I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EEC) No 1877/85

of 4 July 1985

imposing a definitive anti-dumping duty on imports of certain hydraulic excavators originating in Japan

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to 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 (1), and in particular Article 12 thereof,

Having regard to the proposal submitted by the Commission after consultation within the Advisory Committee as provided for under the above Regulation,

Whereas :

A. Provisional action

1. The Commission, by Regulation (EEC) No 595/85 (2), imposed a provisional anti-dumping duty on imports of certain hydraulic excavators originating in Japan.

B. Subsequent procedure

2. Following the imposition of the provisional anti-dumping duty, the exporters, certain importers and the complainant Community producers requested, and were granted, an opportunity to be heard by the Commission. In addition, certain exporters and importers made written submissions making known their views on the provisional findings and rates of duty.

3. Certain exporters and importers also requested to be informed of the essential facts and considerations on the basis of which the Commission intended to recommend definitive action, and these requests were granted.

The Council examined the provisional findings of the Commission as defined in Regulation (EEC) No 595/85.

C. Normal value

4. The Council decided that normal value should be based on the domestic prices paid or payable in the ordinary course of trade of those producers who exported to the Community and who provided sufficient evidence and were considered to be representative of the domestic market concerned.

5. The Council noted that the Commission had provisionally found that the prices of certain of the like products by the exporters on their domestic market had been lower than cost of production over an extended period of time. In such cases, the normal value was, therefore, determined either by adjusting the subproduction cost prices (for those companies that sold certain models at prices below cost of production) referred to above in order to eliminate the losses and allow a reasonable profit, based on the firms' performance concerning these models during a representative profitable period, or on the basis of constructed value.

The constructed value was determined by adding cost of production and a reasonable margin of profit. The costs of production were computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses. A profit margin of 5,2 % was

(1) OJ No L 201, 30. 7. 1984, p. 1.
(2) OJ No L 68, 8. 3. 1985, p. 13.

added to these costs and this was considered to be reasonable in the light of the industry's performance during a representative profitable period. The Council saw no reason to alter this approach.

One exporter argued that it was a subsidiary of a steel company and claimed, therefore, that a much lower profit margin prevailing in the steel industry should be used. However, this claim was rejected on the ground that for the purposes of establishing normal value only the profit margins of the industry producing the like product are relevant.

D. Export price

6. With regard to exports by Japanese firms to independent importers in the Community, the Council accepted the approach followed by the Commission under which export prices were determined on the basis of the prices actually paid or payable for the products sold for export to the Community.

7. In those cases where exports were made to subsidiary companies in the Community, export prices were constructed on the basis of the prices at which the imported product was first resold to an independent buyer, suitably adjusted to take account of all costs incurred between importation and resale, including all duties, and of a reasonable profit margin.

E. Comparison

8. When normal value was compared with export prices, account was taken where appropriate, of differences in conditions and terms of sale affecting comparability, and allowances were made for differences in physical characteristics, payment terms, selling expenses, commissions and transport where claims in these areas could be satisfactorily demonstrated. All comparisons were made at ex-works level.

F. Dumping

9. Normal value on a monthly weighted average basis was generally compared with export prices during the corresponding months on a transaction-by-transaction basis.

No new evidence on dumping has been received since the imposition of the provisional duty with the exception of certain evidence concerning one Japanese exporter, Komatsu Ltd. In the case of this exporter, which has a subsidiary in the Community, the export prices had been constructed on the basis of prices at which the products were first resold to an independent buyer. The exporter claimed that for the purpose of constructing the export price, allowance should be made not for the commission paid by the parent company for the sales made by its subsidiary but for the actual costs incurred by this subsidiary in respect of the line of products concerned. The Commission, after verification of evidence submitted by the exporter in question, used for its calculation the actual costs incurred.

10. Another exporter, Hitachi Construction Machinery Co. Ltd, argued that in comparing normal value with export prices, allowance should have been made for certain expenses, notably 'demonstration fees', incurred in relation to sales in Japan.

