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(Acts whose publication is obligatory)

COUNCIL REGULATION (EEC) No 1058/86

of 8 April 1986

imposing a definitive anti-dumping duty on imports of certain electronic scales 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 Commission proposal presented after consultations within the Advisory Committee set up under the above Regulation,

Whereas :

A. Provisional action

1. By Regulation (EEC) No 2865/85 (2) the Commission imposed a provisional anti-dumping duty on imports of certain electronic scales originating in Japan and terminated the investigation as regards Yamato Scale Co. Ltd, Teraoka Seiko Co. Ltd and Kubota Ltd. This duty was extended for a period not exceeding two months by Regulation (EEC) No 265/86 (3).

B. Continuation of investigation

2. After the provisional anti-dumping duty had been imposed, one exporter and a number of Community producers which had lodged complaints asked for, and obtained, a Commission hearing. The Commission gave detailed information on the reasons for its provisional conclusions. The exporter also made known its views on the conclusions in writing.

3. At their request the parties concerned were also informed of the main facts and considerations on the basis of which the Commission intended to propose the establishment of definitive duties and the definitive collection of the amounts provided as security under a provisional anti-dumping duty. The Commission granted them a period during which they were able to make known their views. Their comments were taken into consideration.

C. Dumping

4. As regards the Ishida company, none of the parties concerned sent in any new evidence or put forward any arguments convincing enough to call into question the Commission's findings concerning the dumping as set out in Regulation (EEC) No 2865/85, so that these findings are henceforth considered to be definitive.

5. In the case of Tokyo Electric Co. (hereinafter referred to as 'TEC') the method used by the Commission to determine dumping was again disputed.

   Irrespective of the points already made in this respect by the Commission in its Regulation (EEC) No 2865/85, which the Council endorses, the arguments put forward by TEC cannot be accepted for the following reasons.

D. Normal value

6. Normal value for imports of all scales from Ishida Scales Manufacturing Co. Ltd and for some imports of scales from TEC were based on the prices of domestic sales in Japan. With regard to the sales realized by TEC through its sales company, the Council confirms the conclusion of the Commission in the 15th recital of Regulation (EEC) No 2865/85 that, within the framework of TEC's organization, both the manufacturing firm and the sales company formed part of the one corporate structure, the sales company fulfilling functions substantially similar to those of a sales branch or sales department. The fact that the sales company in law constitutes an independent undertaking does not alter the fact that one is dealing here with a single economic entity. What is of relevance in this case is not the legal structure but the fact that the main function of the sales company is to sell, or promote the sale of, the corporate product and that it is controlled by the corporate parent company whether because of majority share ownership or otherwise.

(1) OJ No L 201, 30. 7. 1984, p. 1.
(2) OJ No L 275, 16. 10. 1985, p. 5.
(3) OJ No L 32, 7. 2. 1986, p. 4.

In the case of TEC, its sales company is controlled by the corporate parent company and its exclusive function is to sell the corporate products on the domestic market. The sales company is therefore to be seen as part of its corporate structure and only selling prices charged by this company to clients independent of it can be regarded as occurring in the ordinary course of trade and therefore be taken to reflect the product's true normal value.

Because TEC's sales company's sales to end-users were at higher prices than its sales to dealers only, the sales prices to dealers were taken into consideration to facilitate comparison of normal value and export prices at the same level of trade.

7. Normal value for imports of scales for which there were no sales on the domestic market of comparable models was constructed as set out in the 17th, 18th and 19th recitals of Regulation (EEC) No 2865/85. The conclusions of the Commission in this respect are confirmed by the Council.

TEC points out that on the basis of Article 2 (3) (b) (ii) of Regulation (EEC) No 2176/84 the constructed normal value is intended to determine the value of the product on export and that there is therefore no reason to include in the constructed value the general expenses of the sales subsidiary on the Japanese market.

