JUDGMENT OF THE COURT (Fifth Chamber)
5 October 1988 *

In Joined Cases 273/85 and 107/86

Silver Seiko Ltd, whose registered office is in Tokyo (Japan),

Silver Reed (UK) Ltd, whose registered office is in Watford (United Kingdom),

Silver Reed International GmbH, whose registered office is in Kelsterbach (Federal Republic of Germany),

represented by Philippe De Smedt, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 13 boulevard Royal, and

Silver Seiko Ltd, whose registered office is in Tokyo (Japan), represented by Philippe De Smedt, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 13 boulevard Royal,

applicants,

v

Council of the European Communities, represented by the Director in its Legal Department, H. J. Lambers, and its Legal Adviser, E. H. Stein, acting as Agents, assisted by F. Jacobs, QC, with an address for service in Luxembourg at the office of J. Käser, Manager of the Legal Directorate of the European Investment Bank, 100, boulevard Konrad-Adenauer,

defendant,

supported by

* Language of the Case: English.

Commission of the European Communities, represented by its Legal Adviser, J. Temple Lang, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

and, in Case 273/85, by

Committee of European Typewriter Manufacturers (Cetma), represented by D. Ehle, Rechtsanwalt of Cologne, with an address for service in Luxembourg at the Chambers of E. Arendt and G. Harles, 4 avenue Marie-Thérèse,

interveners,

APPLICATION for:

(i) a declaration that Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 163, p. 1) is void in its entirety or at least in so far as it applies to the applicants (Case 273/85);

(ii) a declaration that Council Regulation (EEC) No 113/86 of 20 January 1986 amending Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1986, L 17, p. 2) is void in its entirety or at least in so far as it applies to the applicant (Case 107/86),

THE COURT (Fifth Chamber)

composed of: G. Bosco, President of Chamber, J. C. Moitinho de Almeida, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 22 September 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 March 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 6 September 1985 (Case 273/85), the company Silver Seiko Ltd, whose registered office is in Tokyo, and its European subsidiaries, Silver Reed (UK) Ltd and Silver Reed International GmbH, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 163, p. 1) was void in its entirety or at least in so far as it affected the applicants. In the alternative, the applicants seek a declaration that Articles 1 and 2 of that regulation are void, in the further alternative a declaration that Article 1 is void in so far as it imposes a definitive anti-dumping duty of 21% on the electronic typewriters originating in Japan and sold in and exported to the Community by the applicants and, in the further alternative, a declaration that Article 2 is void in so far as it orders the definitive collection of the amounts secured by the provisional duty previously imposed in respect of those typewriters.

2 Silver Seiko Ltd is an undertaking which has manufactured electronic typewriters since 1981 and markets them both abroad, in particular in the European Economic Community through its subsidiaries Silver Reed (UK) Ltd, established in the United Kingdom, and Silver Reed International GmbH, established in the Federal Republic of Germany, and, albeit on a somewhat smaller scale, in Japan through a subsidiary distribution company, Silver Business Machines. In 1984, together with other Japanese manufacturers, it was the subject of a complaint made to the Commission by an association of European manufacturers, the Committee of European Typewriter Manufacturers (Cetma), which accused it of selling its products in the Community at dumping prices.

3 The anti-dumping proceeding initiated by the Commission on the basis of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984, L 201, p. 1) led initially to the imposition upon Silver Seiko Ltd of a provisional anti-dumping duty of 26.6%. The Council, on a proposal from the Commission, then fixed the definitive anti-dumping duty at 21% by Council Regulation No 1698/85, against which Silver Seiko Ltd and its European subsidiaries have brought the present action.

4 By a document lodged on the same date as the application, the applicants applied for interim measures suspending the operation, with respect to them, of Regulation No 1698/85 until the Court had given judgment. The application for interim measures was dismissed by an order of the President of the Court of 18 October 1985, in which the costs were reserved.

5 By an application lodged at the Court Registry on 6 May 1986 (Case 107/86), Silver Seiko Ltd brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Council Regulation (EEC) No 113/86 of 20 January 1986 amending Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1986, L 17, p. 2) was void in so far as it applied to the applicant.

6 By an order of 11 March 1987, Cases 273/85 and 107/86 were joined for the purposes of the procedure and judgment.

7 The Commission of the European Communities and Cetma were given leave to intervene in the two cases in support of the defendant's submissions.

8 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.

