REPORT FOR THE HEARING
delivered in Case 258/84 *

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I — Law, economic background 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 F (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 — *Economic background*

By way of introduction the applicant describes the situation on the Community market in ball-bearings, the share represented by the putative market in small bearings and the prices charged.

1. *Situation on the Community market in ball-bearings*

According to the *applicant,* the Community ball-bearing market has been dominated for several years by Aktiebolaget SKF, a company established in Sweden, and by its subsidiaries. In 1983 SKF's world sales were more than double those of the applicant, even though the applicant is the largest manufacturer of ball-bearings in Japan.

The SKF group's share of the Community market in ball-bearings amounts to approxi-

mately 30 to 40%. Although accounting for less than 6% of the market, Japanese imports of ball-bearings into the Community provide the main effective competition for SKF and European manufacturers.

The *Council* states that inquiries made by the Commission with importers, exporters and the industry concerned have enabled it to evaluate, with a reasonable degree of accuracy, the actual situation on the market in small ball-bearings. If the Court wishes, the Council is prepared to produce those figures, with due precautions to take account of their confidentiality; the figures differ from those produced by the applicant.

2. *The putative market in small bearings and the position of Nippon Seiko*

The applicant claims that the distinction between small bearings as covered by Regulation No 2089/84 and other ball-bearings is arbitrary and unjustified in so far as small bearings do not constitute a distinct commercial category of goods.

The *applicant* states that there is no commercial basis for the distinction made between bearings with a diameter of not more than 30 mm and those exceeding 30 mm. In support of that statement the applicant refers to recital 17 in the preamble to Commission Regulation (EEC) No 3669/84 of 21 December 1984 imposing a provisional anti-dumping duty on imports of certain ball-bearings and tapered roller-bearings originating in Japan (Official Journal 1984, L 340, p. 37), from which it appears that until 1983 the available Community statistics did not differentiate between ball-bearings with an external diameter of not more than 30 mm and those exceeding 30 mm. According to the applicant the statistics, which have remained unchanged since then, cover all ball-bearings.

The main manufacturer and exporter of small bearings is the company Minebea. Small bearings represent some 13% of the applicant's total sales in the Community; its exports of small bearings to the Community have been static for some years.

The applicant conducts its sales through its European subsidiaries, namely NSK-UK, responsible for distribution in the United Kingdom and Ireland, NSK-France, responsible for the French and Greek markets, NSK-Germany and NSK-Holland, the latter also being responsible for distribution in Belgium, Luxembourg and Denmark.

The *Council* states that, although the applicant's description; description of the market may have been true of the past, the ball-bearing market has changed over the last few years owing to the development of a new specialized market in small ball-bearings. These bearings are used in sophisticated industries like computer equipment, consumer electronics, precision mechanics and other high-technology areas. The traditional, bigger bearings are used in engineering, motor-car production and the iron and steel industry.

As Annex I to its rejoinder, the Council produces a 'Message from the President' of the applicant company in the annual report for 1984, from which it appears that a specialized market in small bearings has arisen from the development of sectors such

as electronics, office automation and robotics and that in 1984 sales of small bearings rose by 50%. The President states that the applicant has some 75% of the Japanese market in small bearings intended for video-tape recorders.

In view of that trend the Community adopted a new Nimexe code (Nimexe 84.62-01) in relation to heading 84.62 of the Common Customs Tariff for ball-bearings whose greatest external diameter is not more than 30 mm.

3. *The prices of ball-bearings*

The applicant considers that the situation described in Decision No 74/634 of 29 November 1974 (Official Journal 1974, L 343, p. 19) relating to the Franco-Japanese ball-bearings agreement has remained basically unchanged.

C — *Background to the case*

In 1977, following a complaint made by the Federation of European Bearing Manufacturers' Associations (Febma) and an anti-dumping proceeding initiated by the Commission, the Council adopted Regulation No 1778/77 of 26 July 1977 (Official Journal 1977, L 196, p. 1). That regulation imposed a definitive anti-dumping duty on imports of ball-bearings, the operation of which was suspended as long as the four major Japanese producers of bearings, including the applicant, observed undertakings given by them to the Commission. The undertaking which the applicant gave was based on a draft provided by the Commission and required it, first, to increase its prices and, secondly, to notify the Commission of the weighted average prices of the 100 most important types of ball-bearings sold in each Member State of the Community (the weighted average price was calculated by dividing total sales by the total number of units sold) (Annex 4 to the application).

After the Court declared that regulation void, the undertaking remained in force.

In May 1979 Febma submitted another complaint to the Commission; the proceeding which the Commission then initiated (Official Journal 1979, C 235, p. 2) was closed after the Commission had accepted a new undertaking in 1981 (Commission Decision No 81/406 of 4 June 1981, Official Journal 1981, L 152, p. 44).

According to the preamble to the decision:

'the export prices were constructed on the basis of the weighted average prices at which the imported products were first resold to an independent buyer . . .

. . . the comparisons were made on a weighted average basis at the ex-factory level'.

Although the terms of the undertaking are highly confidential the applicant is prepared to produce a copy if the Court thinks it necessary. The applicant undertook to provide the information requested by the Commission on the basis of weighted average prices unless the Commission asked expressly for it on a transaction-by-transaction basis.

When the Commission made its first request in the spring of 1983 it made no mention of the fact that the method provided for in the 1981 undertaking was no longer appropriate.

D — *Origin and course of the proceedings*

In March 1983 the Commission received a fresh complaint from Febma which, although relating mainly to the activities of Minebea, partly referred to the small bearings which had been the subject of the 1981 undertaking.

In view of that complaint, the market trend in small bearings and the information which it had collected when monitoring undertakings given, *inter alia*, by Nippon Seiko at the conclusion of the previous anti-dumping proceeding (Commission Decision No 81/406 of 4 June 1981, mentioned above), the Commission announced the initiation of an anti-dumping proceeding concerning imports of certain ball-bearings originating in Japan and Singapore (Official Journal 1983, C 188, p. 8).

During the investigation which it conducted between July 1983 and March 1984 the Commission requested information on a transaction-by-transaction basis, sent the applicant and its subsidiaries questionnaires and verified the answers given both in Japan and in the Community.

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

(i) repealed Decision No 81/406 accepting the aforesaid undertakings concerning small bearings given *inter alia* by Nippon Seiko KK;

(ii) imposed a provisional anti-dumping duty at the rate of 18.30% on imports of certain ball-bearings exported by the applicant.

By a telex message of 22 March 1984 the Commission informed the applicant that it was withdrawing with immediate effect its acceptance of the 1981 undertaking in so far as it related to small bearings (Annex 7 to the application).

Article 4 of Regulation No 744/84 provided that the regulation was to apply for a period of four months, unless the Council adopted definitive measures before the expiry of that period. Pursuant to Article 3 of the regulation, under which the parties concerned had the opportunity to make known their views within a period of one month, Nippon Seiko requested a meeting with the officials of the Commission responsible for the matter. During that meeting, which took place on 3 April 1984, the Commission's officials stated for the first time that all the calculations which had led to the imposition of the provisional duty were made on a substantially different basis from that previously used. Details of the new method were given at the meeting. The Commission's officials left the applicant in some doubt, however, as to what was to happen to the previous undertakings given in respect of larger bearings. Review of those undertakings was still in progress when the present action was brought.