The abovementioned provision stipulates that the constructed normal value should be determined by adding the cost of production and a reasonable profit margin. This means all costs in the ordinary course of trade in the country of origin, including selling costs, administrative and other general expenses. It follows clearly that the constructed normal value must be determined as if the sales had taken place on the domestic market. This is, moreover, the only possible method of constructing a normal value that is equivalent to the normal value in its usual form, namely the price actually paid in the ordinary course of trade on the market of the exporting country or country of origin.

8. According to TEC, the method adopted by the Community institutions is compatible with Article 2 (9) of Regulation (EEC) No 2176/84, in that the incorporation of general and selling expenses of a sales subsidiary conflicts with the requirement that comparison be made at the ex-works stage.

This argument cannot be accepted. In the first place, Article 2 (9) concerns allowances to be made after the normal value has been determined in accordance with Article 2 (3) (b) (ii). In addition, the constructed value is a reconstruction of the price which would actually be paid in the ordinary course of trade on the market of the exporting country; it must inevitably, therefore, in the same way as this price, incorporate the general and selling expenses which are normally included in this price. Just like the market price, a normal value thus constructed may be subject subsequently to adjustments pursuant to Article 2 (9).

E. Export price

9. TEC also raised the point that since in the case of associated importers, all costs of the importer are taken into account for the purpose of constructing the export price, an identical approach should be followed where sales on the domestic market are being made indirectly through an associated sales company. This argument confuses two different issues, namely the construction of the export price on the basis of a resale price of a related importer, and the comparison between normal value and export price. For the purpose of constructing the export price, Regulation (EEC) No 2176/84 prescribes the deduction of all costs incurred between importation and resale. This is designed to arrive at an export price which is not influenced by the relationship between the exporting company and its associated importers. As to the comparison between normal value and export price other rules apply which have led to price adjustments for all allowable factors, as explained under the 23rd recital of Regulation (EEC) No 2865/85.

F. Comparison

10. According to TEC, an export price based on sales to a distributor, on the one hand, and a normal value including general expenses incurred by a distributor on the domestic market, on the other, are determined at different levels of trade and adjustment must accordingly be made in accordance with Articles 2 (9) and 10 (3) of Regulation (EEC) No 2176/84.

The adjustment requested for administrative and general expenses cannot be granted: this is because, generally speaking, no adjustment is made for differences in administrative and general expenses; none of the arguments produced by TEC would justify a departure from this general rule; in particular, it has not been demonstrated that, in the present case, differences in administrative and general expenses would have a direct and functional connection with the sales under consideration.

11. TEC points out that deducting all costs incurred by the subsidiary in the Community plus a profit margin gives an export price for a distributor, whereas including all general expenses incurred by the subsidiary in Japan gives a normal value at the level of sales to dealers and end users; from this TEC deduces that comparison is not made at the same level of trade.

It should be remembered that under the terms of Article 2 (9) the export price and the normal value must normally be compared at the same level of trade, preferably at the ex-works stage, i. e., at the level of sale to the first independent buyer. In the present case, the normal value and the export price are compared at the same level, as the sales taken into consideration were sales to first independent buyers belonging to similar buyer categories. Moreover, this rule does not invalidate the special rule contained in Article 2 (8) (b) with regard to the construction of the export price applicable in the present case; besides, if all the costs and profit of an associated importer were not deducted when the export price was reconstructed, such an associated importer would be receiving more favourable treatment than an independent importer whose purchase price must normally allow for such costs plus a profit margin.

12. In order to make a fair comparison between the normal value and export prices, appropriate account was taken of the differences affecting price comparability, such as differences in the terms and conditions of sale where it could be demonstrated that there was a direct relationship between such differences and the sales in question. In this context, account was taken of additional information and evidence provided by TEC showing a direct relationship between certain costs incurred by the sales subsidiary in Japan and sales of scales or demonstrating that such costs were directly attributable to sales of other products by the parent company.

