the Commission informed the applicant's representative by telex of the precise terms of Febma's complaint, stating that the proceeding would mean a partial review of the undertakings which it had previously accepted. The initiation of the proceeding was therefore to be regarded as a general inquiry and not as a measure adversely

affecting any party. The Council refers in this regard to the judgment of 11 November 1981 in Case 60/81 *International Business Machines* v *Commission* [1981] ECR 2639.

As regards the allegedly unlawful nature of the procedure adopted, the cases envisaged in Article 10 and Article 14 of Regulation No 3017/79 must be distinguished. Whereas Article 10 (6) deals with the withdrawal or breach of undertakings, Article 14 provides for a review of undertakings, which continue in force until the end of the review procedure.

The Council considers that, since the applicant was informed of the terms of the review and had every opportunity of submitting its views, the passage cited by the applicant in the judgment of 29 March 1979 in Case 120/77 is irrelevant.

In the Council's view, the Community rules do not prohibit a partial review of undertakings. Such a review was justified in the present case by the fact that small ball-bearings intended mainly for high-technology industries producing precision mechanics, computers and consumer electronics constituted a new market which the Commission had to identify by means of the questionnaire sent to the undertakings concerned.

The Council does not understand the applicant's argument based on the fact that when it gave undertakings in 1977 Regulation No 3017/79 was not in force. The applicant's undertakings comprise three documents dated 20 June 1977, 7 November 1980 and 3 March 1981 (Annex 13 to the application). The latter undertakings could in no case be governed by a parent regulation which was no longer in force; moreover, they were accepted by the Commission on the basis of Article 10 of Regulation No 3017/79. The Council also observes that, as far as the review of undertakings is concerned, Regulation No 3017/79 codified the practice already followed by the Commission when Regulation No 459/68 was in force.

Finally, the Council observes that the existence of a regulation of general scope cannot give the persons concerned a legitimate expectation that those rules will never be changed.

The *Commission* has made no submissions on this point.

Febma observes that the anti-dumping proceeding was initiated in accordance with the provisions of Regulation No 3017/79, as is shown in the preamble to Commission Regulation No 744/84, on the basis of the complaint which it had lodged in March 1983.

That complaint related to the dumping of small ball-bearings by all exporters operating from Japan and Singapore. Although Febma did not formally allot a volume of exports to any particular exporter, the complaint satisfied the requirements of Article 5 of Regulation No 3017/79. In any event, the Commission was entitled under Article 14 (1) of Regulation No 3017/79 to initiate the proceeding on its own initiative.

Febma submits that the restriction of the anti-dumping proceeding to ball-bearings with a maximum external diameter of not more than 30 mm is not the result of an artificial division of the ball-bearings market but is intended to combat manifest dumping in that segment of the market.

In Febma's view, the allegation concerning the breach of the principle of protection of legitimate expectation is unfounded since decisions to accept undertakings are not unalterable, as is shown by the review procedure provided for in Article 14 of Regulation No 3017/79.

The submission alleging infringement of the principle of business certainty

The *applicant* takes the view that the methods used to calculate the contested anti-dumping duty were different from those adopted and notified by the Commission in a letter sent to the applicant on 14 October 1980 (Annex 12 to the application). That unilateral change of method is contrary to the principle of business certainty. Furthermore, the new method is inequitable and leads to unfair results.

The Council observes that the applicant is making an assertion without any supporting argument and that consequently it is impossible for it to answer such a charge.

The *Commission* submits that, since anti-dumping duties can be introduced only prospectively and not retroactively, there is no substance in the applicant's argument that the transaction-by-transaction method, which reviews past undertakings, 'introduced new rules with retroactive effect'. According to the Commission, which cites the judgment of 4 October 1983 in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, the Community industry, which has a right to complain about dumping and to challenge any decisions of the institutions with which it is not satisfied, cannot be deprived of those rights on the ground that the institutions have employed other methods in the past. The employment of new methods has not infringed any established rights and so cannot be vitiated for breach of the principle of legitimate expectation.

According to *Febma*, this submission is unfounded since, contrary to the applicant's assertion, it was not unaware of the change in the method used. Febma refers in this regard to a letter which the applicant sent to the Commission on 31 May 1984.

In any event, the change in method does not infringe any established rights; it was the Commission's duty to adopt appropriate methods to prevent dumping.