At that meeting the applicant was informed that an application for a refund of the duty imposed would be most unlikely to meet with success because the applicant would not be able to show that the dumping had been eliminated or that the bearings at issue had been cleared for customs within the

three months prior to the application and because no refund could be obtained where the anti-dumping duty had been imposed, as in the present case, on the basis of weighted average prices.

By a letter sent to the Commission on 30 April 1984 the applicant proposed amendments to the undertakings given in 1981. A copy of the letter, which is highly confidential, was given to the Council. The applicant is prepared to provide a copy for the Court if required.

After two further meetings with the Commission's officials on 14 May and 8 June 1984, the applicant reiterated its observations concerning the procedure adopted and stated that if it had itself changed the method it would have been in breach of the 1981 undertaking. In the applicant's view, the new method is incorrect, inequitable and inappropriate as it does not result in a fair comparison of like with like, as required by Article 2 (9) of Regulation No 3017/79; if it is correct, it has been applied in disregard of the principle of legitimate expectation.

By a telex message dated 15 June 1984 the Commission informed the applicant that it had decided to propose to the Council, pursuant to Article 11 (6) of Regulation No 3017/79, that a definitive anti-dumping duty should be imposed.

By Regulation No 2089/84 of 19 July 1984 the Council imposed a definitive anti-dumping duty on imports of certain ball-bearings originating in Japan and Singapore. The duty imposed on the applicant was fixed at the rate of 14.71%.

II — Procedure before the Court

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

By an application lodged at the Court Registry on 5 December 1984 the applicant requested the adoption of an interim measure suspending the operation of Articles 1 and 2 of Council Regulation No 2089/84 pending the delivery of final judgment in the main action.

Following an application dated 12 December 1984 the Commission was granted leave, by order of the Court of 13 December 1984, to intervene in the proceedings for interim measures in support of the Council's conclusions.

The application for interim measures was dismissed by order of the President of the Court of 17 December 1984 (Case 258/84 R [1984] ECR 4357).

By an application received at the Court Registry on 17 December 1984 the Commission requested leave to intervene in support of the Council's conclusions. The application to intervene was granted by order of the Court of 30 January 1985.

By an application lodged at the Court Registry on 27 December 1984, Febma requested leave to intervene in support of the Council's conclusions. That application was granted 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.

However, the Court requested the Council, the Commission and the applicant to reply in writing to certain questions before 31 May 1986; the requests were complied with within the time-limit laid down.

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

III — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare Council Regulation No 2089/84 of 19 July 1984 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 in so far as it purports to impose a definitive anti-dumping duty of 14.71% upon small bearings originating in Japan (or Singapore) and manufactured or exported by the applicant;

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 duty in respect of such small bearings manufactured by the applicant and exported to the Community should be definitively collected, whether to the extent that the amounts do not exceed the definitive anti-dumping duty on such small bearings of 14.71% or at all;

5. In any event order the Council to pay the applicant's costs;

6. Order such other relief as may be lawful or equitable in all circumstances.

The *defendant* contends that the Court should:

1. Declare admissible the application only in so far as the regulation appealed against 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 bear the costs of the defendant.

The Commission contends that the Court should:

1. Dismiss the application;

2. Order the applicant to pay the costs including the Commission's costs.

Febma contends that the Court should:

1. Dismiss the application;

2. Order the applicant to pay the costs including Febma's costs.

IV — Submissions and arguments of the parties

Admissibility

The *Council* has serious doubts as to whether the application is admissible in so far as it asks for the annulment of the whole of Regulation No 2089/84. Apart from the applicant the regulation also applies to four other identified Japanese producers/exporters and to exporters of ball-bearings from Singapore.

The Council refers to paragraphs 7 to 16 of the judgment of 21 February 1984 (Joined Cases 239 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005), from which it is apparent that,

although the measures in question are of general application, they may still be of direct and individual concern to the producers and exporters against whom allegations of dumping are made.

Having regard to that judgment, the Council considers that the action is admissible only in so far as it is concerned with the anti-dumping duty imposed on the applicant.

The *applicant* refers to the judgment cited by the Council and claims that the contested regulation is of direct and individual concern to it since it is expressly mentioned in paragraph 20 of the preamble and in Article 1 (2). In addition the applicant states that it could, if necessary, also refer to the judgment of 4 October 1983 in Case 191/82 *Fediol* v *Commission* [1983] ECR 2913.

The *Commission* has made no comment on this issue.

Febma expresses in similar terms the doubts expressed by the Council.

Substance

The applicant makes four submissions in support of its action:

(a) Unlawfulness of the method used for calculating the dumping margin (infringement of Article 2 (9), (10) and (13) of Council Regulation No 3017/79);

(b) Infringement of essential procedural requirements;

(c) Unlawfulness of the refusal to take account of the undertakings offered or at least the price increases during and after the period of investigation;

(d) Breach of the principle that the rate of anti-dumping duty imposed must be proportionate to the injury suffered or failure to give a proper statement of reasons on this point.

In its reply the applicant states that it is unable to answer the Council's defence in so far as it is pleaded with such generality, ambiguity and lack of particularity and adds that the Council refused to answer a request for further and better particulars which the applicant made by letter dated 11 February 1985.

In its rejoinder the Council states that it declined to comment on the pleadings outside the formal exchange of pleadings provided for in the Rules of Procedure and proposed to answer in its rejoinder the questions raised in the reply.

The first submission: unlawfulness of the method used for calculating the dumping margin (infringement of Article 2 (9), (10) and (13) of Council Regulation No 3017/79)

The applicant puts forward two lines of argument designed to show that, in breach of Article 2 (9), (10), and (13) of Regulation No 3017/79 and Article 2 (6) of the GATT Anti-Dumping Code, the comparison between the normal value and the export price was not made on a comparable basis since the methods used for calculating the two terms of the comparison were different.

1. *The export price of small bearings was established on a transaction-by-transaction basis whereas their normal value was established on the basis of a weighted average of the prices charged on the domestic market for each kind of product*

The *applicant* claims that, according to the first sentence of Article 2 (9) of Regulation No 3017/79, the normal value of the product on the domestic market of its country of origin and the export price, which governs the calculation of the dumping margin, must be established 'on a comparable basis'.

It is expressly stated at paragraphs 11 and 16 of Regulation No 2089/84 that the normal value was calculated on the basis of a weighted average of the prices of the applicant's total sales in Japan and that the export prices were compared on a transaction-by-transaction basis, that is to say, they were compared one by one with the average weighted price. If, as the Council states, calculation of the export price and the normal value are different operations, they are not completely independent since they must form the basis of a fair comparison. Consequently, they must be calculated in a manner which allows a fair comparison to be made between them, pursuant to Article 2 (9) and (10) of Regulation No 3017/79. In the second place, the applicant claims that only export prices less than the weighted average price on the Japanese market were taken into account in calculating the dumping margin. In the applicant's view, the method thus adopted disregards a large volume of export sales made without dumping, that is to say at prices exceeding the weighted average price, and inevitably leads to a finding of dumping even when the export prices are on average exactly the same as the prices on the domestic market.