13. TEC requested adjustments in order to allow for the lower prices at which certain models, whose production was halted during the first period of investigation, were exported to the Community in the second period of investigation, pointing out that such price reductions would have been necessary also on the Japanese market. Appropriate adjustments were granted.

14. It was also accepted, on the basis of additional evidence, that certain costs incurred by the subsidiary in the United Kingdom should not be taken into account when determining export prices.

15. The additional adjustments granted involved amendment of the dumping margin as first determined in respect of TEC. The definitive dumping margin is calculated as a weighted average of 8,4 % for the first period from October 1982 to August 1983 and 20,6 %, for the second period of investigation from September 1983 to June 1984.

G. Injury

16. The Commission's conclusions with regard to injury caused by the dumped imports, which appear in Regulation (EEC) No 2865/85 were contested by TEC.

17. TEC claims that most Community producers did not take part in the investigation, either because like the Italian producers, they did not support the complaint from the outset, or because they stopped cooperating by not answering the questionnaires sent to them by the Commission in order to obtain additional information for the updated investigation period. It is alleged, therefore, that since the Commission's conclusions are based on information from only three Community producers, they are not a true reflection of the general situation in the Community industry concerned.

First of all, it should be noted that the Commission made sure that the three producers which continued to play an active part in the investigation account for a major proportion of Community production, excluding producers who have links with the exporters. By this definition, the three producers account for the bulk of Community production — over 70 % in fact. Moreover, as regards the trend of market shares for the Community as a whole, the Commission used the information supplied by the European Committee of Weighing Instrument Manufacturers, supplemented by detailed, confidential information which was provided by the producers which lodged the complaint and was checked on the spot. Lastly, as regards the Italian market, Italy's legislation on weights and measures is such that production and sales of electronic scales incorporating a strain-gauge sensor the measuring weight — the only type of scales covered by this proceeding — are practically non-existent and so have no effect on the Commission's conclusions concerning the injury cause to the Community industry.

TEC has not, moreover, provided different information which could call into question the outcome of the investigation, particularly as regards the trend of imports of electronic scales originating in Japan and the trend of their market shares, both in the Community as a whole and in certain Member States referred to in the 32nd recital of Regulation (EEC) No 2865/85.

18. TEC also claims that the Community did not correctly assess the situation of certain producers which lodged a complaint, since the appreciable increase in their production and sales would suggest that they did not suffer injury as a result of imports of scales originating in Japan.

Although the production and sales of certain Community producers have continued to rise, despite the increasing pressure from Japanese imports, the growth of Community producers' sales on the Community markets most affected by Japanese imports has been very restrained compared with that of their sales in the Member States where the Japanese products have had little success owing to those States' legislation on weights and measures; the disparities in this legislation explain, moreover, why scales sold in one Member State are generally not exported to another Member State. Of the increase in the production and sales of three main Community producers between 1981 and 1984, 62 % was accounted for by sales in the Member States which do not import any appreciable quantity from Japan, and only 12 % by sales in the Member States where Japanese imports have their largest market shares, even though consumption in the latter Member States almost doubled over the same period. Although certain Community producers made greater inroads into markets where there was no competition from Japan, they nevertheless suffered significant injury on markets where they were directly confronted with competition from Japan.

19. TEC also asserts that the prices at which imports were sold in the Community could not be the cause of injury to Community industry, since the lowest prices on the markets of certain Member States were those charged by Community producers and in any event no undercutting of the prices of Community producers had been ascertained by the Commission.

The Commission analyzed in the 34th recital of Regulation (EEC) No 2865/85 the pattern of prices of electronic balances produced in the Community compared with the prices of scales imported from Japan.

The Council agrees with this analysis. The fact that the Commission did not find systematic and substantial price undercutting by Japanese producers of scales is not sufficient to dispel the injury. Community producers had in fact to align their prices on the prices of Japanese scales, i. e., set them at a level at which they only partially covered their costs, or in some cases they had to stop competing altogether, while other producers had to allow a growing share of their market to be taken over by dumped imports.

