JUDGMENT OF THE COURT (Fifth Chamber)
10 March 1992 *

In Case C-171/87,

Canon Inc., Tokyo, Japan, represented by Ivo Van Bael, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Freddy Brausch, 8 Rue Zithe,

applicant,

v

Council of the European Communities, represented by Hans-Jürgen Lambers, Director in its Legal Service, and Erik Stein, Legal Adviser, acting as Agents, assisted by Hans-Jürgen Rabe and Michael Schütte, Rechtsanwälte, Hamburg and Brussels, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg,

defendant,

supported by

Commission of the European Communities, represented by its Legal Adviser John Temple Lang, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

intervener,

and by

* Language of the case: English.

Committee of European Copier Manufacturers (CECOM), Cologne, represented by Dietrich Ehle and Volker Schiller, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Harles, 4 Avenue Marie-Thérèse,

intervener,

APPLICATION for the annulment of Articles 1 and 2 of Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (Official Journal 1987 L 54, p. 12), in so far as they relate to the applicant,

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of the Chamber, Sir Gordon Slynn, F. Grévisse, J. C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 October 1990, at which Canon was represented by Alain Vanderelst, of the Brussels Bar,

after hearing the Opinion of the Advocate General at the sitting on 13 December 1990,

gives the following

Judgment

1 By application lodged at the Court Registry on 6 June 1987, Canon Inc. (hereinafter referred to as 'Canon'), whose registered office is in Tokyo, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Articles 1 and 2 of Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (Official Journal 1987 L 54, p. 12), hereinafter referred to as 'the contested regulation', in so far as they relate to the applicant.

2 The Canon company manufactures plain paper copiers ('PPCs') which it sells (a) to distributor companies in which it holds shares, these being responsible for marketing the PPCs in Japan, the United Kingdom, France and Germany; (b) to Canon Europa NV, an export coordination company, whose registered office is in Amsterdam, which then exports the PPCs to exclusive distributors in Denmark, Ireland and Greece; and (c) to original equipment manufacturers (companies supplying under their own brand name products manufactured by other undertakings, hereinafter referred to as 'OEMs').

3 In July 1985 Canon, together with other Japanese manufacturers, was the subject of a complaint lodged with the Commission by the Committee of European Copier Manufacturers (CECOM), which accused it of dumping its products in the Community.

4 The anti-dumping procedure 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) resulted in the adoption of Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan (Official Journal 1986 L 239, p. 5). The rate of the provisional anti-dumping duty was fixed at 15.8% of the net free-at-Community-frontier price in the case of imports of PPCs manufactured and exported by Canon. By the

contested regulation, adopted on a proposal from the Commission, the Council subsequently set the definitive anti-dumping duty at 20%.

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or referred to hereinafter only in so far as is necessary for the reasoning of the Court.

6 In support of its action Canon relies upon five pleas in law, alleging variously miscalculation of the normal value, miscalculation of the export price, incorrect comparison of the normal value and the export price, incorrect evaluation of the injury suffered by the Community industry and breach of the duty to state reasons.

The plea in law alleging miscalculation of the normal value

7 Canon maintains, first, that the institutions wrongly refused to take as the normal value the price charged in transactions in Japan between Canon and its Japanese sales subsidiary Canon Sales Company (hereinafter referred to as 'CSC') and applied Article 2(3)(a) of Regulation No 2176/84, thus determining the normal value on the basis of the prices charged by CSC on the first sale to an independent purchaser. In so doing, they determined the normal value at a level of trade which is not comparable to that taken into account in order to construct the export price, which was determined on the basis of sales from Canon to its European subsidiaries. Canon adds that, when determined in that way, even after allowances were made under Article 2(10) of Regulation No 2176/84, the normal value includes certain expenses incurred by CSC whereas those incurred by Canon's European subsidiaries were excluded from the calculation of the export price. According to Canon, the sales were not comparable and therefore the institutions should have established the normal value in accordance with Article 2(3)(b) of Regulation No 2176/84, that is to say, they should have used the comparable price for exports to a third country, or constructed a normal value.

8 It should be borne in mind, first, that according to Article 2(3)(a) of Regulation No 2176/84 the normal value is taken to mean 'the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin'. Other factors mentioned in Article 2(3)(b)(i) and (ii) may be used as the normal value 'when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison'. It appears from the wording and scheme of those provisions that regard must primarily be had to the price actually paid or payable in the ordinary course of trade in order to establish the normal value, the other possibilities being merely subsidiary (judgment in Joined Cases 277 and 300/85 *Canon* v *Council* [1988] ECR 5731, at paragraph 11).

