REPORT FOR THE HEARING
delivered in Case 255/84 *

Summary

* Language of the Case: German.

I — Law and facts

A — *Relevant regulations*

1. *Main provisions*

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

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

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

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

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

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

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

(a) *Assessment of dumping*

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

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

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

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

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

Article 2 D (9) provides that:

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

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

Nachi Fujikoshi Corporation exports ball-bearings to the EEC through its subsidiaries or companies in which it has a participation, namely Nachi Germany GmbH, Nachi Fujikoshi Europe GmbH, Neuss (Federal Republic of Germany) and Nachi Limited, Birmingham (United Kingdom), and through ISO Import Standard Office, Paris, which is completely independent of the applicant.

In 1976 the Commission initiated the first anti-dumping proceeding against the applicant, which was terminated upon the acceptance of an undertaking signed by the applicant on 20 July 1977 (Annex 3 to the application). In spite of that undertaking, on 26 July 1977 the Council adopted Regulation No 1778/77 concerning the application of the anti-dumping duty on ball-bearings and tapered roller-bearings originating in Japan (Official Journal 1977, L 196, p. 1). That regulation was annulled by judgment of the Court of 29 March 1979 in Case 121/77 *Nachi Fujikoshi* v *Council* [1979] ECR 1363.

As provided for in the undertaking signed in 1977, certain alterations were made in relation to the fixing of prices under new undertakings signed on 10 November 1980 and 25 March 1981 (Annexes 4 and 5 to the application).

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

The complaint lodged by Febma contained evidence of dumping practices operated by the applicant and others and of serious injury to the Community.

Having regard to Febma's complaint, developments on the market in that product and information which it had itself gathered during the monitoring of undertakings given in particular by the applicant at the conclusion of a previous anti-dumping proceeding (Commission Decision No 81/406 of 4 June 1981, Official Journal 1981, L 152, p. 44), the Commission announced the initiation of an anti-dumping proceeding concerning imports into the Community of the products in question originating in Japan and Singapore (Official Journal 1983, C 188, p. 8, and C 310, p. 3).

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

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

(i) repealed Decision No 81/406/EEC accepting the undertakings given by *inter alia* Nachi Fujikoshi in respect of the abovementioned ball-bearings;

(ii) imposed a provisional anti-dumping duty of 11.88% on imports of certain ball-bearings exported by the applicant.

Article 4 of Regulation No 744/84 provided that the regulation was applicable for a period of four months unless the Council adopted definitive measures before the expiry of that period. The parties concerned made known their views within the period of one month prescribed in Article 3 of the regulation. In telex messages of 14 June and 18 June 1984 the applicant offered fresh undertakings (Annexes 8 and 9 to the application).

However, the Commission made a proposal pursuant to Article 11 (6) of Regulation No 3017/79 that the Council should adopt a definitive anti-dumping duty. By Regulation No 2089/84 of 19 July 1984 the Council imposed a definitive anti-dumping duty of 9.65% on imports by the applicant of certain ball-bearings (Official Journal 1984, L 193, p. 1).

II — Proceedings before the Court

The present application was lodged at the Court Registry on 29 October 1984.

By application received at the Court Registry on 17 December 1984 the Commission of the European Communities requested leave to intervene in support of the Council. It was granted leave to intervene by order of the Court of 30 January 1985.

By application received at the Court Registry on 13 December 1984 Febma requested leave to intervene in support of the Council. It was granted leave to intervene by order of the Court of 20 March 1985. Following a request by the applicant the Court ordered that documents considered confidential submitted in the proceedings should not be sent to the intervener.

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 answer certain questions before 31 May 1986. Answers to its questions were lodged within the prescribed period.