In evaluating the injury, it is not relevant to establish whether, as alleged by TEC, in a number of transactions the prices of dumped imports were undercut by certain Community producers trying to defend their share of the market. It is obvious that in a situation where there is normal competition these imports at dumped prices are more than sufficient in terms of volume and market share, to determine the level of prices of the Community markets particularly affected. It has been clearly demonstrated that on these markets, namely the United Kingdom, Belgium, the Netherlands and Greece, the level of the prices is too low to cover Community producers' costs, much less secure a reasonable profit.

The pattern of the market shares held by imports dumped on the markets of the Member States referred to above clearly shows that whenever Community producers' market share drops the Japanese competitors move in, but this does not have any positive effect on the level of prices and hence does not improve the extent to which costs are covered. In such circumstances Community producers either have to withdraw from the market or defend their market position by setting their prices below the cost price. It is true that an undertaking can, over a limited period, to some extent stop making a profit and recouping all its costs; in longer term such a policy is bound to undermine seriously its viability. There is therefore no doubt that growing dumping margins combined with a sharp increase in the quantities imported, particularly by TEC, compel Community producers to adopt a ruinous commercial strategy and so causes them considerable injury.

20. None of the arguments presented by TEC calls into question the validity of the conclusion reached by the Commission in its preliminary findings concerning the injury suffered; this conclusion is consequently confirmed.

H. Community interest

21. In view of the particularly serious difficulties facing the Community industry, and given its economic, social and technological importance, the Council has reached the conclusion that it is in the Community's interest to take measures. In these circumstances it is necessary, in order to protect the Community's interests, to introduce a definitive anti-dumping duty on imports of electronic scales originating in Japan.

I. Undertaking

22. TEC offered a new undertaking concerning its future exports to the Community.

Following consultations, the Commission did not accept this undertaking. It informed TEC of the reasons for this Decision.

J. **Observations made by the parties concerned on the measures proposed by the Commission**

23. TEC argued that imposing an anti-dumping duty at the level of its definitive dumping margin was unjustified since it would allow Japanese competitors with a lower dumping margin to set prices lower than those TEC would have to set after introduction of the duty. In other words, the Commission would be establishing the normal value for TEC's products at a different level of trade from that taken into consideration for other exporters.

This argument cannot be accepted for the following reasons. First, contrary to what is claimed by TEC, the normal values for all the Japanese producers concerned were determined at the same level of trade (see 11th recital), the factors taken into consideration being, depending on the case, sales to independent dealers or production costs plus selling and administrative expenses and other general expenses incurred by independent dealers in marketing the product, together with a reasonable profit margin.

Secondly, although the Japanese competitors, Yamato and Teraoka, sold scales to certain companies in which they have holdings of 5 % or more, these sales did not account for more than 25 % of these two companies' sales in Japan. The normal values determined on the basis of at least 75 % of these companies' sales to independent dealers may be regarded as representative and non-discriminatroy. The investigation did not reveal any sales to associate buyers in the case of Kubota and Ishida.

24. TEC also complained that the Commission had determined the dumping margin to be taken into consideration for the definitive duty using only the results of the second investigation period from September 1983 to June 1984, ignoring the results of the first period between September 1982 and August 1983, whereas in the case of the Kubota company only the results of the first investigation had been taken into account.

TEC requested that dumping be established on the basis of both investigation periods, or alternatively, that if production of certain models had stopped before September 1983, these models should be excluded from the calculations based on the second investigation period.

This request cannot be granted. The case establishing dumping on the basis of the updated investigation period, as set out in Commission Regulation (EEC) No 2865/85 (38th recital) remains valid.