9 Secondly, according to the documents before the Court, Canon has financial control of CSC, which is a distribution company for its products in Japan, and entrusts to it tasks which are normally the responsibility of an internal sales department of the manufacturing organization.

10 As the Court has already held, in particular in its judgment in Case 250/85 *Brother* v *Council* [1988] ECR 5683, at paragraph 16, the division of production and sales activities within a group made up of legally distinct companies can in no way alter the fact that the group is a single economic entity which organizes in that way activities that, in other cases, are carried on by what is in legal terms as well a single entity.

11 In those circumstances, the fact that the institutions took the prices paid by the first buyer who was independent of the sales subsidiary is justified, given that those prices may quite properly be regarded as the prices actually paid or payable in the ordinary course of trade within the meaning of Article 2(3)(a) of Regulation No 2176/84.

12 With regard to Canon's argument that the Council determined the normal value on the basis of sales that were not comparable to those taken into account for the purposes of calculating the export price, it should be recalled, first, that, as the Court stated in its judgment in Joined Cases 277 and 300/85 *Canon* v *Council*, cited above, at paragraph 19, the requirement of comparability laid down in Article 2(3)(a) of Regulation No 2176/84 is satisfied provided that the normal value and the export price are both determined by reference to the first sale to an independent purchaser. The comparison must therefore be between the figures arrived at in that way, subject to the allowances and discounts expressly provided for in Article 2(9) and (10) of Regulation No 2176/84.

13 Finally, with regard to the inclusion in the normal value of certain expenses incurred by CSC, it must be held that in view of the considerations set out above (in paragraphs 9 and 10) and as the Court held in Joined Cases 273/85 and 107/86 *Silver Seiko* v *Council* [1988] ECR 5927, at paragraph 14, by taking into consideration the sales subsidiary's prices it is possible to ensure that costs which manifestly form part of the selling price of a product where the sale is made by an internal sales department of the manufacturing organization are not left out of account where the same selling activity is carried out by a company which, despite being financially controlled by the manufacturer, is a legally distinct entity.

14 Canon maintains, secondly, that in the case of its OEM sales and sales of three of Canon's own-brand models, designated A, B and C, for which both the normal value and the export price were constructed, the institutions included in calculating the normal value, not only production costs and a profit margin, but also all Canon's and CSC's selling, administrative and other general expenses. On the other hand, for the export price only Canon's selling, administrative and other general expenses were taken into account, and not those incurred by the European subsidiaries. Hence the constructed normal value is not comparable to the export price.

15 In this connection it should be recalled that, according to the Court's case-law (see *inter alia* the judgments in Case 240/84 *Toyo* v *Council* [1987] ECR 1809, at

paragraph 13, Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, at paragraph 14, Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, at paragraph 14, and Case 260/84 *Minebea* v *Council* [1987] ECR 1975, at paragraph 8), determination of the normal value and determination of the export price are governed by separate rules and therefore selling, administrative and other general expenses need not necessarily be treated in the same way in both cases.

16 It should be added that the selling, administrative and other general expenses of CSC, which, as indicated above, acted as a sales department of Canon, are in reality only comparable to those of its export department, whose equivalent expenses were not deducted from the export price, not to those of its European subsidiaries. Any differences in the amount of those expenses could be taken into account under the allowances provided for in Article 2(10)(c) of Regulation No 2176/84.

17 Canon maintains, thirdly, that the normal value of the three Canon own-brand models mentioned above was artificially inflated by the use of profit margins which were inappropriate for the products concerned.

18 On this point it must first be pointed out that the Council did not exceed the bounds of its discretion by using, in order to calculate the normal value of the three models, average profit determined by the institutions on the basis of the amount exceeding production costs, including a reasonable amount by way of selling, administrative and other general expenses, based on total sales of Canon models in the ordinary course of trade.

19 Model C was sold at a loss in substantial quantities over a fairly long period and the Council was therefore right to consider those sales as not having been made in the ordinary course of trade, in accordance with Article 2(4) of Regulation No 2174/84.

20 Furthermore it should be noted that Model B was not taken into account for the purposes of calculating Canon's dumping margin in view of that model's very low sales in the Community.