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

III — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare void Council Regulation No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball-bearings originating in Japan and Singapore;

2. Alternatively, declare void Council Regulation No 2089/84 of 19 July 1984 imposing a definitive anti-dumping duty on imports of certain ball-bearings originating in Japan in so far as it concerns ball-bearings manufactured by the applicant in Japan and exported by the applicant;

3. Order the defendant to pay the costs.

The *Council* contends that the Court should:

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

2. Dismiss the rest of the application;

3. Order the applicant to pay the costs.

The *Commission* submits that the Court should:

1. Dismiss the application;

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

Febma submits that the Court should:

1. Dismiss the application;

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

IV — Submissions and arguments of the parties

Admissibility

Nachi Fujikoshi considers that the application is admissible in so far as the contested measure is a decision which, although in the form of a regulation, concerns it directly and individually, as the Court held in the aforesaid judgment of 29 March 1979 in Case 121/77 in respect of another Council regulation imposing a definitive anti-dumping duty. The applicant, which also considers itself concerned as an exporter of ball-bearings, refers to the judgment of 21 February 1984 in Joined Cases 239/82 and 275/82 *Allied Corporation and Others* v *Commission* [1984] ECR 1005.

In view of the doubts expressed by the Council, the applicant has reservations about challenging only part of Regulation No 2089/84; nevertheless, should the Court take the view that the regulation at issue is composed of a number of individual decisions and that the application must be confined to the applicant's own exports, it alternatively seeks a declaration that the regulation is void in so far as it concerns those exports.

The Council, which refers in particular to paragraphs 7 to 16 of the judgment of 21 February 1984 in the aforementioned *Allied Corporation* case, considers that the criteria laid down in the second paragraph of Article 173 of the EEC Treaty are satisfied only in so far as the application concerns

the anti-dumping duties imposed by Regulation No 2089/84 on the applicant's exports. The Council takes note that the applicant is not withdrawing its main claim for the annulment of the contested regulation.

The *Commission* makes no submission on this issue.

Febma shares the Council's doubts, which, it claims, are indirectly confirmed by paragraphs 12 and 13 of the judgment of 29 March 1979 in *Nachi Fujikoshi* v *Council*, cited above.

Substance

In support of its application the applicant makes two submissions, namely that the principle of proportionality has not been observed and that the calculation of the dumping margin is unlawful.

The submission concerning the breach of the principle of proportionality and the infringement of Articles 10 (1) and 13 (3) of Council Regulation No 3017/79

After discussing the scope of the principle of proportionality in German law and Community law, the applicant argues that the regulation at issue involves a breach of that principle in two respects: the anti-dumping duty imposed cannot be justified in view, first, of the offer of undertakings which was made by the applicant but which was not considered by the Commission and was rejected by the Council without any statement of reasons, and secondly of the small degree of injury suffered by the Community industry.

As regards the scope of the principle of proportionality, the applicant states that, according to the case-law of the Bundesverfassungsgericht and German legal theory, the principle of proportionality, which is a higer-ranking rule of law, emanates from the principle of legality and fundamental rights which cannot be restricted by public authorities save in so far as is necessary for the protection of public interests.

The principle of proportionality, which is expressed in various provisions of the EEC Treaty (Articles 36, 48 (3), 56 (1) and 90 (3)) and in secondary law, in particular in safeguard provisions in implementing regulations (for example, Article 3 (2) of Regulation No 2707/72 of the Council of 19 December 1972, Official Journal, English Special Edition 1972 (28-30 December), p. 3) has been widely recognized by the Court in its decisions. The applicant cites in particular the judgment of 12 November 1969 in Case 29/69 *Erich Stauder* v *City of Ulm, Sozialamt* [1969] ECR 419 and the judgment of 24 October 1973 in Case 5/73 *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091.

It is clear from the established case-law of the Court that the principle of proportionality, which is a higher-ranking rule of law for the protection of individuals, is a test of the validity or lawfulness of any rule of Community law.

(1) *The first complaint: an anti-dumping duty cannot be imposed when offers of undertakings have not been considered (Article 10 (1) of Regulation No 3017/79) or have been rejected without a statement of reasons (paragraph 24 of the preamble to Regulation No 2089/84)*

The *applicant* claims that under the rules of the GATT, to which the governing Council regulations refer and which lay down the principle of the free movement of goods, an anti-dumping duty may be imposed only if it is the least restrictive means for achieving the desired result. Contrary to the Council's contention, the applicant is not suggesting that there should be an order of priority between the acceptance of undertakings and the imposition of an anti-dumping duty; it

does however think that such priority necessarily follows from the application of the principle of proportionality which requires that measures be strictly necessary for attaining the desired objectives and consequently that the least restrictive measures should be sought; the application of that principle runs counter to the characteristic tendency of all administrative authorities to make things as easy as possible.

