

ORDER OF THE PRESIDENT OF THE COURT
9 NOVEMBER 1977 ¹

**Nachi Fujikoshi Corporation and Others
v Council of the European Communities**

Case 121/77 R

In Case 121/77 R

1. NACHI FUJIKOSHI CORPORATION, Tokyo, represented by its President, Toshio Takamatsu,
2. NACHI (DEUTSCHLAND) GMBH, Düsseldorf, represented by its Managing Director, Masao Tomita,
3. NACHI (UK) LTD., Birmingham, represented by its Managing Director, Minoru Yoshida,

assisted by Dr Lothar Nagel, Advocate in Düsseldorf, with an address for service in Luxembourg at the offices of Mrs Danielle d'Huart, 11 A, Boulevard Prince Henri,

applicants,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Brückner, with an address for service in Luxembourg at the offices of Mr Van den Houten, European Investment Bank, Place de Metz,

defendant,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

¹ — Language of the Case: German.

ORDER

Facts

1. Article 15 (1) (a) of 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 (OJ, English Special Edition 1968 (I), p. 80) provides as follows:

Where preliminary examination of the matter shows that there is dumping and there is sufficient evidence of injury and the interests of the Community call for immediate intervention, the Commission ... shall:

- ..., fix an amount to be secured by way of provisional anti-dumping duty, collection of which shall be determined by the subsequent decision of the Council under Article 17;
- ...
- stipulate that entry of such products for Community consumption shall be conditional upon the provision of security for the aforementioned amount.

Having regard in particular to the aforesaid article, the Commission of the European Communities, by Regulation (EEC) No 261/77 of 4 February 1977 (OJ L 34, p. 60) introduced a provisional anti-dumping duty of 20 % on ball bearings, tapered roller bearings and parts of those two types of bearings, originating in Japan, and made the entry of such products for Community consumption conditional upon the provision of security for the amount of the provisional duty.

By Council Regulation (EEC) No 944/77 of 3 May 1977 (OJ L 112, p. 1), the provisional duty was extended for a

period not exceeding three months. The regulation applied 'until the entry into force of a Council act adopting definitive measures or, at the latest, until the expiry of a period of three months beginning on 5 May 1977'.

These definitive measures were adopted by Council Regulation (EEC) No 1778/77 of 26 July 1977 (OJ L 196, p. 1), which entered into force on 4 August 1977. This regulation:

- introduced a definitive anti-dumping duty of 15 % on ball bearings and tapered roller bearings originating in Japan (Article 1(1));
- suspended, under given conditions, the application of this duty (Article 1(2));
- ordered that the amounts secured by way of provisional duty under the provisions of Regulations Nos 261/77 and 944/77, in respect of products manufactured and exported by — among others — Nachi Fujikoshi Corporation (hereinafter referred to as 'Nachi'), 'shall be definitively collected to the extent that they do not exceed the rate of duty fixed in this regulation', that is, 15 % (Article 3).

Nachi's German subsidiary, Nachi (Deutschland) GmbH, paid the German customs authorities on 29 August 1977 the whole amount owed by Nachi under Article 3 of Regulation No 1778/77 in respect of its imports into Germany. The security which it had previously provided lapsed.

In September 1977 Nachi's British subsidiary, Nachi (UK) Ltd., paid the British customs authorities a small proportion of the amount which Nachi owed under the abovementioned pro-

vision in respect of its imports into the United Kingdom; it furnished a bank guarantee in respect of the remainder of the amount owed.

2. (a) In an application against the Council received at the Court Registry on 10 October 1977, Nachi and the abovementioned subsidiaries requested that Regulation No 1778/77, or in the alternative Article 3 thereof, should be declared void (Case 121/77). In their application they state in detail why the abovementioned regulation is in their view incompatible with Community law. They claim in particular that the order contained in Article 3 of the regulation that the amounts secured should be definitively collected is not justified because Nachi gave the Commission an undertaking to increase its prices and the Commission accepted the undertaking.

(b) On 12 October 1977 Nachi and its subsidiaries applied under Article 83(1) of the Rules of Procedure of the Court of Justice for the adoption of interim measures. The requests, which were amended in subsequent documents received at the Court Registry on 24 and 25 October 1977, are in their final version to the effect that the Court should:

- Order that the amounts which have already been paid, where applicable against the provision of a corresponding bank guarantee, should be repaid;
- Suspend the application of Article 3 of Regulation No 1778/77 in respect of the balance owed in so far as a guarantee has already been provided.

The applicants refer to the contents of their application in Case 121/77 in support of their claims. In addition, they state that if the order which they have requested is not issued they would incur serious damage since, as they show with the aid of figures, the monthly interest which they would have to pay in respect of a bank loan taken up in the amounts owed would be considerably higher than

the monthly cost of a bank guarantee for the same amounts.