As regards the Council's observation that the regulation 'does not allow dumped sales to be justified by other export sales at normal or higher than normal prices', the applicant states that it has never sought to make such a claim. It objects simply to the fact that the normal value, which has been calculated by reference to the weighted average price for all transactions on the domestic market and reduced to a single figure, should be compared with the lowest export prices calculated by means of a selection of transactions rather than on the transaction-by-transaction basis contemplated by the regulations.

In the applicant's opinion, that method is both incorrect and unlawful, since Article 2 (13) (b) of Regulation No 3017/79 on the calculation of the dumping margin contemplates a choice between the two methods at issue (that is to say, the weighted average method and the transaction-by-transaction method) but not a mixture of the two.

Having regard to the large number of domestic Japanese and export transactions, the differences in particular market conditions in Japan and in the Community, and the problems associated with finding individual transactions that were fairly comparable, the applicant accepts that the Commission could not have proceeded on the basis of a transaction-by-transaction comparison, as contemplated by Article 2 (13) (b) of Regulation No 3017/79. Nor does the applicant suggest that the Commission could reasonably have proceeded by reference to the 'most frequently occurring' or 'representative' prices, also contemplated by Article 2 (13) (b).

Consequently, of the methods specified by Article 2 (13) (b) of Regulation No 3017/79, the only practicable method was calculation by reference to weighted average prices, which was the method previously employed in the small bearings sector by the Commission for both the domestic and the export market. In that regard the applicant cites the Commission's defence in Case 119/77 *Nippon Seiko* v *Council and Commission* [1979] ECR 1303 and a statement made by the head of the relevant division of the Commission at a public hearing of the Committee on External Economic Relations of the European Parliament held in Brussels on 23 and 24 June 1980 (Annex 9 to the application).

The applicant considers that, owing to the use of the contested method, it is required to pay an anti-dumping duty which is 4.49% more than it would have had to pay on the weighted average basis previously employed.

In view of the figures for the dumping margin which, according to the Council, application of the Commission's method and the method suggested by the applicant would have given, the applicant states that the Commission was not in error in reducing the dumping margin but in making an incorrect and unfair comparison of the two factors taken into account.

The *Council* considers that the method of calculation adopted is lawful and reasonable. As regards the lawfulness of the method adopted, the Council contends that Regulation No 3017/79 contains no obligation such as that suggested by the applicant; on the contrary, Article 2 specifies at least 10 methods for calculating the normal value and four methods for calculating the dumping margin; there would be no reason for this if the applicant's argument were correct. In the Council's opinion, the establishment of normal values, export prices and dumping margins are three entirely different and independent operations. Since the data and circumstances involved in each operation are different it is inevitable that there should be different methods of calculation for each of them.

The only textual reference made by the applicant, namely to Article 2 (9) of Regulation No 3017/79, is irrelevant. The aim of that provision is to put the normal value and export prices on a comparable level so as to permit calculation of the dumping margin by way of a simple subtraction of the export price from the normal value. The fact that Article 2 (10) sets out rules to enable due allowance to be made for differences affecting price comparability shows that the different factors may be assessed on the basis of different criteria.

The Council considers that the 'fair comparison' mentioned in Article 2 (9) and (10) of Regulation No 3017/79 refers not to the calculation of the normal value and the export price but to the physical characteristics of the product, quantities and conditions and terms of trade. It is by means of the adjustments to export prices and to the normal value provided for by Regulation No 3017/79 — and not by their method of calculation — that the two terms of the comparison are put on a comparable basis.

As regards the reasonableness of the method used, the Council states that under Regulation No 3017/79 the calculations can only lead to a finding that there is dumping or to a finding that there is no dumping; the regulation does not allow dumped sales to be compensated for by other export sales at high prices.

Contrary to what the applicant maintains, in those cases where transactions were found not to have involved dumping the Commission gave credit by taking such transactions into the overall dumping calculation, treating them as cases of zero dumping. The method applied by the Commission led to a weighted average dumping margin of 14.71% whereas if the method proposed by the applicant had been adopted the average would have been 19.42%.

The change in method cannot be regarded as unreasonable in so far as it was required by the circumstances. In that regard the Council contends that the calculation of the export price according to the weighted average method, which was the method previously used, allowed a degree of 'negative' dumping to be taken into account and, therefore, the continuation of a degree of dumping in individual transactions.

The new transaction-by-transaction method was finally adopted when its application showed that the degree of negative dumping had obviously been underestimated in the past.

In arguing that export transactions at the bottom end of the price range should not be compared with a weighted normal value on the domestic market the applicant is in essence seeking the right to compensate for dumping by charging higher prices.

The Council cannot accept such an unreasonable argument, which is contrary to the terms of Regulation No 3017/79.

The Council states that the other methods for calculating the dumping margin provided for by Regulation No 3017/79, namely taking the most frequently occurring or the most representative export prices and setting them against the benchmark normal value, were not adopted in view of the results of the investigation, which showed that the most frequently occurring export prices were amongst the lowest. The method using the most frequently occurring prices would therefore have led to higher dumping margins since it would have disregarded many export sales made at higher than average, albeit dumped, prices.

With regard to the applicant's argument that since calculation of the normal value had led to a single figure a single export price should be established by means of the weighted average method, the Council states that although such a method would no doubt have been more favourable to exporters it was rejected since it would in fact have allowed dumped sales to be offset by sales at prices higher than the normal value; such general offsetting, which is not provided for by Regulation No 3017/79, would not suffice to remove the sometimes irreparable damage suffered by Community industry.

The Council cites the hypothetical case of a Community manufacturer whom a Japanese

exporter decides to drive from the market by means of dumping prices. The offsetting of such dumped sales by means of other transactions unconnected with that manufacturer would in no way reduce the injury suffered. The applicant's argument leads to disregard of the provisions of Article 4 (5) and Article 13 (6) of Regulation No 3017/79, which in this type of situation permit the Community to be divided into two or more markets in order to avoid the imposition of a higher rate of duty on exports to other Member States at lower, dumped prices.

According to the Council, two other methods are conceivable. The first would have been to calculate a weighted average of all prices of sales to the Community which are below the normal value without taking account of prices equal to or greater than the normal value. That solution, which would have been the most favourable to the Community industry, was nevertheless rejected in favour of an intermediate solution, which was considered more reasonable; this solution was to take the weighted average of all export prices and, instead of disregarding sales at prices equal to or greater than the normal value, to incorporate them in the calculation as if made at prices equal to the normal value. That method was considered fairer since it takes account of the actual dumping margin and is more favourable to exporters, since the greater the volume of sales at prices equal to or greater than the normal value, the less the dumping margin becomes.

The Council contends that if the calculations had been made according to the method advocated by the applicant the weighted average of the dumping margin would have been reduced from 14.71 to 14.15%, which would have meant a reduction of 0.56% and not 4.49% as the applicant claims.