Furthermore, the dumping margins established in the case of TEC rose steadily in the course of the two investigation periods, and this was accompanied by a sharp increase in the quantities exported to the Community, which was not the case for the other Japanese producers concerned. This merely confirms the fact that the size of TEC's dumping margins, which rose from 4,8 % at the beginning of the first investigation period to 23,0 % at the end of the second period, is not the result of a discriminatory method of calculation, as TEC claims, but of a significant drop in the prices charged by this company on the Community market. On the question of models of scales no longer in production, but previously exported to the Community at very low prices, there is no reason for the Commission to exclude them from its calculations to establish dumping. These sales contributed to the injury caused to Community industry. However, due account was taken of these sales at reduced prices in the price comparison (see 13th recital).

Lastly, the argument that Kubota's price undertaking was accepted on the basis of dumping established during only part of the period considered in the case of TEC must be rejected.

In the first investigation period, Kubota exported to only one Member State and the quantities concerned were relatively small compared to those exported by the other Japanese firms. In the second investigation period, the Commission did not receive any information from either the complainants or the other parties concerned to the effect that Kubota had exported scales to the Community. Moreover, TEC's argument could not constitute grounds for re-examining the undertaking made by Kubota when no information has been made available to back up the argument.

25. One of the Community producer complainants disputed the method of calculation used for determining the proposed anti-dumping duty, the method being based on the weighted average of dumping margins for the whole Community. This complainant requested that the level of the anti-dumping duty be based on the highest known dumping margin on the markets of the Member States, so as to take account of the special nature of the electronic scales market.

This request cannot be granted. First, such a method would lead to excessive duties, as the Commission explained in Regulation (EEC) No 2865/85. Secondly, the aim of anti-dumping measures is not to eliminate

the injury caused to one individual Community producer; it is the situation of the whole Community industry affected by dumped imports which has to be taken into consideration.

K. Rate of duty

26. The results of the updated investigation period from September 1983 to June 1984 should be those which determine the rate of duty, since an average taken of the whole investigation period would not accurately reflect the real situation, notably as regards the injury caused most recently.

In view of the difference between the prices at which electronic scales originating in Japan are sold in the Community and the prices deemed necessary to cover Community producers' production costs and give an adequate profit margin, the anti-dumping duty should be set at the level of the overall dumping margin as definitively established for the updated investigation period.

In view of the price differences between the various models of scales in question, the anti-dumping duty should be set in the form of a percentage rate *ad valorem.*

There were other companies for which dumping margins were found comparable to that of Ishida Scales Manufacturing Co. Ltd, but those companies offered price undertakings which were considered acceptable by the Commission as set out in recitals 40 and 41 of Regulation (EEC) No 2865/85.

L. Collection of the provisional duty

27. Given that dumped imports of certain electronic scales originating in Japan have caused material injury to the Community industry concerned, the amounts secured by way of provisional anti-dumping duty should be definitively collected up to the amount of the definitively established dumping margins,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of electronic scales for use in the retail trade which incorporate a digital display of the weight, unit price and price to be paid (whether or not including a means of printing these data) falling within heading No ex 84.20 of the Common Customs Tariff, corresponding to NIMEXE code ex 84.20-81, originating in Japan, with the exception of those produced by Yamato Scale Co. Ltd, Teraoka Seiko Co. Ltd, and Kubota Ltd.

2. The rate of the anti-dumping duty shall be 20,6 % of the net free-at-Community-frontier price before duty.

For imports of electronic scales produced by Ishida Scales Manufacturing Co. Ltd the rate of duty shall be 1,5 % of the net free-at-Community-frontier price before duty.

3. The provisions in force concerning customs duties shall apply.

Article 2

The amounts secured by way of the anti-dumping duty under Regulation (EEC) No 2865/85 shall be definitively collected up to the amount of the definitively established dumping margins.

Article 3

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

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

Done at Luxembourg, 8 April 1986.

For the Council

The President

G. M. V. van AARDENNE