9 The applicants (hereinafter collectively referred to as 'Silver Seiko') rely upon the following seven submissions in support of their actions:

(i) illegal and incorrect calculation of the normal value;

(ii) miscalculation of the export price;

(iii) errors in the comparison between the normal value and the export price;

(iv) errors in the determination of the injury suffered by the Community industry;

(v) imposition of definitive anti-dumping duties at an excessively high level;

(vi) unlawfulness of the definitive collection of the provisional duties;

(vii) procedural deficiencies.

The submission concerning illegal and incorrect calculation of the normal value

10 Silver Seiko claims that the manner in which the domestic market prices were determined in order to establish the normal value of its products was illegal and incorrect, in so far as the Japanese prices were not comparable prices within the meaning of Regulation No 2176/84, because in calculating the normal value of the models sold in Japan the institutions relied upon the prices charged by Silver Seiko's sales subsidiary and because the profit margin used to construct the normal value of the models not sold in Japan was obtained by systematically underestimating the costs.

11 As regards the first point, whilst it is true that, for reasons relating in particular to the specific features of written Japanese, typewriters are not used for business relations within Japan and are therefore marketed there in very small numbers compared with sales in the Community, there does nevertheless exist in Japan, as is clear from the documents before the Court, a market in electronic typewriters involving some tens of thousands of machines each year which, as demonstrated

inter alia by the presence of foreign manufacturers, is fairly competitive. In those circumstances, there is nothing to preclude the view that the prices achieved on the Japanese market are comparable with those obtained on the Community market.

12 As regards the criticism that the institutions calculated the normal value on the basis of Silver Seiko's sales subsidiary's retail prices in Japan, it must be observed that it is apparent from the documents before the Court that Silver Seiko markets its products in Japan through a distribution company which it controls financially and to which it entrusts tasks that are normally the responsibility of an internal sales department of a manufacturing organization.

13 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 carries out in that way activities that are in other cases carried out by what is in legal terms as well a single entity.

14 In view of those findings, it must be concluded that 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.

15 Silver Seiko then claims that the institutions wrongly constructed the normal value 'as if sales had taken place on the domestic market', instead of determining the costs to be included in that value by reference to the exportation of the product, and that the profit margin used in constructing the normal value was obtained by systematically underestimating the costs.

16 As regards the first argument, it must be borne in mind that, according to the scheme of Regulation No 2176/84, the purpose of constructing the normal value is to determine the selling price of a product as it would be if that product were sold

in its country of origin or in the exporting country. Consequently, it is the expenses relating to sales on the domestic market which must be taken into account.

17 As regards calculation of the profit margin, it must be observed that, contrary to Silver Seiko's opinion, the institutions were not under any obligation to choose as 'the reasonable margin of profit', within the meaning of Article 2 (3) (b) (ii) of Regulation No 2176/84, the profit margin of the manufacturer (Silver Seiko Ltd) rather than that of its sales subsidiary in Japan (Silver Business Machines) and were fully entitled to adopt for that purpose the combined profit margins of the two companies. In fact, as already pointed out, those two companies constituted a single economic entity.

18 The argument must also be rejected that Silver Seiko was discriminated against by comparison with other undertakings such as TEC and Sharp, which do not sell their products on the domestic market and for which the institutions adopted the lowest of the margins achieved by the undertakings (Silver Seiko, Canon and Brother) which had sufficient sales on the domestic market. In fact, the situation of Silver Seiko, for which a real profit margin was established, cannot be regarded as identical to that of TEC and Sharp, with respect to which, in the absence of real information, a degree of discretion had necessarily to be accorded to the institutions.

19 As regards Silver Seiko's claim that, when calculating the profit, the institutions did not deduct from the sales price any of the distributor's general expenses, thus unreasonably inflating the profit margin, it must be stated that if those expenses had been deducted, they would have had to be added to the production cost, with the result that the constructed normal value would have remained the same.

20 Silver Seiko claimed, for the first time at the hearing, that the institutions included in the profit margin calculated for the purpose of constructing the normal value of certain models its sales subsidiary's expenses directly linked with sales. In its opinion, if those expenses had been deducted, in accordance with Article 2 (10) (c), from the constructed normal value, the dumping margin would have been reduced from 31 to 18%.

21 In that connection, it is apparent from the evidence before the Court that, in documents handed to officials of the Commission on 19 and 20 July 1984 containing a breakdown of its unit costs for each electronic typewriter model, Silver Seiko mentioned 'general and administrative expenses of Silver Seiko Ltd and Silver Business Machines respectively' and also showed the selling expenses and delivery costs separately, whereas the figure for selling, general and administrative expenses was finally calculated after 'substantial negotiations' between the parties on the basis of the documents submitted by Silver Seiko which referred to the 'total selling, general and administrative expenses for typewriters'.