The Council adds that the dumping margins varied according to the different representative types of small bearings investigated from 0 to 59%. In view of the extent of the injury caused to Community industry, the option of establishing weighted averages provided for by Article 2 (13) (c) of Regulation No 3017/79 could have been disregarded and an appropriate overall anti-dumping duty imposed, which would in any event have been higher than the 14.71% duty imposed. In those circumstances, the Council thinks that the applicant cannot argue that the method adopted was unlawful or unreasonable.

The Commission states that according to Article 2 (13) of Regulation 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), which re-enacts Article 2 F of Regulation No 3017/79, the transaction-by-transaction method is one of the methods which may be used when export prices vary substantially from one transaction to another; Article 2 (13) provides for four methods of establishing the dumping margin in such a case.

In the Commission's view, it is necessary in the present case to choose one of the following two methods:

(i) the weighted average method, according to which the average of all export prices is calculated and then

weighted on the basis of the volume of goods sold at each price; or

(ii) the transaction-by-transaction method used by the Commission.

According to the second method, all transactions below normal value are looked at, but, unlike the first method, sales above normal value are not allowed to offset sales of the same volume of goods at proportional dumping prices; they are treated as if they were made at 'normal value' and are included in the assessment of the overall margin of dumping on this basis.

According to the Commission, the choice of the second method is necessary precisely where export prices vary greatly both above and below the normal value since application of the weighted average method would result in a finding that no dumping was occurring at all. In answer to the argument that where there is no dumping there should be no anti-dumping duty, the Commission contends that, if there is dumping, it must be compensated for by an anti-dumping duty and not by the fact that certain sales have been made without dumping.

The Commission contends that the argument to the effect that the method is illogical in so far as it treats sales at prices above the normal value as if they were at the normal value is irrelevant. The fact that some prices are higher than the normal value is irrelevant because they do not necessarily alter the economic effect of the sales at dumping prices; if, on the other hand, there are many sales at higher prices, they should be taken into account in assessing the actual injury which the Community industry may have suffered.

The Commission states that Regulation No 2176/84, which is intended to compensate for a particular form of unfair competition, provides in Article 4 (1) that no account is to be taken of injury caused by the 'volume and prices of imports which are not dumped or subsidized'. Article 13 (4) (b) (i), which provides that account must be taken of sporadic dumping, that is to say massive dumped imports of a product in a relatively short period, confirms that the applicant's argument is wrong.

In order to shed more light on its arguments, the Commission has appended to its observations the results of applying the two methods of calculation in the present case. it points out that in three of the cases pending before the Court the two methods give results which differ by less than 1% while in the two other cases the results differ by less than 2%.

Febma contends that the establishment of anti-dumping margins requires the assessment of a complex economic situation.

Febma cites Case 40/72 *Schröder* v *Federal Republic of Germany* [1973] ECR 125 as authority for the proposition that when a regulation permits the choice of different methods to achieve a particular purpose the Community authorities are entitled, in the exercise of their discretion, to adopt the most appropriate method in the circumstances. That discretion may lead to the choice of the dissimilar methods challenged by the applicant.

The applicant's claims have to be considered in the light of established case-law, recently confirmed by the judgment of 4 October 1983 (Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, at p. 2935), according to which the Court confines itself to considering whether the contested decision contains a manifest error or constitutes a misuse of powers or whether the authority in question has clearly exceeded the bounds of its discretion.

In adopting the transaction-by-transaction method to calculate the export price the Council, for reasons which it has set out, chose the most appropriate method to remedy the injury suffered by the Community and to put an end to the previous situation in which dumping was allowed to continue because the weighted average method permitted dumped sales to be offset by sales at prices above the normal value. Any other method would therefore have been unlawful and unfair.

Febma adds that the Council, as it points out itself, could have imposed a higher anti-dumping duty in view of the differences found between the dumping margins for the various types of ball-bearings (0 to 59%). The Council could have imposed a correspondingly high anti-dumping duty for the types of ball-bearings with high dumping margins and have calculated the anti-dumping duty for the other ball-bearings according to the weighted average.

Febma contends that the applicant benefited in the present case by the fact that account was taken of a lower normal value as a result of the higher volume of sales on the Japanese market than on the European market. Febma observes that the applicant's volume of sales on the Japanese market is 14 times that of its sales on the European market.

According to Febma, it follows from those considerations that the applicant has not been adversely affected by the method adopted and that the Community authorities have not misused their powers.

2. *The method used for calculating the adjustments to export prices provided for by Article 2 (8) of Regulation No 3017/79 was wrong and unjustified*

The *applicant* states that, according to the second sentence of Article 2 D (9) of Regulation No 3017/79, the export price and the normal value must be compared at the same level of trade, preferably at the ex-factory level. In contrast to the export prices, the normal value was not calculated at that level. The applicant claims that, contrary to the statement made by the Commission at paragraph 19 of the preamble to Regulation No 744/84, the applicant's domestic prices were calculated without taking into account a number of proved expenses of a kind that were deducted from the European subsidiaries' expenses.

In that regard the applicant mentions all the domestic freight relating to sales on the Japanese market, which the Commission considered to be equal to the freight involved in export sales; in fact the corresponding costs on the domestic market are higher because domestic sales are normally made from the distribution centres to a multiplicity of customers at a multiplicity of destinations, whereas export sales are made in bulk from a single distribution centre near a sea port.

The applicant claims that in calculating the provisional duties the Commission originally deducted some freight from export prices but not from domestic prices. That error, which was pointed out to the Commission's representatives, was not corrected and was adopted by the Council; it led to an overstatement of the normal value and to a dumping margin exceeding by 3% the actual margin.

The applicant claims that, although Article 2 (10) (c) of Regulation No 3017/79, cited by the Council, provides that no allowance shall be made for 'differences in overheads and general expenses, including research and development costs, or advertising', that does not mean that costs deducted from the export price should not, in so far as identical costs are involved, be deducted from the calculation of the normal value. In that regard the applicant mentions the costs connected with customer service.

The applicant claims that the aforementioned provision of Regulation No 3017/79 was not only infringed but also wrongly applied, since the Council refused to take account of the cost of communications on the ground that they were overheads, whereas in fact they 'bear a direct relationship to the sales under consideration' and should therefore be allowed.

The applicant claims that the activities of its engineering service department have been misunderstood. Contrary to what the Council contends, it is not a research and development department whose costs cannot be allowed, but provides pre-sales and post-sales service to Japanese customers.

The applicant offers to prove all its statements by evidence from one of its directors in Japan.

The applicant notes that the Commission and Council have announced the adoption of provisions to correct the mistake relating to the freight to be deducted from the normal value.

The Council states that both the normal value and export prices were compared at the ex-factory level, as stated in paragraph 19 of the preamble to Commission Regulation No 744/84. The applicant made no request for a 'level of trade' adjustment during the administrative procedure and therefore can hardly complain now that such an adjustment should have been made.

The Council contends that, contrary to what the applicant claims, there is no link between expenses incurred by the European subsidiaries and deductions from domestic sales prices in Japan. It is necessary, under Council Regulation No 3017/79, to distinguish the calculation of the normal value from that of the export price. In that respect the provisions of the regulation, namely Article 2 (9) and (10) on the one hand and Article 2 (8) (b) on the other, have been observed.