It follows from the foregoing that the Community institutions have disregarded Article 10 (1) of Council Regulation No 3017/79, which provides that an anti-dumping proceeding may be terminated without the imposition of duties where during such a proceeding undertakings are offered which the Commission considers acceptable. The discretion thus conferred on the Commission is intended to ensure that the principles of proportionality and fairness are observed in the application of measures which, as the Council stated in Case 121/77, do not constitute 'sanctions comparable to measures adopted, for example, in the event of infringement of Articles 85 and 86 of the EEC Treaty, but a measure of commercial policy to protect certain specific sectors of the Community industry'. The Council merely states in paragraph 24 of the preamble to Regulation No 2089/84 that a price undertaking is not an appropriate means of obtaining the desired aim, whereas the onus is on the Council to show that it has discharged its duty to assess the relevant legal interests in a careful and balanced way. It thus dismisses without a statement of reasons the undertakings offered in the telex messages sent to the Commission in June 1984, although the giving of undertakings, which the applicant has always honoured, was until then a satisfactory solution and the low production of ball-bearings with which the regulation at issue was concerned did not require the imposition of a definitive duty.

The applicant maintains that its offer of undertakings was never considered at all since from the beginning of the investigation the Commission was clearly inclined to the imposition of an anti-dumping duty. It deplores the fact that the Commission and Council can say, without adducing any evidence, that the market in ball-bearings is not suitable for undertakings because they are generally circumvented by exporters.

The first contention is refuted by the fact that the dumping margin was assessed almost to the last penny on the basis of prices determined on a transaction-by-transaction basis. The second contention is not based on any actual fact, for the applicant has always honoured or changed its undertakings as requested by officials of the Commission. The applicant proposes to call Mr Yoshida, a businessman, of 148 Wiesenstraße, 4040 Neuss 1, as a witness to the fact that its undertakings were made on the basis of the conditions laid down by officials of the Commission. The applicant considers that the second contention is particularly unacceptable in view of the lack of any attempt by the Commission to discuss offers of undertakings or to request the relevant particulars for which the Council asks in its defence.

The applicant denies that its offer to give an undertaking did not cover all its exports to the Community and refers in this regard to its telex messages of June 1984 appended to

the application. Finally, it submits that its undertakings afforded a quick way of adjusting prices which would have come into operation immediately and provided for prices to be adjusted every quarter.

The Council refers to the possibility of a review of the contested provisions under Article 14 of Regulation No 3017/79 but such a review cannot form the basis of an anti-dumping policy and cannot make good the effect of provisions based on misjudgments; in such a case the applicant has the burden of proving that the anti-dumping duty is unjustified.

The *Council* states that, whilst the principle of proportionality constitutes a guiding principle to be observed in administrative practice, it is clear from the case-law cited by the applicant that the administrative authority must accomplish the aims assigned to it.

(i) The aims of the anti-dumping rules

In the Council's view, there is no legal principle requiring only the least drastic means affecting the person concerned the least to be used; the experience of several years demonstrates that the means in question is not effective (paragraph 24 of the preamble to Regulation No 2089/84). Therefore, the most appropriate means for effectively protecting the European industry must be used.

With regard to the GATT rules relied upon by the applicant, the Council contends that neither Article VI of the GATT, in which price undertakings are not even mentioned, nor Article 7 of the Anti-Dumping Code can be interpreted as meaning that the acceptance of undertakings has priority over the imposition of anti-dumping duties. Article 7 (2) of the Anti-Dumping Code states on the contrary that:

'Undertakings offered need not be accepted if the authorities consider their acceptance impractical.'

The same is true of the Community rules. In the Council's view, it is clear, especially from Article 10 of Council Regulation No 3017/79, that the imposition of anti-dumping duties is the normal course of action, unless the price undertakings offered are considered acceptable.