21 Finally, Canon did not dispute the Council's statement to the effect that it considered that the error made by the Commission in the construction of the normal value of Model A, which consisted in considering that that model did not comply with the rule that sales on the market should not be taken into account unless they constituted 5% or more of exports to the Community, had only a limited effect on the dumping margin and it was not therefore necessary to amend the rate of anti-dumping duty.

22 It follows from all the foregoing considerations that the plea in law alleging that the normal value was miscalculated must be rejected in its entirety.

The plea in law alleging that the export price was miscalculated

23 Canon claims, first, with regard to sales to two OEM buyers, that the export price was determined in accordance with Article 2(8)(a) of Regulation No 2176/84 and not, as the Council maintains, in accordance with Article 2(8)(b). As a result, the deduction, for which no provision is made in Article 2(10) of that regulation, of an amount set arbitrarily at 5% is unlawful.

24 Canon goes on to claim that, in the case of sales to Ireland, Denmark and Greece through Canon Europa, the institutions should not have applied Article 2(8)(b) of Regulation No 2176/84, nor constructed the export price by deducting all costs borne by Canon Europa and a profit margin of 5%.

25 According to Canon, Article 2(8)(b) of Regulation No 2176/84 only applies in the above two categories of sales where the product is resold to an independent buyer after being imported. Canon Europa did not import any PPC in the course of the investigation. Thus the sales which it made cannot be regarded as sales of imported products nor its costs as costs incurred between importation and resale.

26 In that connection it should be noted that the PPCs produced by Canon are sold through Canon Europa, which handles customers' orders, sends them the invoices and receives the relevant payments. In view of the activities pursued by Canon Europa the latter incurs costs which effectively reduce the amount received by the exporter.

27 As was made clear by the Court's judgment in Case C-156/87 *Gestetner* v *Council and Commission* [1990] ECR 781, at paragraphs 32 and 33, the fact that the costs incurred by Canon Europa relate to activities pursued prior to importation does not prevent the application of Article 2(8)(b) of Regulation No 2176/84, which does not preclude the making of necessary allowances where the export price must be constructed for reasons other than those referred to in that article.

28 In those circumstances, as the Court held in *Gestetner* (at paragraph 34), it was appropriate to construct the export price in the case of sales to OEM buyers on the basis of the price paid by the first independent purchaser, adjusted to reflect the costs and the profits inherent in the role played by Canon Europa.

29 The same applies as regards determination of the export price in the case of sales made by Canon, through Canon Europa, to the three independent national importers. As the Council pointed out in the third subparagraph of paragraph 15 of the preamble to the contested regulation, in each case Canon Europa assumes the functions typical of an importing subsidiary, similar to those performed in the case of OEMs.

30 It appears neither from the documents before the Court nor from the arguments at the hearing that the deductions made were excessive. The plea in law alleging that the export price was miscalculated must therefore be dismissed.

The plea in law alleging that the comparison of the normal value and the export price was incorrect

31 Canon claims that the institutions infringed Article 2(10)(c) of Regulation No 2176/84 inasmuch as they adopted a narrow interpretation of that provision and did not make any adjustments to the normal value to take into account the costs incurred by CSC, differences in the level of trade, trade-in discounts, transport costs incurred by Canon on sales to CSC and direct expenses incurred by sales staff in respect of sales activity.

32 It should be observed *in limine* that it follows from the judgments in the cases cited in paragraph 15, in particular Case 260/84 *Minebea* v *Council*, at paragraph 43, that the party claiming an adjustment must prove that its claim is justified, that is to say that the difference on which it relies concerns one of the factors listed in Article 2(9) of Regulation No 2176/84, that the difference affects price comparability and lastly, if it is a question particularly of differences in conditions and terms of sale, that those differences bear a direct relationship to the sales under consideration.

33 Canon has not disputed that, as paragraphs 17 and 18 of the preamble to the contested regulation state, the institutions in fact made adjustments pursuant to Article 2(9) and (10) of Regulation No 2176/84 in order to take into account differences relating, *inter alia*, to conditions and terms of sale. Thus expenses incurred by CSC which Canon claims should be deducted from the normal value are restricted to administrative and general expenses. However, Article 2(10)(c) of Regulation No 2176/84 excludes, as a general rule, any allowances in respect of such expenses and Canon has not proved the existence of any special circumstance which might justify a derogation from the rule thus laid down.