As regards the costs which in the applicant's view should have been deducted from the normal value, the Council states that the applicant has supplied no evidence as required by Article 2 (10) (c) of Regulation No 3017/79. With regard to the claim that account should have been taken of the costs of the applicant's engineering service department, the Council replies that during the investigation it was found that that

department comprised both a research and development department and a genuine service department. Under Article 2 (10) (c) no allowance can be made for the costs of research and development. The Council offers to provide evidence that the applicant was never in a position to distinguish between genuine service costs and costs of, for example, design, research and development incurred under the heading 'Technical Service', which are overhead costs and not allowable.

The Council also states that the question of domestic transport costs was carefully considered but that the applicant supplied incomplete information; it omitted *inter alia* to point out that exported products were sometimes air-freighted, thus incurring substantially higher costs, and that it had applied two different yardsticks for determining the transport costs of domestic and export freight, namely turnover for the normal value and weight and volume of the small bearings for the export price. The Commission adopted the latter method for assessing costs in both cases.

Contrary to what the applicant claims, the institutions took account of all costs connected with the sales services of the subsidiaries in so far as it was shown that such costs were connected with the sales in question. Because of the lack of tangible evidence, other costs and in particular marketing costs were treated as overheads.

It is clear from the above that the applicant's claim for a higher allowance is not justified; however, certain corrections to the inland freight costs for shipments destined for export are necessary in view of the incorrect particulars supplied by the applicant.

The *Commission* submitted no observations on this point.

Febma does not consider it necessary to add to the arguments put forward by the Council. It merely points out that, in applying Article 2 (9) and (10) of Regulation 3017/79, the institutions have a large margin of discretion, with which the Court should interfere only within the limits laid down in the aforesaid case-law.

The second submission: breach of essential procedural requirements

In support of this submission the applicant pleads first the lack of any adequate statement of reasons in Regulation No 2089/84 and secondly breach of the principles of legitimate expectation, legal certainty and sound administration.

1. *Failure to state reasons*

The *applicant* claims that the Council cannot justify the change in method either by the administrative reasons given in the second subparagraph of paragraph 18 of the preamble to Regulation No 2089/84 or by stating that in the past the Community thought it could tolerate occasional dumped sales.

The applicant's request for clarification concerning the latter statement, made by the Council in its defence, evoked no response. The applicant states that it does not

understand what the statement means or how it can justify the contested change of method.

With regard to the administrative problems which the transaction-by-transaction calculation is said to cause, the applicant's representatives state that they have encountered cases in which the Commission has had recourse to average export prices when a calculation of export prices on a transaction-by-transaction basis would have been possible. Since they are not at liberty to reveal those cases, although they did not learn of them when defending an institution, they ask the Court, if necessary, to make appropriate requests to the Council.

The applicant states that the information on the prices of various types of bearings requested in the past from the applicant's subsidiaries show that even without a computer the Commission was able to make transaction-by-transaction comparisons. The returns requested under the 1977 and 1981 undertakings were drawn up on a transaction-by-transaction basis.

The Council cannot contend that the change in method was intimated in Regulation No 744/84, which makes no mention of it, or at the meeting with officials of the Commission which took place on 3 April 1984, that is to say after the Commission regulation was adopted. Every regulation must contain a statement of reasons; the Council's argument would make review by the Court impossible in so far as it contends that the statement of reasons for a regulation may be expanded by officials at private meetings.

In the applicant's view, the new method was applied simply because it was considered more appropriate. Paragraph 18 of the preamble to Regulation No 2089/84 does not satisfy the requirement to state reasons laid down in Article 190 of the Treaty, as interpreted by the Court at paragraphs 31 to 33 of its judgment of 26 November 1975 in Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491.

The *Council* contends that the obligation to state reasons was observed. It states that in Article 3 of Regulation No 744/84 the Commission invited the parties concerned to make known their views *inter alia* on the transaction-by-transaction method used as the basis for calculating the provisional duty. The Commission gave detailed explanations of the method adopted at the meeting on 3 April 1984, to which the applicant itself refers. In paragraph 18 of the preamble to Regulation No 2089/84 the Council sets out all the reasons why the transaction-by-transaction method was applied.

The *Commission* submitted no observations on this point.

Febma considers that the institutions were not bound to give full and detailed reasons for the change in the methods used for determining prices, since all the possible methods are specified in Regulation No 3017/79. Consequently, the reasons given by the Council in paragraph 18 of the preamble to Regulation No 2089/84 are sufficient to satisfy the requirement to state reasons laid down in Article 190 of the Treaty.

2. *Breach of the principles of legitimate expectation, legal certainty and sound administration*

The *applicant* claims that Regulation No 2089/84 introduced new rules with retroactive effect in so far as without compelling economic reasons it introduced a new method of calculation in a period during which the 1981 undertaking, based on other methods of calculation, was being reviewed but was nevertheless still in force.

The applicant states that, according to the terms of the 1981 undertaking, it was to remain in force so long as the Commission did not withdraw its acceptance or the applicant had not withdrawn the undertaking. The Commission did not inform the applicant of its intention to withdraw its acceptance until 22 March 1984, that is to say three days after the adoption of Regulation No 744/84.

Contrary to what the Council contends, the applicant cannot be regarded as having been informed of the change in the method because the Commission requested price information on a transaction-by-transaction basis, since such information was requested in previous anti-dumping proceedings.

The applicant cites the judgment of 14 May 1975 in Case 74/74 *CNTA* [1975] ECR 533 at paragraphs 39 and 40 on p. 549 as authority for the proposition that legitimate expectations may be created without any assurance or promise having been given by the institutions to the *administrés*. In addition, referring to paragraph 11 of the judgment of 16 February 1982 in Case 258/80 *Rumi* v *Commission* [1982] ECR 487, it claims that in view of the existence of the undertakings the Community institutions were bound to have regard to the parties' legitimate expectations that the method of assessment would continue to apply until it was withdrawn. The rules of legal certainty and sound administration required that notice of a change in method should be given and reasons stated therefor so that the parties concerned might reorganize their commercial practices in order to comply with the Community requirements.

The applicant disagrees with the Council's contention that the method adopted was advantageous to it. The applicant does not seek favourable treatment but observation of the rules in force.

With regard to the Council's argument that this submission is inadmissible since Commission Regulation No 744/84 was not challenged in time, the applicant states that it put forward its arguments during the proceedings which followed the adoption of that regulation and claims that it is entitled where, as in this case, the proceedings did not lead to the desired result, to challenge the regulation which imposed the definitive anti-dumping duties. The procedure suggested by the Council is unnecessary and confuses the administrative proceedings which follow the imposition of provisional duties and court proceedings.

The *Council* contends that, in so far as the applicant is arguing not that the principle of legitimate expectation prevents a change of method but that the undertakings are being

reviewed on the basis of different methods, every anti-dumping investigation begins with such a review and the Commission must have the right, at least tentatively, to employ other methods in order to ascertain whether they are administratively feasible and lead to more realistic results. The principle of non-retroactivity cannot therefore be pleaded in support of the criticism concerning the change of methods. Contrary to what the applicant claims, no method was agreed between the parties.