This request cannot be granted as the evidence submitted does not show that these expenses bear a direct functional relationship to the sales in question.

11. Consequently, the preliminary determinations are on the one hand confirmed for Hitachi Construction Machinery Co. Ltd, Japan Steel Works Ltd, Kobelco-Kobe Steel Ltd and Mitsubishi Heavy Industries and, on the other hand, modified for Komatsu Ltd. The definitive determinations of the average margin for each exporter investigated are as follows :

— Hitachi Construction Machinery Co. Ltd :	12,4 %
— Japan Steel Works Ltd :	2,9 %
— Kobelco-Kobe Steel Ltd :	31,9 %
— Komatsu Ltd :	26,6 %
— Mitsubishi Heavy Industries :	21,6 %

G. Injury

12. No fresh evidence regarding injury to the Community industry has been submitted and the Council therefore confirms the findings of the Commission. The exporters and importers concerned have repeated certain arguments with regard to injury.

One exporter claimed that the rate of duty should reflect not the level of injury found in the period under investigation, but the current level of injury which is allegedly lower.

This claim has to be refused since it refers to an event which has supposedly occurred after the end of the reference period. Reference is made to the reasons put forward by the Council in Regulation (EEC) No 2089/84 [1] (recital 25) which similarly apply to the injury.

Some exporters also claimed that the rate of duty should be the same for all Japanese producers in order to avoid discrimination among them, in view of the fact that, in the meantime, under a floor price system in Japan introduced in July 1984, the export prices of Japanese producers are all the same.

This claim cannot be accepted. The said floor price system was introduced after the period under investigation and need not, therefore, be taken into account. In addition, the Council has fixed the levels of duty in the light of the dumping margin found for each firm individually. This cannot be discriminatory. If the floor price system produces effects, after the definitive duty has been introduced, which were not intended by those responsible for the system, no doubt it will be modified.

13. The Japanese exporters have argued that they are not responsible for low prices in Europe. They claimed that prices were low before their entry into the Community market.

This argument has not been borne out by the results of the investigation. In 1981, the Japanese exporters held a 2,4 % market share; in 1983, they increased their market share to 10,5 %. During 1981 to 1983 they significantly undercut Community producers' prices. No satisfactory evidence has been submitted that the Japanese exporters gained their market share otherwise than by practising lower prices than those of Community producers. It was because of Japanese low prices — and certain after sales extra commercial advantages given by dealers — that the Community producers were unable to raise their prices in order to take account of increased costs.

14. The Japanese exporters have claimed that the decrease in Community production is not attributable to imports from Japan, but is due to lower sales of Community producers outside the Community market.

This argument is not consistent with the findings of the investigation. It is true that exports of Community producers have decreased owing to severe competition by the Japanese exporters in third countries' markets. But it is also true that Community producers' sales show a continuous decrease since 1981 while sales of Japanese exporters have increased substantially on the Community market where consumption has decreased, as explained in Regulation (EEC) No 595/85.

15. It has been argued that the decline in employment cannot be attributed to imports from Japan and to lower production, but to plant modernization.

It has, however, been found that the losses of jobs were due not only to modernization, but also, and mainly, to lower production, plant closures and bankruptcies. These appear to have resulted from competition by the dumped imports.

16. The Japanese exporters claimed that the critical financial position of the Community producers is not due to Japanese imports and argued that the fact that Community producers made substantial investments between 1981 and 1983 is contrary to the Commission's findings concerning substantial losses incurred by Community producers during that period.

It was found, however, that Community producers were led to make investments in research and development, thereby incurring additional losses which they expected to recuperate subsequently with successful sales of new models resulting from such research and development. These efforts were thwarted by the dumped imports.

17. Finally, it was claimed that the Commission should have examined whether the prices of Japanese imports had undercut the prices of a like product in the Community. It was argued that for that purpose the prices should be compared at end-user level.

It is, however, not considered necessary to undertake a detailed examination of price undercutting by Japanese imports, since the prices realized by the Community producers have been depressed by the prices of the Japanese product. In view of this,

[1] OJ No L 193, 21. 7. 1984, p. 1.

the prices of the Japanese product, cif Community frontier, duty paid, were set against the Community producers' cost of production and a reasonable margin of profit.