34 The fact that CSC also acts as a distributor for the products of other companies cannot justify such a derogation. As is clear from paragraph 12 of the preamble to Regulation No 2640/86 and the contested regulation, the institutions took into account those functions of CSC so as to include in the normal value only expenses relating to sales of Canon's PPCs.

35 With regard to the allowances claimed because the normal price and the export price were allegedly determined at different levels of trade, it must be held, as indicated in paragraph 12 above, that those factors were both established on the basis of the price at which the product was sold for the first time to an independent purchaser.

36 It must further be emphasized that Canon did not prove that the sales on the basis of which the normal value and the export price were determined concerned different categories of purchasers and were consequently at different levels of trade so as to justify the allowances claimed. Therefore the institutions were not bound to grant them.

37 With regard to the allowances claimed with respect to the trade-in discounts granted to buyers of new models when old models are traded in, it should be noted that, according to paragraph 13 of the preamble to the contested regulation, the discount corresponds to the benefit the producers obtain from the removal of the traded-in machines from the market and the lack of a second-hand market for PPCs in Japan. According to the Council, 'the demand for new machines is maintained at the highest possible level with prices consequently also being held at higher levels than would have been the case had a second-hand market existed' and 'this higher demand not only stimulates prices but also higher production levels which should normally result in increased economies of scale and commensurately higher profit levels'.

38 In those circumstances the discounts in question, which correspond to the value which the manufacturer attaches to withdrawal of the machines from the market,

cannot be regarded as bearing a direct relationship to sales within the meaning of Article 2(10)(c) of Regulation No 2176/84. Therefore the institutions were right to refuse to make the allowances claimed.

39 With regard to the allowance claimed for transport costs incurred by Canon on sales to CSC, it must be pointed out that since those costs correspond to the internal transfer of products from Canon to CSC, they are not directly related to the sales under consideration, as is required by Article 2(10)(c) of Regulation No 2176/84.

40 Finally, with regard to the expenses incurred by salesmen in their sales activities (travel expenses, parking fees, car insurance and sales training), it must be held that, as a general rule, those expenses are regarded as administrative or general expenses and no allowance is therefore made for them pursuant to Article 2(10)(c) of Regulation No 2176/84. Canon has not proved the existence of any special circumstance which might justify a derogation from the general rule set out in that provision.

41 That finding is not invalidated by Canon's argument that an allowance was made in respect of such expenses on the basis of identical evidence in the case which gave rise to the judgment in Joined Cases 277 and 300/85 *Canon* v *Council*, cited above. Even assuming that those expenses and their link with the sales were similar, which, moreover, has not been established, it must be pointed out that, as the Court has held, in particular in its judgment in Case 52/81 *Faust* v *Commission* [1982] ECR 3745, where the Community institutions enjoy a margin of discretion in the choice of the means needed to achieve their policies, traders are unable to claim that they have a legitimate expectation that the means initially chosen will continue to be employed, since those means may be altered by the institutions in the exercise of their powers.

42 It follows from all the foregoing considerations that the plea in law alleging that the comparison of the normal value and the export price was incorrect must be rejected.

The plea in law alleging that the injury suffered by the Community industry was inaccurately assessed

43 It must be observed *in limine* that the institutions concluded that all PPCs, at least those falling within adjoining segments, from the personal copier to segment 5 in the Dataquest classification, were to be regarded as like products; segment 6 machines, for which there was no Community production, were excluded from the investigation (paragraph 31 of the preamble to the contested regulation).

44 It must be observed in this connection that, according to the Info-Markt and Dataquest PPC classifications referred to by the institutions in this case, the PPC market comprises different segments defined on the basis of the technical features and performance of the machines in question. As paragraph 31 of the preamble to the contested regulation indicates, however, in the reference period Japanese manufacturers exported PPCs falling solely within the personal copier segment and segments 1 to 4.

45 Canon maintains that the institutions wrongly ignored the segmentation of the PPC market and regarded all machines as like products within the meaning of Article 2(12) of Regulation No 2176/84. Canon considers that that approach distorted the institutions' assessment of competition, particularly with respect to the Canon Personal Copier (hereinafter referred to as the 'PC') which created a new market and is distinct from PPCs in segment 1.

46 Canon argues, moreover, on the basis of a detailed analysis of figures for the development of the market share of the Community manufacturers concerned,

both in each segment taken separately and in groups of adjoining segments, that their share of the market did not decrease and they suffered no injury as a result of the importation of Japanese photocopiers.