The Council refers to paragraphs 17 and 18 of the preamble to Regulation No 2089/84 and contends that the submission concerning a breach of the principle of legitimate expectation should be rejected, as in the judgment of 7 June 1983 (Joined Cases 100 to 103/80 *Musique diffusion française and Others* v *Commission* [1983] ECR 1825). The applicant cannot claim to be surprised by the application of one of the methods provided for by Regulation No 3017/79.

The Council contends that since the applicant did not challenge Commission Regulation No 744/84 within the required period, it cannot do so in the present case.

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*, cited above, the Community industry, which has a right to complain about dumping and to challenge 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 interests so that it cannot be vitiated for breach of the principle of legitimate expectation.

Febma cites the judgment of 28 October 1982 (Case 52/81 *Faust* v *Commission* [1982] ECR 3745) as authority for the proposition that traders cannot legitimately expect that a situation which may be changed by the institutions in the exercise of their discretion will be maintained.

There can be no legitimate expectation that a method which has shown itself to be inadequate to eliminate dumping practices and is therefore incompatible with the objective of the Community rules will continue to be used. The change made in that respect can only contribute to the removal of the injury suffered by the Community industry.

Febma adds that the applicant was informed in good time during the investigation proceedings of the method of calculation adopted, pursuant to Article 7 (4) (b) of Council Regulation No 3017/79, and in any event in April 1984 as soon as Commission Regulation No 744/84 was published.

The third submission: unlawfulness of the refusal to take account of the undertakings offered or at least of the price increases during and after the period of investigation

The *applicant* states that in an annex to its letter to the Commission of 18 June 1984 it set out, in respect of each of the 11 bearing types taken into consideration by the Commission, the weighted average prices of those bearings charged by each of its subsidiaries during and after the investigation period; it also produced tables comparing calculations on the basis of the established method with the new method. The information given about the period subsequent to the investigation in the letter of 18 June 1984 and a further letter of 11 July 1984 covered the period from 1 April 1984 to 30 June 1984 and accounted for 14 types of bearings representing some 70% of sales by the applicant's European subsidiaries.

In addition the applicant sent a complete set of computer print-outs, showing all relevant sales of the applicant's European subsidiaries on a transaction-by-transaction basis during that period.

A copy of all that information was sent to the Council; thus when the Commission made its proposals to the Council and the Council adopted Regulation No 2089/84 they disregarded the information which they had.

In view of the highly confidential nature of that information it is set out in Annex 10 to the application on an index number basis; it shows that in 53 of the 70 cases weighted average prices had risen from between 1 and 237%; in one case the weighted average price was unchanged and in 16 other cases reductions were made ranging from 5 to 10%.

As regards paragraph 25 of the preamble to Regulation No 2089/84, which states that the evidence of alleged price increases was incomplete and of doubtful accuracy, the applicant states that there was no more that it could have done to satisfy the Commission of the price increases. The dumping found resulted only from the method of calculation employed and the failure to take account of changes in the exchange rates.

It follows, according to the applicant, that the only question to be resolved is whether the Community institutions should have taken the price increases into account or whether they were entitled, as the Council contends, to disregard them.

In that respect the applicant refers to the Opinion of Mr Advocate General Warner in the previous bearing cases. There it is stated that the Council explained that the purpose of the imposition of a provisional anti-dumping duty is to induce immediate increases in prices in order to avoid the imposition of a definitive duty or in any event to reduce the rate. The applicant also cites the Order of the President of the Court of 19 July 1983 in Case 120/83 R *Raznoimport* v *Commission* [1983] ECR 2573.

In the applicant's opinion, the argument in paragraph 25 of the preamble to Regulation 2089/84 to the effect that price increases after the investigation period cannot be taken into account is inapposite since it fails to take account of the difference between provisional and definitive anti-dumping duties and disregards Article 12 of Council Regulation No 3017/79, which reads as follows:

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

In the past that provision, which makes no mention of an investigation period or at least does not specify its terms, has always been scrupulously applied by the institutions. Although difficulties experienced in following that practice led the Council to insert a reference to the investigation period in Article 12 of Regulation No 2176/84 of 23 July 1984, on protection against dumped or subsidized imports from countries not members of the European Economic Community, in order to avoid taking into account price increases made after that period, Regulation No 2176/84 was not yet in force when Regulation No 2089/84 was adopted.

Contrary to what the Council states, to take account of price changes occurring after the investigation period would not lead to a continuing or permanent investigation. The applicant claims that it made the relevant price changes after the provisional but before the definitive anti-dumping duties were imposed.

In other anti-dumping proceedings the institutions have taken account of events occurring after the investigation period; in that respect the applicant cites paragraph 14 of the preamble to Council Regulation No 191/80 of 29 January 1980 (Official Journal 1980, L 23, p. 19), Council Regulation No 2236/82 of 11 August 1982 (Official Journal 1982, L 238, p. 1) and paragraph 22 of the preamble to Commission Decision No 84/103 of 23 February 1984 (Official Journal 1984, L 57, p. 19).

In answer to the Council's argument that since the Commission was not bound to accept the undertakings offered it could not be required to take account of price increases after the investigation, the applicant states that in view of the difference between provisional and definitive anti-dumping duties the institutions cannot disregard the actual position without infringing the terms of Council Regulation No 3017/79.

Contrary to the statements in paragraph 25 of the preamble to Regulation No 2089/84, the procedure for refunding anti-dumping duties provided for in Article 15 of Regulation No 3017/79 does not allow an exporter to obtain sufficient compensation for the damage resulting from the fact that no account was taken of price increases. In any event the applicant has misgivings about the likelihood of obtaining a refund of duties imposed on the weighted average basis in view of statements by the Commission's representatives in relation thereto.

The *Council* states that since the entry into force of Regulation No 3017/79 it was the Commission's standard practice not to take account of any events occurring after the end of the investigation period, as is stated at paragraph 25 of the preamble to Regulation No 2089/84.

The applicant's argument would mean that the Commission, even after refusing

voluntary undertakings and coming to the conclusion that an anti-dumping duty was justified, would be obliged, through the unilateral conduct of the exporter, to institute a permanent investigation in order to monitor the market after the expiry of the investigation period.

That argument is unsound since the Commission is not obliged to accept the undertakings offered and therefore, *a fortiori*, cannot be required to take account of unilateral price changes occurring after the investigation period.

The argument would moreover lead to a number of insuperable difficulties, since exporters, in the absence of formal undertakings, are not bound to maintain price increases and hence the Commission could not in those circumstances monitor the position effectively in order to protect Community industry against dumping practices.

Contrary to what the applicant claims, the validity of Regulation No 744/84 was restricted to four and not to six months; the alleged price increases must therefore have taken place one month or later after the imposition of the provisional duties. Had the Commission been required to take account of those increases, it would have needed to determine their precise effect in relation to all invoiced sales. The short period available would not have been sufficient for such a complex inquiry.

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, 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 large 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 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 a 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.