22 In those circumstances, there is no reason to conclude that the figure used by the institutions does not refer to the total expenses of the Silver Seiko group for electronic typewriters.

23 The submission must therefore be rejected.

The submission concerning the miscalculation of the export price

24 Silver Seiko maintains that, in calculating its export prices, the institutions should have taken account of the profit margin of its European subsidiaries and not that of the independent importers of electronic typewriters.

25 Where there is an association between a manufacturer and an importer in the Community, the institutions are authorized by Article 2 (8) (b) of Regulation No 2176/84 to disregard the price paid for the product by one to the other and to rely upon the price at which the product is first resold to an independent Community buyer, and it is therefore appropriate that the calculation of a 'reasonable margin of profit' should be based not on information from the associated importer, which may be influenced by that association, but on information from an independent importer of electronic typewriters.

26 Silver Seiko further contests the allocation of the general expenses of its subsidiaries as between electronic typewriters and other types of machines, on the ground that that allocation was made, contrary to its suggestion, on the basis of turnover and not of the number of machines sold.

27 In that connection, it must be observed that the general rule laid down in Article 2 (11) of Regulation No 2176/84 provides for an allocation in proportion to the turnover for each product and market under consideration. Thus, although the institutions are entitled to depart from that general rule if they consider that a different allocation gives a more accurate reflection of the costs involved, Silver Seiko has not explained why a derogation was justified in this case.

28 The submission must therefore be rejected.

The submission concerning errors in the comparison between the normal value and the export price

29 Silver Seiko maintains that the institutions wrongly refused to make allowances for differences in the level of trade, differences of quantity and differences between conditions of sale.

30 As regards the alleged differences in the level of trade, it must be borne in mind that the institutions were not obliged to make allowances in that respect, since Silver Seiko and its sales subsidiary in Japan constituted a single economic entity and the subsidiary's price had therefore to be regarded as the price of the product at the ex-factory stage on the domestic market.

31 As regards the allowances for differences of quantity, it must be observed that Silver Seiko has provided no proof whatsoever that the discounts granted to a Japanese customer on two of its models were 'made freely available in the normal course of trade', nor has it shown that a system existed of price discounts for quantity sales under which such discounts were available to any prospective purchaser. It has not therefore fulfilled the conditions laid down in Article 2 (10) (b) (i) for such allowances to be made.

32 As regards the difference in trading conditions, it is apparent from the documents before the Court that allowances for credit granted in Japan were made by the institutions, although not to the extent desired by Silver Seiko. In any event, Silver

Seiko has not shown that the amounts for which allowances were not made bore a direct relationship to the sales under consideration, as required by Article 2 (10) (c) of Regulation No 2176/84.

33 Silver Seiko's argument that those expenses should have been taken into consideration for the purposes of an allowance, in so far as similar expenses were deducted in determining the price of exports to the Community, cannot be upheld. As the Court made clear in its judgments of 7 May 1987 (in Cases 240, 255, 256, 258 and 260/84, concerning an anti-dumping duty on imports of ball-bearings, [1987] ECR 1809, 1861, 1899, 1923 and 1975), there are three sets of distinct rules, each of which must be complied with separately, for the respective purposes of determining the normal value, establishing the export price and making the comparison between the two.

34 Silver Seiko criticizes the institutions for having made the comparison not on a transaction-by-transaction basis but by reference to the average weighted prices.

35 It must be pointed out that, even if under Regulation No 1698/85 'normal value was generally compared with export prices on a transaction- by-transaction basis', the method of weighted average prices used in the case of Silver Seiko is expressly provided for in Article 2 (13) (b) of Regulation No 2176/84.

36 Finally, there is no foundation for Silver Seiko's contention that, contrary to Article 2 (9) of Regulation No 2176/84, the normal value and the export price were not compared over the same period. Although the normal value was determined by reference to a period of one year, the monthly export prices were weighted according to the quantities sold each month and an annual average of those prices was then determined.

37 In the light of those considerations, the submission must be rejected.

The submission concerning errors in the determination of injury suffered by the Community industry

38 Silver Seiko claims that, in determining the injury, account was wrongly taken of the damage suffered by Community manufacturers which had themselves imported products allegedly sold at dumping prices, that the injury factors were not properly analysed, that the so-called 'target-price' system used by the institutions is an inadequate basis upon which to determine the injury and that any losses suffered by the Community industry were caused by factors other than dumping.