H. Undertakings

18. The exporters concerned were informed of the main findings of the investigation and commented on them. Undertakings were subsequently offered by Hitachi Construction Machinery Co. Ltd, Japan Steel Works Ltd, Kobelco-Kobe Steel Ltd, Komatsu Ltd and Mitsubishi Heavy Industries concerning their exports of certain hydraulic excavators to the Community.

An undertaking was also received from another Japanese producer. This undertaking could not be taken into consideration as it was received by the Commission after the 8 April 1985 official deadline established by Regulation (EEC) No 595/85 resulting from Article 7 (4) (b) and (c) of Regulation (EEC) No 2176/84.

19. The Commission proposed that the Council accept the undertakings offered. However, discussion within the Council showed that a qualified majority would reject this proposal. In order to avoid a situation where no measure would be taken the Commission subsequently altered its original proposal.

I. Community interest

20. Community construction companies that use excavators have argued that the introduction of protective measures would not be in the Community interest because it would increase the cost of construction and that it would make them less competitive.

21. In view of the particularly serious difficulties facing the Community industry and the relatively low incidence of a price increase on the costs of the construction industry, the Council has, however, come to the conclusion that it is in the Community's interest that action be taken.

22. Moreover, the Council considers that, in this particular case, in view of the remaining doubts on the possibilities to effectively monitor price undertakings in this particular market and in the light of the present trade relations with Japan, it is not in the interest of the Community to have recourse to price undertakings as an appropriate remedy for the injury resulting from the dumped imports.

J. Definitive duty

23. The extent of the impact of the dumped products on the Community industry is examined in Regulation (EEC) No 595/85; of particular consequence in coming to the conclusion that a lower level of duty would not suffice to eliminate the injury was the level of price undercutting found (up to 52 %) and its consequent effect on the Community producers' production, sales, market share and profitablity.

Therefore, in order to eliminate the level of injury sustained by the Community producers, the levels of duty to be imposed should correspond to the margins of dumping established for each of the exporting companies concerned.

24. Some products of producers who neither replied to the Commission's questionnaire nor made themselves known otherwise in the course of the investigation, have been sold in the Community. The Council considers that it would create an opportunity of circumvention of the duties to hold that the dumping margin of these exporters were any lower than the highest dumping margin determined with regard to an exporter who had cooperated in the investigation.

25. For the same reasons, the level of this duty should not be lower than that necessary to eliminate the highest dumping margin of 31,9 % as determined.

K. Collection of provisional duty

26. It is considered that the dumped imports of certain hydraulic excavators originating in Japan have caused material injury to the Community industry concerned. Therefore the amounts secured by way of provisional anti-dumping duty should be definitively collected to the extent of the definitive dumping margins established,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of self-propelled hydraulic excavators, track-laying or wheeled, of a total operating weight exceeding six tonnes but not exceeding 35 tonnes, equipped with a single bucket mounted on a boom capable of pivoting through 360°, or intended to be so equipped, falling within subheading ex 84.23 A I b) of the Common Customs Tariff, corresponding to NIMEXE code ex 84.23-11, originating in Japan.

2. The rate of duty shall be as set out below, expressed as percentage of the net, free-at-Community-frontier price, before duty:

Manufactured by	*Rate of anti-dumping duty*
— Hitachi Construction Machinery Co. Ltd:	12,4 %
— Japan Steel Works Ltd:	2,9 %
— Kobelco-Kobe Steel Ltd:	31,9 %
— Komatsu Ltd:	26,6 %
— Mitsubishi Heavy Industries:	21,6 %
— Others:	31,9 %

3. The provisions in force with regard to customs duties shall apply.

Article 2

The amounts secured by way of provisional anti-dumping duty under Regulation (EEC) No 595/85 shall be definitively collected up to the amount of the definitive dumping margins established.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Communites.*

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 4 July 1985.

For the Council

The President

J. SANTER