As regards the price increases referred to by the applicant, the Commission states that the conclusions of Mr Advocate General Warner to which NSK refers concerned a situation different from the present case. In the cases which gave rise to the aforesaid judgments of 1979, the Advocate General was examining whether anti-dumping duties could be imposed where undertakings based on price increases made by the applicants had been accepted. The present case raises the different question of whether the institutions are bound to take into account price increases made after the end of the investigation period.

The Commission states finally that the aforesaid order in *Raznoimport* was one of a series of interim orders requiring the Commission to monitor price changes 'in view of the specific features of the case' and with a view to allowing the Court to verify whether the adoption of interim measures suspending the provisional duty was necessary. Those orders are not relevant to the present case.

In the Commission's opinion, the applicant's statement that price increases made after the investigation period cannot be disregarded when duties are imposed, when they are taken into account in examining undertakings offered results from the confusion of two different things. According to the Commission, NSK is confusing the fact that undertakings may be based on events which occur after the investigation period with the fact that anti-dumping duties must be based on the findings of a thorough and limited investigation.

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 emphasizes that the applicant does not state what provisions of Community law require the institutions to take into account price increases allegedly made after the investigation period. Febma considers that the terms of Council Regulations Nos 3017/79 and 2176/84 do not permit the institutions to take account of events occurring after the investigation period.

In Femba's view, it is essential to lay down a specific and limited investigation period in order to attain the objectives of the anti-dumping rules, which require that the comparison between the normal value and the export price should 'be as nearly as possible at the same time' (Article 2 (9) of Regulation No 3017/79) and that the anti-dumping proceedings should normally be conducted within a period of one year (Article 7 (9) of Regulation No 3017/79).

The need for a limited investigation period was confirmed by Article 12 of Regulation No 2176/84.

Febma adds that if in the applicant's opinion the amount of the anti-dumping duty is not justified it may request a refund under Article 15 of Regulation No 3017/79 or a review under Article 14 of the same regulation. The fact that the applicant is required to take the initiative with such

requests and must bear the burden of proof is reasonable. In Febma's opinion, an anti-dumping duty may be removed or reduced only if exporters show that the dumping has been completely or partly eliminated.

Febma emphasizes, however, that since the imposition of the provisional anti-dumping duties the applicant has not been in a position to offer price increases capable of reducing the injury to the European industry.

The fourth submission: breach of the principle of proportionality and the failure to state reasons for the rate of the anti-dumping duty imposed

The *applicant* points out that according to Article 13 (3) of Regulation No 3017/79 provisional or definitive anti-dumping duties should be less if such lesser duty would be adequate to remove the injury. Regulation No 2089/84 does not show whether and to what extent the principle of proportionality has been observed in view of the price increases which occurred after the imposition of the provisional anti-dumping duty. The applicant considers that in any event Regulation No 2089/84 contains an inadequate statement of reasons on that issue.

The *Council* agrees that once the dumping margin has been established it is necessary to consider the question whether a lesser anti-dumping duty would suffice to remove the injury. That question was considered.

In the Council's view, it is clear from paragraph 34 of the preamble to Commission Regulation No 744/84 that in view of the extent of the injury caused it was necessary that the anti-dumping duty should correspond to the dumping margins provisionally established. There was therefore no room for the application of Article 13 (3) of Regulation No 3017/79, on which the applicant seeks to rely.

The *Commission* has not submitted observations on this point.

Febma considers that the amount of the anti-dumping duty is justified and that sufficient reasons are given for it. In support of that statement it refers to paragraphs 24 and 34 of the preamble to Regulation No 744/84 and emphasizes that, according to paragraph 21 of the preamble to Regulation No 2089/84, the Japanese exporters, including the applicant, did not provide any new evidence regarding the injury caused to the Community industry.

V — Answers to questions put by the Court

A — *Questions put to the Council and Commission*

Question 1

Is there any previous case in which a comparison has been made between a normal value and export prices determined according to different methods? If so, state which cases and give the reasons.

Answer

The institutions look at each export transaction to see if it was at a price above or below normal value. (This is why the method is called the 'transaction-by-transaction' method). The institutions treat all export prices which are at or above normal value as if they were at normal value. The exports so treated as having been sold at normal value are then aggregated with the exports sold at prices below normal value and a weighted average dumping margin for all exports is arrived at.

The reason why transactions at prices above normal value are treated as having been

made at normal value is to prevent those prices offsetting the prices below normal value, that is to say the dumped prices.

Therefore the institutions generally use different methods of calculating the average figures used as 'normal value' and the 'export price', when some of the export prices in individual sales by a given exporter exceed normal value. However, the institutions had simply compared weighted averages and had not used the different approaches described above in certain cases in the past when the institutions believed that the different approaches would not significantly affect the result, or when the necessary data were not available.

It is evident that if all the export prices are below normal value, there is no 'negative dumping', the two methods give the same result and a simple comparison of weighted averages of all transactions is used. This is the situation in many anti-dumping investigations.

Rather than citing all the past cases in which a comparison was made between 'normal value' based on a weighted average and 'export price' determined according to the method just explained, the institutions limit themselves to a series of examples which are found in the annex to the answers to the questions put by the Court.

Question 2

The applicant has claimed that after the investigation period it eliminated the dumping margin by raising its prices unilaterally. On what precise grounds do the Council and Commission intend to answer that claim?

Do they maintain that any new factor arising after the investigation period must automatically be disregarded, even though the competent authorities have knowledge of it when they fix the provisional or definitive duties? What is the position, for example, as regards rates of exchange? Is account never taken of the rates of exchange obtaining after the investigation period, which may have the effect of eliminating the dumping margin?

Or do the Commission and the Council consider that, regardless of the position adopted on the previous question, a unilateral change of conduct on the part of a producer is too unreliable to be taken into account when anti-dumping duties are fixed?

Or do the Commission and the Council rely on both of the grounds set out above?

Answer

The institutions do not consider that all factors arising after the reference period must automatically be disregarded; their decision is based on the two grounds mentioned by the Court and, more particularly, on a distinction between developments which are not due to anything done by the exporters and which are not under their control and those which are due to their actions.

In the first case, the institutions consider whether it is possible to determine the effects of the new development precisely and with confidence without a fresh full inquiry. As an illustration the institutions

cite the case of the aluminium investigation where a complete change in the world market price occurred after the end of the reference period. The fact that this change had occurred was publicly known and the extent of it was easily and unequivocally confirmed by the prices of aluminium on the London Metal Exchange. These prices were not under the control of the parties to the investigation. The structure of the international market and the relatively homogenous nature of the product allowed the Commission to conclude, without an extensive new investigation, that no action was needed. It was however stated publicly that future developments would be followed in case it became necessary to take action (Official Journal 1984, L 57, p. 19).

In the second case, developments since the end of the investigation period which are due to the actions of the exporters and which are under their control are not generally taken into account, except (a most important exception) when undertakings are offered and accepted in accordance with Article 10 of the basic regulation. This is because, in most circumstances, a change in the behaviour of the exporters, if they have not undertaken to continue it, might be reversed at any time. Any such later return to the first situation, if it occurred, might not become known to the institutions, or even to potential complainants in the Community, for some time. The possibility that an ostensible increase in export prices, intended to avoid anti-dumping duties being imposed, might be accompanied by deliberately concealed compensating rebates or refunds must be kept in mind.