39 As regards the first point, it is apparent from the contentions of the institutions, which have not been seriously challenged by Silver Seiko, that only a few models, all of them at the lower end of the range, were imported by Community manufacturers to fill gaps which at that time existed in their range of products and that the total volume of such imports was always relatively low. In those circumstances, the Community manufacturers' imports must be regarded as not having contributed to the injury to the Community industry and there is therefore no reason to exclude such manufacturers from the determination of injury.

40 As regards the complaint that the factors indicated in Article 4 (2) (a), (b) and (c) of Regulation No 2176/84 (volume of dumped imports, the prices of such imports and their impact on the Community industry) were not considered, the preamble to Regulation No 1698/85 shows that the institutions did examine those factors. If, in assessing the impact of the dumping on the Community industry, they did not examine all the relevant economic factors mentioned in the list contained in Article 4 (2) (c), it must be borne in mind that, as is apparent from the wording of that provision, the list is merely indicative and the institutions were therefore free to take the view that the most relevant factors contained therein were in themselves a sufficient basis for forming a judgment.

41 As regards the argument concerning use of the so-called 'target-price' method, it must be borne in mind that the Commission was unable to determine the injury until after the complaint was lodged by the Community manufacturers on 15 February 1984, whereas it is apparent from the documents before the Court that the Community industry had already some time before begun to feel the effects of

the Japanese imports which were subsequently the subject of the anti-dumping proceeding. The prices of the Community products during 1984 could therefore no longer be used for determination of the injury within the meaning of Article 4 of Regulation No 2176/84, in so far as they had already been reduced for some time with a view to resisting the ever-growing pressure from Japanese imports.

42 In the light of the foregoing considerations, constructing the price which would have obtained within the Community if it had not been subject over a long period to downward pressure because of Japanese imports is the only way of ensuring that the comparison provided for in Article 4 (2) (b) of Regulation No 2176/84 is not rendered meaningless.

43 According to Silver Seiko, the institutions wrongly attributed to the dumping injury which was in fact due to other causes, principally the Community companies' failure to adapt to the new technology.

44 It is apparent from the documents before the Court that in reality European producers were the first to perfect the new technology for typewriters and marketed electronic typewriters as from the end of the 1970s, before Japanese producers entered the market. In those circumstances, Silver Seiko has not adduced sufficient evidence to show that the European electronic typewriter industry's difficulties stem from its being technologically less advanced than the Japanese industry.

45 Although the transition to the production of electronic typewriters was less easy for some Community undertakings than for others and although very substantial investment was required, the losses attributable to that investment must not in any event be confused with those due to dumping. Since the Community companies were manifestly in a position, throughout the period covered by the investigation, to offer a wide range of electronic typewriters, the fall in their market share is accounted for not by difficulties of adjustment but primarily by the dumping by the Japanese producers.

46 The data contained in the documents before the Court also show that during the period of the investigation the Community undertakings neverfully used their production capacity, which proves that the loss of market share was not due to the Community industry's inability to meet the upsurge in demand.

47 Finally, no evidence has been adduced by Silver Seiko to show that the factors mentioned above or any others, such as the price of imports from other non-member countries, or a shrinkage of demand, contributed to the injury as found.

48 The submission concerning errors in the determination of the injury must therefore be rejected.

The submission concerning the imposition of definitive anti-dumping duties at an excessively high level

49 Silver Seiko claims that the institutions fixed the definitive anti-dumping duties at a higher level than the dumping margin or the injury actually suffered by the Community industry, as a result of errors of methodology and of calculation which affected the procedure followed by them.

50 As regards the methodology, it must be pointed out, on the basis of the considerations set out above, that neither the taking into account of the Community producers which had imported electronic typewriters originating in Japan, nor the fact that only some of the factors mentioned in Article 4 (2) (c) of Regulation No 2176/84 were analysed, nor the use of the 'target-price' system can be regarded as factors of such a kind as to affect the validity of the institutions' determination of the injury.

51 As regards the alleged calculation errors, it must be observed that Silver Seiko's statements are not supported by any evidence.

52 Nor can the argument be accepted that the imposition of definitive anti-dumping duties on the applicant, when definitive duties have not been imposed on Nakajima All Precision Co. Ltd, constitutes unlawful discrimination.

53 It must be observed that after the adoption of Regulation No 3643/84 cited above, the Commission found that it had made a mistake in the calculation which had led it to consider Nakajima's dumping margin to be *de minimis*. The Commission very quickly decided that the proceedings against Nakajima should be reopened but it was not possible at the same time to suspend the operation of Regulation No 3643/84 with regard to those undertakings in respect of which the existence of a substantial dumping margin had been established without the risk of irreparable damage to the Community industry which that regulation was intended to protect.