Contrary to the applicant's contention the Commission is not bound to accept undertakings, for the conditions and terms of undertakings which may be accepted have never been defined, and secondly it has never been the Commission's policy to accept all undertakings offered. The Council appends to its defence a table showing that more than half of the investigations conducted by the Commission have ended in the imposition of anti-dumping duties in spite of offers of undertakings.

(ii) The rejection of the applicant's offers

The Council states that the offers of undertakings made by the applicant were rejected after careful consideration of their merits because they were not sufficiently precise on various points and the price reviews were insufficient to eliminate dumping and the resulting injury to the Community. More precisely, the undertakings did not provide for comprehensive, immediate price increases for exports to the whole of the Community, were silent about the methods for calculating minimum prices and made

no provision for the requisite adjustments to be made with the speed which the situation required. The applicant's offer is really no more than a declaration of intention to reach an agreement. In that respect the Council refers to telex messages from the applicant (Annex 2 to the rejoinder) which claims to have made its proposals on the basis of conditions laid down by the Commission at a meeting with the applicant on 6 June 1984. As Annex 1 to the rejoinder the Council provides a copy of the minutes of that meeting which show that none of the points discussed at that meeting is mentioned or clarified in the applicant's proposal.

Thus the applicant's claims that it was prepared to follow the instructions of the Commission are not sufficient to show that the adoption of the regulation at issue was not justified; in any event, the argument that it has always honoured its undertakings must be rejected since the dumping margin found was in fact of the order of 9.65%.

Precisely because of past experience with undertakings the Council takes the view that the structure of the market in ball-bearings, with its very wide range of products and wide variety of prices charged in individual transactions, makes it particularly unsuitable for price undertakings and makes the monitoring of them by the Commission particularly difficult. The Council states that the institutions reached the conclusion that a satisfactory monitoring of all the undertakings would require the full attention of two Commission officials out of a staff of 26 in the anti-dumping department.

(iii) The comparative effects of an undertaking and an anti-dumping duty

The Council denies that a price undertaking is a more flexible instrument than an anti-dumping duty.

In this regard it points out that Article 14 of Regulation No 3017/79 provides for the possibility of a review at the request of an interested party one year after the imposition of a definitive duty, that in any event the amount of the duty may be adjusted should there be a change of commercial practice or in the economic situation and finally that, according to Article 15 (1) of the present anti-dumping Regulation No 2176/84, on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984, L 201, p. 1), which applies to the applicant, an anti-dumping duty lapses after a period of five years.

The Council states in the second place that, since there can be no legal obligation to reach agreement on undertakings, the alternative course, the imposition of an anti-dumping duty, cannot be in the nature of a penalty. That statement is not contradicted by the Council's arguments in Case 121/77.

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

criteria indicating when undertakings may be accepted.

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

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

After pointing out that in the event of a deliberate breach of undertakings no penalty may be imposed other than the initiation of an investigation, the Commission states that paragraph 24 of the preamble to Regulation No 2089/84 reflects the experience of monitoring all the undertakings which have been given in relation to ball-bearings. In view of that experience the Commission states that it may be unwilling to accept a given undertaking, even if its terms may on their face appear satisfactory. Such 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.

The Commission states that, contrary to the applicant's contention, the imposition of an anti-dumping duty does not cause more inconvenience than the observance of undertakings. The Court should bear in mind that an exporter willing to increase his export prices will do so even if his offer of an undertaking is not accepted, for his profit from each export sale will increase and his importers will be able to request a refund of the anti-dumping duty under the review procedure provided for in Regulation No 3017/79.

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

Febma observes that this submission is based on a confused idea as to the aim of the present application, which is to secure the annulment of definitive anti-dumping duties imposed by the Council and not the annulment of the decision to reject undertakings offered by the applicant. It is clear from the division of powers between the Commission and the Council in Article 10 (1) and Article 12 (1) of Regulation No 2176/84 that the Commission alone is competent to determine whether an undertaking is acceptable or whether an anti-dumping duty should be imposed instead and that the Council may decide only whether to accept or reject a proposal made by the Commission in that respect.