The Council submitted its observations in two documents which were received at the Court Registry on 19 October and 4 November 1977. Its statements may be summarized as follows:

In so far as the applications relate to the amounts which have not yet been paid the Council leaves the decision to the discretion of the Court. In this connexion it refers to the Orders of the President of the Court of Justice of 14 October 1977 in Case 113/77 R and Case 113/77 R — Application to Intervene and of 20 October 1977 in Case 119/77 R. These orders suspended the application of Article 3 of Regulation No 1778/77 to the Japanese companies NTN Toyo Bearing Co Ltd. (Case 113/77 R and Case 113/77 — Application to Intervene) and Nippon Seiko K.K. (Case 119/77 R) — which are also affected by this provision — and to their European subsidiaries, as far as concerns the sums owed but not yet paid under Article 3 of Regulation No 1778/77 on condition that and for so long as these companies continue to provide security in the said amounts.

In so far as the applications are for the repayment of the amounts which have already been paid, it is impossible to grant them. If this were not so the principle laid down in Article 185 of the EEC Treaty, according to which acts of the institutions of the Community are considered to be lawful unless the Court has declared them void, would be infringed. In the established case-law of the Court applications for the adoption of interim measures which went beyond the suspension of the operation of the measures in question have been dismissed. Quite apart from this, the applicants could have lodged applications before payment and could have requested the suspension of the operation of Regulation No. 1778/77. In addition,

they have not shown that they would incur serious and irreparable damage if the amounts which have been paid were retained until judgment has been delivered in the main action. In comparison to the average monthly

turnover of the applicants any loss of interest must be regarded as unimportant. Finally, the amounts involved are not commensurate with the measures which would be necessary if an order for repayment were made.

Decision

- 1 The Council has not contested that the applicants would incur the additional charges to which they have referred in the event of the dismissal of their application. It has not been possible to establish conclusively within the context of the present proceedings whether in the event of the applicants' being successful in the main action this expenditure could be recouped. Having regard to the probable duration of the procedure in the main action charges of the amount quoted by the applicants cannot be regarded as negligible.
- 2 It is however necessary to distinguish between the proportion of the amounts owed which has not yet been paid and that which has already been paid.
- 3 With regard to the proportion which has not yet been paid by the applicant Nachi (UK) Ltd. the Council has not been able to demonstrate that the adoption of the interim measures applied for would cause appreciable detriment to the European Economic Community if the applicant were to maintain the existing bank guarantee in that amount. It is in addition necessary to take into consideration in the applicant's favour with regard to that proportion the fact that the President of the Court of Justice has already granted corresponding requests in the Orders of 14 and 20 October 1977 in Cases 113/77 R and 113/77 R — Application to Intervene and 119/77 R.
- 4 On the other hand it is necessary to state with regard to the amounts already paid by Nachi (UK) Ltd. and Nachi (Deutschland) GmbH and collected by the national customs authorities that an order for the repayment of these amounts would go beyond the suspension of the application of Article 3 of Regulation No 1778/77. This is because that provision has already been applied in respect of those amounts. In addition, the charges incurred by the public budget involved in an order for repayment are heavier than the damages which the applicants would incur in the event of the dismissal of

their applications. Finally, it is necessary to take into consideration the fact that the applicants could have lodged an application for the suspension of the application of Article 3 of Regulation No 1778/77 before payment of those amounts.

- 5 The applicants have finally substantiated the circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the interim measures sought (Article 83(2) of the Rules of Procedure of the Court of Justice) only in so far as their application concerns the amount owed but not yet paid by Nachi (UK) Ltd. The application of Article 3 of Regulation No. 1778/77 to Nachi (UK) Ltd. must therefore be suspended until the final judgment in the case of *Nachi and Others v Council* (Case 121/77) with regard to this amount, on condition that and for so long as that company continues to provide security for the performance of its obligation in the abovementioned amount. On the other hand it is necessary to dismiss the applications in so far as they seek the repayment of those amounts which Nachi (UK) Ltd. and Nachi (Deutschland) GmbH have already paid.
- 6 The decision with regard to costs should be reserved for the final judgment in Case 121/77.

On those grounds,

THE PRESIDENT,

as an interlocutory decision, hereby orders as follows:

1. The application of Article 3 of Council Regulation (EEC) No 1778/77 to the applicant Nachi (UK) Ltd. is suspended until the final judgment in the case of *Nachi and Others v Council* (Case 121/77) as far as concerns the sum owed but not yet paid by Nachi (UK) Ltd. under the abovementioned provision, on condition that and for so long as Nachi (UK) Ltd. continues to provide security for the performance of its obligation in that amount.
2. In all other respects, the applications are dismissed.

3. **The decision with regard to costs should be reserved for the final judgment in the case of Nachi and Others v Council (Case 121/77).**

Luxembourg, 9 November 1977.

A. Van Houtte
Registrar

H. Kutscher
President