54 The anti-dumping proceeding concerning the importation of electronic typewriters manufactured by Nakajima subsequently led to the adoption of Commission Decision 86/34/EEC of 12 February 1986 (Official Journal 1986, L 40, p. 29) which established that Nakajima's dumping margin was to be regarded as insignificant.

55 Since Nakajima's exclusion from the number of companies subject to a definitive anti-dumping duty stems from that decision, discrimination in favour of Nakajima could not, even if it were established, lead to the annulment of the regulation imposing a definitive anti-dumping duty on Silver Seiko, which was adopted on the basis of findings correctly made in the course of the anti-dumping investigation and in accordance with the rules laid down in Regulation No 2176/84. The submission as to discrimination must therefore be rejected.

56 The submission must therefore be rejected.

The submission concerning the illegality of the definitive collection of the provisional duties

57 Silver Seiko maintains that Regulation No 1698/85, which entered into force on 23 June 1985, is not valid in so far as it provided for the definitive collection of the

provisional duties imposed by Regulation No 3643/84, which expired either on 22 April 1985 or, if the view is taken that its period of application of four months was validly extended by two months by Council Regulation No 1015/85 of 19 April 1985 (Official Journal 1985, L 108, p. 18), on 22 June 1985.

58 It must first of all be stated that Commission Regulation No 3643/84 was indeed validly extended by Council Regulation No 1015/85 pursuant to Article 11 (5) of Regulation No 2176/84, according to which provisional duties may be extended 'where exporters representing a significant percentage of the trade involved so request or, pursuant to a notice of intention from the Commission, do not object'. Even though, amongst the exporters on whom Regulation No 3643/84 had imposed a provisional anti-dumping duty, Brother and Silver Seiko raised objections concerning the Commission's intention to extend that regulation, the fact that all the other exporters, who, taken together, were at least as substantial as those two companies, did not object precludes the view that the extension was made in breach of the abovementioned provision.

59 It remains therefore to establish whether Regulation No 3643/84, its period of validity having been extended by Regulation No 1015/85, expired before the entry into force of Regulation No 1698/85, as Silver Seiko maintains.

60 Pursuant to Article 4 (2) of Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time-limits (Official Journal, English Special Edition 1971 (II), p. 354), the 'entry into force, taking effect or application of acts of [the institutions] ... fixed at a given date shall occur at the beginning of the first hour of the day falling on that date', whereas, pursuant to Article 4 (3), the expiry of validity, the termination of effect or the cessation of application of such acts, fixed at a given date, is to 'occur on the expiry of the last hour of the day falling on that date'. Accordingly, Regulation No 3643/84, which entered into force on 23 December 1984 and was extended until 23 June 1985 when it was due to expire at 24.00 hours, was replaced, during the period of its validity, by Regulation No 1698/85 which entered into force on 23 June 1985 at 00.00 hours.

61 The submission must therefore be rejected.

The submission concerning procedural deficiencies

62 Silver Seiko claims finally that the regulation is vitiated by the fact that the right to a fair hearing was frustrated during the procedure, as is shown by the fact that Silver Seiko was not given the same access to the information as the other undertakings and was not granted the same opportunities to defend itself.

63 In that connection, it must be observed that the detailed rules laid down in Articles 7 and 8 of Regulation No 2176/84 regarding information to be given to undertakings involved in an anti-dumping investigation were complied with in this case. The differences between the dates on which the information was given to the various companies stem from the practical impossibility of organizing meetings of all the companies concerned at the same time or of giving them all the information simultaneously; those differences cannot therefore be regarded as representing a breach of Silver Seiko's right to a fair hearing, particularly since there is nothing to suggest that they were used to place Silver Seiko in a less favourable position than any of the other companies involved.

64 The submission must therefore be rejected.

65 In view of the foregoing findings, the actions in their entirety must be dismissed as unfounded.

Costs

66 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their submissions, they must be ordered to pay, jointly and severally in Case 273/85, the costs of both the main proceedings and the proceedings for the adoption of interim measures, including the costs of the interveners which asked for them.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the applications.

(2) Orders the applicants to pay, jointly and severally in Case 273/85, the costs of both the main proceedings and the proceedings for the adoption of interim measures, including the costs of the interveners which asked for them.

Bosco Moitinho de Almeida

Everling Galmot Joliet

Delivered in open court in Luxembourg on 5 October 1988.

J.-G. Giraud
Registrar

G. Bosco
President of the Fifth Chamber