Febma therefore considers it unnecessary to inquire whether the Commission's proposal that the Council should impose such a duty is lawful since such an inquiry would be relevant only to an action brought against the Commission. In Febma's view, it is clear from paragraph 24 of the preamble to Council Regulation No 2089/84 that before

making that proposal the Commission decided not to accept the undertaking offered; that decision has not been challenged by the applicant.

Febma argues that it follows from the aforegoing that the Council cannot be held responsible for the alleged breach of the principle of proportionality. However, in case that view is not accepted, Febma makes the following observations.

On many occasions it has attempted to convince the Commission that undertakings were inappropriate in the ball-bearings sector in view, in particular, of the variety of the products in question — it states that there are 2 000 to 3 000 different small ball-bearings — and the way in which they are sold, since the prices of the same ball-bearings vary from one transaction to another according to the volume sold. Those two factors offer many possibilities for circumventing undertakings, as is shown by the experience referred to in the regulation at issue.

Therefore, in spite of the applicant's incorrect statements that the undertakings entered into had been honoured, the imposition of an anti-dumping duty was absolutely necessary in order to stop dumping once and for all. It is not an excessive measure but an appropriate means of protection consistent with the provisions of the GATT and the Community rules. Nor does it constitute a penalty; it is merely to make good the injury suffered. In Febma's view, it is the European industry which is being 'penalized' by the Japanese exporters which do not seem to have improved their conduct in 1985.

(2) *The second complaint: the anti-dumping duty outweighs the injury suffered (infringement of Article 13 (3) of Regulation No 3017/79)*

The applicant puts forward two arguments in support of this contention.

(i) *Regulation No 2089/84 applies to imports of ball-bearings from Japan and Singapore*

The applicant contends, however, that it has exported ball-bearings originating solely in Japan in small quantities unlikely to cause significant injury to the European industry. The injury referred to by the Commission only results in fact from the aggregation of imports from Japan and Singapore. The applicant asks the Council to reconsider the statement that it is the second largest exporter of ball-bearings. The applicant's shares are, according to the statements of the Commission in April 1984, 0.17% in the Federal Republic of Germany, 3% in the United Kingdom and 16.5% in France.

(ii) *The Commission fixed an anti-dumping duty which was precisely equal to the dumping margin found, without taking into account* inter alia *the fact that the Japanese currency was revalued during the anti-dumping proceeding*

In such a proceeding the real value at which goods are manufactured, exported and then sold in each Member State should be taken into account; Regulation No 3017/79 does not make it necessary to adhere to the official exchange rates, which do not reflect the relative purchasing power of the various currencies; the Council ought to have taken account of those factors by referring to the comparative consumer purchasing-power parities calculated by, among others, the German Federal Office of Statistics; such statistics are referred to by, for example, the Organization for Economic Cooperation and Development and the United Nations

Organization. As a result of the method used by the Council the applicant has to pay more anti-dumping duty than is necessary to make good any injury suffered by the European industry.

The *Council* contends that it is the Commission's customary practice to aggregate imports from all the exporting countries investigated, which is compatible with the principles of the GATT. Contrary to the applicant's assertions, the investigation showed that it was the second largest Japanese exporter to the Community. The Council is willing to disclose in confidence the market shares which have been found if the Court considers such information relevant.

As regards the injury caused by the applicant's exports, the Council refers to paragraph 21 of the preamble to Regulation No 2089/84 and paragraphs 23 to 32 of the preamble to Commission Regulation No 744/84. The Council states that, since sales by importers are expressed in the currency of the Member State into which the goods are imported, fluctuations in the Japanese currency do not affect the determination of the injury. The relationship between the currency of the exporting country and the currencies of the Member States only affects the calculation of the dumping margin; normally the various data used to calculate the dumping margin are expressed in different currencies and must therefore be given a common basis. That conversion is made on the basis of the bank exchange rates which in turn are based on the official parities. That principle, which has always been followed in such cases, led in the present case to the taking into account of an average exchange rate of DM 1 = 100.48 yen calculated over a period of 12 months and taking into account the difference in the rate at the beginning and at the end of the investigation (DM 1 = 94.17 yen).