The submission alleging infringement of Council Regulation No 3017/79

The applicant argues that paragraph 24 of the preamble to Regulation No 2089/84, which states that the undertakings offered were held to be unacceptable because 'past experience with price undertakings in the ball-bearings sector has shown that undertakings, even if generally respected, do not constitute a satisfactory solution', disregards the provisions of the GATT and of the Community regulations. It is clear from those provisions that anti-dumping duties are imposed only if undertakings offered are not satisfactory; offers of undertakings should not be ruled out *a priori*.

The Council contends that undertakings are accepted under Article 10 of Regulation No 3017/79 only if they are satisfactory. The applicant's offers were not satisfactory, however, since they did not, in particular, provide for any price increase. The Commission therefore correctly exercised its discretion under the Community rules.

Febma's arguments are similar to those of the Council. It also observes that the applicant is well known for its particularly aggressive dumping practices. Febma refers in this regard to Council Regulation No 1778/77 of 26 July 1977 (Official Journal L 196, p. 1), which mentions an average dumping margin of 15%, and to the Commission Decision No 81/406/EEC of 4 June 1981, cited above, in which the applicant's dumping margins were assessed at between 0 and 40%. According to Febma, those large percentages are due to the fact that the applicant was operating at a loss and the undertaking could be restructured only through Toyota's involvement.

The *Commission* states that it agrees substantially with the arguments put forward by the Council but adds that it has a wide discretion, subject to the powers of the Council and to review by the Court of Justice where appropriate, in judging whether or not to accept an undertaking offered, especially since neither the GATT nor the Community rules lay down any criteria indicating when undertakings may be accepted.

After mentioning both the advantages and the difficulties, not to say inconvenience, associated with the acceptance of undertakings, the Commission submits that in any event it is difficult to monitor them. The difficulty arises from the variety of ball-bearings and the prices charged by the same producer and the impossibility of discovering the identity of the manufacturer whose products, which are identical to many other ball-bearings, are exported without any documents.

Apart from the risk of circumvention, the monitoring of undertakings involves a substantial administrative burden. There is wide scope for circumvention in so far as it may occur at any link in the chain extending from the manufacturer to the exporter and the Commission does not have the means of carrying out all the necessary investigations in Japan.

After pointing out that in the event of a deliberate breach of undertakings no penalty may be imposed other than the initiation of an investigation, the Commission states that paragraph 24 of the preamble to Regulation No 2089/84 reflects the experience of monitoring all the undertakings which have been given in relation to ball-bearings. In view of that experience the Commission states that it may be unwilling to accept a given undertaking, even if its terms may on their face appear satisfactory. Such refusal does not necessarily imply any criticism of any particular undertaking and is not a sanction or penalty. The Commission states that, contrary to what the applicant argues, the monitoring of undertakings is very much more onerous than a request to alter the rate of a duty which has been imposed.

The Commission submits that the Court should be slow to interfere with the results of an assessment made on pragmatic, practical and administrative grounds.

Febma observes that the undertakings offered by the applicant have always been accepted by the Commission. Experience has simply shown that the acceptance of undertakings does not eliminate dumping.

Febma considers this submission inadmissible in any event since the action is directed against a regulation adopted by the Council, which has no power under Regulation No 3017/79 to accept undertakings; according to Article 12 of that regulation, it

may only accept or reject a proposal from the Commission to impose a definitive anti-dumping duty.

The submission alleging a breach of the principle of proportionality and of the obligation to state reasons

The applicant claims that the contested regulation was adopted in breach of Articles 11 and 12 of Council Regulation No 3017/79, from which it is clear that a definitive anti-dumping duty is to be imposed only if the facts as finally determined show that the dumping causes injury to the Community industry. In view of the procedure followed, the applicant considers that the definitive anti-dumping duty imposed on it by the Council is not justified.

The *Council* states that the Commission explained at length in paragraphs 23 to 32 of the preamble to Regulation No 744/84 the injury to the Community industry; in the absence of fresh evidence, the Council concluded in paragraph 21 of the preamble to Regulation No 2089/84 that the injury was continuing, as so defined in accordance with Article 12 of Regulation No 3017/79.

The *Commission* has made no submissions on this point.

Febma observes that Article 12 (1) of Regulation No 3017/79 requires the Council to determine the anti-dumping duty. The fact that its decision is based on findings set out by the Commission in Regulation No 744/84 is not unlawful and accords with its obligation to state reasons. This submission must therefore be dismissed as unfounded.

Y. Galmot
Judge-Rapporteur

OPINION OF MR ADVOCATE GENERAL MANCINI

(see Case 240/84, p. 1833)