Therefore, if exporters claim to have increased their export prices and:

they are nevertheless unwilling to give an undertaking to maintain the increased prices; or

undertakings cannot be accepted by the insitutions (as in these cases, for reasons already explained to the Court), and

the exporters nevertheless claim that their price increases, although not the subject of undertakings, make it unlawful for the institutions to impose anti-dumping duties, the argument should be rejected.

Exporters may argue that increases in export prices do not make it unlawful to impose anti-dumping duties, but make it unlawful to impose duties without having a further investigation of the new, or allegedly new, situation. This argument could not be accepted either, since it would enable exporters to prevent the institutions from imposing any duties at any time merely by claiming, on the basis of some evidence which they could easily produce, that they had just raised their export prices.

The institutions, however, do not exclude the possibility that there may be situations where, as a result of changes in the market such as those which occurred in the aluminium case, a claim by exporters that they had increased their prices (and were certain, given the market situation, to maintain them at the higher level) might be entirely convincing, and would be acted upon. No such circumstances exist in these ball-bearing cases.

Under Article 14 of the basic regulation the applicant was entitled to have a review carried out by the institutions at any time if it submitted evidence of changed circumstances. The applicant was thus free at any time since July 1984 to submit evidence showing that its increased export prices had eliminated dumping. No request for any such review has been received by or suggested to the institutions.

In answer to the question from the Court on the rates of exchange the institutions state that they proceed in the following manner:

When (as in the present case) the value of the currency in the exporting country has risen since the reference period, the normal value (expressed in the currency of the importing country), and hence probably the dumping margin also, can be expected to have increased. However, in most cases it would be inappropriate to take this into account merely by applying the new rate of exchange (even assuming that it was sufficiently stable and likely to last) to the facts as they existed during the reference period. This would be inappropriate:

First, because of the artificiality of applying one rate of exchange to a situation in which another, perhaps significantly different, rate of exchange had been in operation;

Secondly, because although a revaluation of the exporting country's currency would tend to increase normal value, this effect might be partly or even substantially offset by the reduced cost (in that country's currency) of imported raw materials used in the production of the goods said to have been dumped. Such an offsetting effect might be clearly foreseeable even if it took some time to come about, and even if the precise effect on the domestic prices of the goods in question (or on the cost of the production of those goods, in a situation where normal value had to be constructed under Article 2 (3) (b) (ii) of the basic regulation) could not be calculated in advance.

Thirdly, a change in exchange rates may have extensive indirect effects on the economy of the exporting country (even if these effects do not necessarily occur immediately), for example on the rate of inflation there. Therefore it would normally be inappropriate to take into account only the effect of the change in the exchange rate on the relationship between the normal value (if based on domestic price or on production costs in the exporting country) and the export price without taking into consideration all the other elements in the situation.

The Court will see that when (as in these ball-bearing cases) the currency of the exporting country has increased substantially in value since the reference period, the fact that the institutions do not take that increase into account will almost always tend to favour the exporters and to work against the interests of the Community industry.

Corresponding but contrary considerations will apply when a fall in the value of the exporting country's currency tends to reduce the normal value (expressed in the currency of the importing country). In such a situation (which is not, of course, the

situation in these present cases) the institutions' practice of not taking recent developments into account will tend to work against the interests of the exporters and to benefit the Community industry.

In cases where export prices are expressed in the currency of the exporting country, a change in the exchange rate of that currency will have no direct effect on the margin of dumping.

The institutions do not exclude the possibility of a new reference period should there be a substantial change in rates of exchange altering the whole situation. However, that is unlikely to happen at present in view of the floating exchange rates and their transient effects upon the market.

In conclusion the institutions consider that it would be wrong to take into consideration the price increases said to have been made by the applicant without also taking into account the effects, whatever they may be, of the increase in the value of the yen since the end of the reference period. The value of the yen increased by approximately 15% against the German mark, approximately 20% against the French franc and approximately 19% against the pound sterling between the reference period and June 1984 (just before the regulation imposing the definitive duty was adopted in July 1984).

B — *Questions put to the applicant*

Question 1

The applicant complains that the Commission took different criteria and amounts into account in computing certain expenses and charges affecting the costs of its European subsidiaries which import ball-bearings, on the one hand, and Japanese companies, on the other.

The applicant is requested to elaborate on that claim, and in particular:

(a) To state in which calculations those costs were taken into account by the Commission: in determining the export price or in determining the normal value?

(b) To state the reasons for which the costs attributable to certain sales should, in their view, be strictly identical for Japanese companies and their European subsidiaries;

(c) If possible, to give precise examples demonstrating that such disparities in the assessment of costs were not justified.

Answer

Export prices were constructed by deducting expenses from the NSK European subsidiaries' resale prices in order to determine the Japanese ex-factory prices. The greater the expenses so deducted, the lower the export price compared with normal value and, *ceteris paribus*, the greater the likelihood of apparent dumping. In fact, in constructing the export prices the Commission deducted all the expenses of the NSK European subsidiaries, that is to say direct expenses and overhead expenses attributed to small bearings.

Normal value was arrived at by taking the weighted average of all domestic prices of the relevant bearings and deducting from them certain expenses in order to determine ex-factory prices. The smaller the expenses so deducted the higher the normal value compared with export prices and, *ceteris*

paribus, the greater the likelihood of apparent dumping. In fact, in calculating normal value the Commission deducted only the expenses categorized by the Commission as the 'direct' expenses attributable to the applicant's sales of small bearings in Japan.

The NSK Japanese branch offices were at the same level in the distribution hierarchy as the NSK European subsidiaries and were concerned exclusively with distribution in Japan.

Against that background the applicant provides a breakdown showing the asymmetrical treatment of the expenses of the NSK European subsidiaries and the expenses incurred by the applicant in Japan.

The reasons for which the costs attributable to certain sales should be strictly identical for Japanese subsidiaries and their European companies are set out in the reply in Case 308/85, which is pending before the Court.

Question 2

The applicant claims that certain price rises which it adopted unilaterally were not taken into account in the contested regulation. Did the applicant exercise the right to apply for a refund which is conferred on it by Article 15 (1) of Regulation No 3017/79 or by Article 16 (1) of Regulation No 2176/84? If not, on what grounds did it not do so?

Answer

Out of prudence the applicant has exercised the right to apply for refunds ever since provisional duty was imposed and the applicant will continue to do so. No refunds have yet been paid to the applicant because of a dispute as to the method of calculation to be used on refund applications. Although the Commission has not yet adopted a formal position in this regard, one high official has stated in writing that anti-dumping duty is to be deducted as a cost in the construction of export prices; if that were right, then in order that the anti-dumping duty paid should be refundable, the price at which the NSK European subsidiaries would have to resell would not merely have to eliminate all dumping in the normal sense but also have to be inflated by the amount of the anti-dumping duty itself (in which case the NSK European subsidiaries would make no, or substantially no, sales of Japanese bearings).

As to the inadequacy of the refund procedure as a remedy generally, the applicant respectfully refers to paragraphs 8.82 to 8.85 of the application.

Y. Galmot
Judge-Rapporteur