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

Febma presumes that the applicant alleges an infringement of Article 4 (1) of Regulation No 2176/84 because it provides that dumped imports must cause or threaten to cause material injury to a Community industry, which cannot be the case with the applicant's exports in view of its small share of the market. Febma considers, however, that in view of the terms of that provision, the total effect of all imports on the Community market must be considered; that approach is justified by practical considerations, namely that the small ball-bearings originating in Japan and Singapore are interchangeable, they are sold by the same distributors and sales are based on the same pricing policy.

In Febma's view, the taking into account of all imports could only have the effect of reducing the anti-dumping duty imposed on the applicant, so that its argument is groundless.

It suggests that the applicant cannot complain of a change in the exchange rates since the revaluation of the yen leads to a higher normal value and consequently to a higher dumping margin.

The submission concerning the unlawfulness of the calculation of the dumping margin and breach of the principle of making a fair comparison between the normal value and the export price laid down in Article 2 (9) of Regulation No 3017/79 (paragraphs 11 and 16 of the preamble to Regulation No 2089/84)

The *applicant* contends that in paragraphs 11 and 16 of the preamble to Regulation No 2089/84 the Council disregards the principle laid down in Article 2 (9) of Council Regulation No 3017/79 which provides that the calculation of the dumping margin must be based on a comparison between the normal value of the product and the export price established on comparable bases. In this regard the applicant points out two errors made by the

Commission and incorporated in the Council regulation.

(i) *The normal value of ball-bearings in the Community was established on the basis of a weighted average of all prices charged in individual transactions.* In order to establish the dumping margin the normal value was then compared to all export sale prices in individual transactions, without any weighting. In the applicant's opinion, such a procedure is inevitably unfair to exporters since the sale prices of large quantities of goods are generally lower than the prices of goods sold in smaller quantities. The Council's arguments cannot refute that argument, for whilst the provisions of Regulation No 3017/79 offer several alternatives, they do not allow inconsistency.

In the applicant's view, it is clear from the aforegoing arguments that the dumping margin is incorrect and that consequently the anti-dumping duty, which is equal to that margin, constitutes an unjustified penalty.

(ii) *When sale prices in the EEC and in the exporting country are established the importer's and exporter's administrative costs are normally deducted.* The Commission did not take into account all the administrative costs incurred except in the case of the applicant's European subsidiaries and paid no attention to the points made in this regard.

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 sets out at least 10 methods of calculating the normal value and four methods of 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 which permits 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.

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 dumping exists or to a finding that there is no dumping; the regulation does not allow dumped exports to be compensated for by export sales at higher prices.

The Council does not know in which context to place the applicant's observation that its costs have not been taken into account. Exporters' costs are taken into account in the calculation of the export price in accordance with Article 2 (8) (b) of Regulation No 3017/79. The costs of a subsidiary in the Community are treated as export costs because the exports would not be possible without the existence of such a subsidiary.

The *Commission* agrees with the Council's arguments but adds the following observations:

(i) *The choice of the transaction-by-transaction method*

It is clear from Article 2 (13) of Regulation No 2176/84, which re-enacts Article 2 F of Regulation No 3017/79, that 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 for 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:

(a) 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

(b) the 'transaction-by-transaction' method used by the Commission.

According to the latter 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 the weighted average method would say 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 dumping exists, 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%.

(ii) *The argument that the same methods must be used for calculating the normal value and the export price*

The Commission observes that there is no provision in the governing regulations to support the applicant's argument. On the contrary, it is clear, especially from all the provisions of Article 2 of Regulation No 2176/84, that the Community and the Japanese markets are appreciably different and consequently require different methods of assessment. That is why, to take only one example, Article 2 (8) (b) envisages that the export price may have to be constructed 'on any reasonable basis'.

(iii) *The argument that notice should have been given in advance of the change in the method of calculation*

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 Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, 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 and so cannot be vitiated for breach of the principle of protection of legitimate expectation.