47 It must be pointed out in this connection that according to Article 4(1) of Regulation No 2176/84, '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(4) provides that 'the effect of the dumped or subsidized imports shall be assessed in relation to the Community production of the like product (. . .)'. Furthermore, Article 4(2) sets out various factors which must be taken into consideration when carrying out an examination of injury, including the impact of the imports in question on Community production *inter alia* in the light of the development of the market share of the manufacturers concerned.

48 On the basis of the market surveys carried out by Info-Markt and Dataquest, the institutions concluded that although all PPCs were not like products, at least PPCs in adjoining segments, from the personal copier to copiers in segment 5 of the Dataquest classification, should be regarded as such. It appears from the documents before the Court that in the said surveys the segments were not clearly delimited inasmuch as, on the one hand, some PPCs can be classified in several different segments in view of certain of their features and technical characteristics and, on the other hand, there is competition both between PPCs in adjoining segments and between PPCs classified in the various segments referred to above.

49 It must therefore be conceded that the differences in point of *inter alia* speed and copy volume between PPCs falling within one or various segments are not sufficient to establish that those PPCs do not have identical functions or do not satisfy the same needs. Moreover, as the third subparagraph of paragraph 30 of the preamble to the contested regulation indicates, the fact that customers' choice may be made on the basis of factors relating in particular to the decision to centralize or decentralize their photocopying facilities confirms that there is competition between machines in different categories.

50 Those considerations are likewise applicable to PCs and PPCs in segment 1. According to paragraph 29 of the preamble to the contested regulation, which Canon has not contested, the development of the PC helped to expand the market for small copiers but also increased competition in the low copy volume market. Consequently, the argument that the introduction of the PC created a market distinct from the market for other PPCs cannot be accepted.

51 In view of the foregoing, there is no need to examine whether, as Canon maintains, the market shares of the Community manufacturers concerned increased in one or other of those segments.

52 It must therefore be held that Canon has not established that the institutions made an error of assessment by considering that in this case 'Community production of the like product' within the meaning of Article 4(4) of Regulation No 2176/84 was production of all PPCs in all segments merged together.

53 The plea in law alleging that the injury suffered by the Community industry was inaccurately assessed must therefore be rejected.

The plea in law alleging breach of the duty to state reasons

54 Canon maintains that the contested regulation does not contain an adequate statement of reasons regarding, first, the comparison between the sales used to determine normal value, as prescribed by Article 2(3)(a) of Regulation No 2176/84, and sales used to calculate the export price; secondly, the Council's refusal to examine the evidence presented to it concerning the functions of CSC; and, finally, the refusal to accept certain selling expenses as being directly related to sales.

55 In this connection it should be recalled that according to a consistent line of cases, referred to in particular in the judgment in Case C-156/87 *Gestetner*, at paragraph 69, the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Court to exercise its supervisory jurisdiction.

56 That requirement was satisfied in this case. In paragraphs 5 to 16 of the preamble to the contested regulation the Council makes it clear that the normal value and the export price were determined on the basis of the prices paid by the first independent buyer and explains the reasons why it either confirmed or partially accepted the methodology used for that purpose by the Commission.

57 With regard to evidence purporting to show that CSC was also performing functions other than those of a sales body, it follows from the considerations set out above (paragraphs 9 to 11) that the institutions were not obliged to examine such evidence in order to determine whether CSC actually did perform the functions normally performed by a sales department. As stated above (paragraph 34) the other functions performed were taken into account so as to include in the normal value only the expenses relating to sales of Canon PPCs.

58 Finally, as far as the refusal to take into account certain expenses on the ground that they are not directly related to sales is concerned, the preamble to the contested regulation contains, in paragraph 20, which confirms paragraph 26 of the preamble to Regulation No 2640/86, and in paragraphs 13 and 14, the reasons underlying the position adopted in this respect by the institutions.

59 In view of the foregoing considerations, the plea in law alleging breach of the duty to state reasons must be rejected, and consequently the application must be dismissed in its entirety.

Costs

60 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs, including the costs of the intervener CECOM which has asked for them in its pleadings. The Commission shall bear its own costs in accordance with Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs, including those incurred by the intervener CECOM.**

Joliet Slynn

Grévisse Moitinho de Almeida Zuleeg

Delivered in open court in Luxembourg on 10 March 1992.

J.-G. Giraud
Registrar

R. Joliet
President of the Fifth Chamber