Febma, which mostly repeats the arguments put forward by the Council and Commission, considers that the applicant has not shown that in the very complex economic circumstances involved the Commission has committed a manifest error of assessment or has misused or exceeded its powers. It has therefore not shown that the methods used led to an unjustified finding regarding the dumping margin and to an excessive duty.

Febma suggests that the Commission would, however, have had a much more valid comparison if it had compared the prices of quantities sold in Japan with the prices of the same quantities sold in the Community. The quantities sold to various Japanese customers are much larger than those sold in the Community. Since prices vary according to the quantities sold, the determination of normal value on the basis of average sale prices leads to a normal value which is too low and therefore to a finding of dumping less than what it really is.

As regards the applicant's argument that the anti-dumping duty also applies to ball-bearings that are not dumped, Febma submits that under Article 2 (13) (b) of Regulation No 2176/84 the Commission is entitled to determine the dumping margin on the basis of weighted average prices where the prices of a product vary from transaction to transaction, as has been shown above. Dumping of that kind cannnot be combated except by a duty on all small ball-bearings.

With regard to the taking into account of administrative costs, Febma agrees with the arguments of the Council but states that, in view of the confidential nature of the infor-

mation in question, it does not know which costs were taken into account by the Commission in the present case. It observes, however, that it appears from Regulation No 1739/85 of 27 June 1985 (Official Journal 1985, L 167, p. 3) that general and administrative expenses were not taken into account on the ground that they do not bear a direct functional relationship to sales.

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, i. e. 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

Is it correct, as Nachi Fujikoshi Corporation alleges, that the adoption of different methods for assessing the normal value and export prices results in a comparison being made between sales prices applicable to different quantities? If so, what adjustments were made to take account of that fact?

Answer

The applicant's argument is not correct. The ball-bearing markets are characterized by:

(i) numerous sales transactions, involving between one and several hundred thousand bearings per transaction;

(ii) prices are generally the result of individual price negotiations. Price-lists in general exist but are nothing but an indication and are not adhered to. It is not unusual for prices of small quantities to be lower than prices for larger quantities;

(iii) a purchaser of large quantities does not automatically get a lower price.

It will be seen from the answer to Question 1 that the use of different methods has nothing to do with comparing sales prices for different quantities. If in fact it was found that either in the market used for determining normal value or in the Community different prices were normally charged for different quantities of identical products, allowances for these differences in quantities were granted provided that they were claimed and that the conditions of Articles 2 (10) (b) were proved to be fulfilled. The applicant did not make such claims during the administrative proceeding.

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

First of all, the applicant challenges the method adopted by the Commission in determining the dumping margin, under which all the costs of the applicant's European subsidiaries are taken into account while the applicant's costs are virtually disregarded. The applicant challenges the fact that the Commission treats all the general expenses of the European subsidiaries as export costs and deducts them in calculating the export price whereas as regards its own costs and the calculation of the normal value it takes account only of costs strictly necessary for or connected with the sale.

The applicant gives confidential figures showing the difference between the calculations it has made and those made by the Commission in relation to the costs of its subsidiary in the United Kingdom.

In the second place the applicant challenges the method of calculating the normal value, since the Commission has refused to take account of the salaries and wages of women employed in the sales department and bank interest in respect of stocks for sales in Japan and exports. The applicant produces figures for all the costs not taken into account or only partially taken into account by the Commission.

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

The sales prices of the applicant's subsidiaries in the Community were increased before the Commission adopted its definitive decision.

Applications under Article 16 (1) of Regulation No 2176/84 were not made. That is because Article 16 reverses the burden of proof. The importer is required to prove that the duty exceeds the actual dumping margin. It is practically impossible to provide such proof since in determining the export price account has to be taken of the anti-dumping duties, insurance, loading, freight and other costs (Article 2 (8) (b) (ii) of Regulation No 2176/84).

Y. Galmot
Judge-Rapporteur

OPINION OF MR ADVOCATE GENERAL MANCINI

(see Case 240/84, p. 1833)