JUDGMENT OF THE COURT (Second Chamber)

13 September 2007 *

In Case C-443/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, lodged on 8 December 2005,

Common Market Fertilizers SA, established in Brussels (Belgium), represented by A. Sutton, Barrister, and N. Flandin, avocat,

appellant,

the other party to the proceedings being:

Commission of the European Communities, represented by X. Lewis, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: French.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Klučka, J. Makarczyk, G. Arestis and L. Bay Larsen (Rapporteur), Judges,

Advocate General: P. Mengozzi,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 October 2006,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2007,

gives the following

Judgment

1 By its appeal, Common Market Fertilizers SA ('CMF') asks the Court to set aside the judgment of the Court of First Instance of the European Communities of 27 September 2005 in Joined Cases T-134/03 and T-135/03 *Common Market Fertilizers* v *Commission* [2005] ECR II-3923 ('the judgment under appeal') by which the Court dismissed its actions for annulment of Commission Decisions C(2002) 5217 final and C(2002) 5218 final of 20 December 2002 ('the contested decisions') declaring the remission of import duties applied for by CMF to be unjustified.

Legal context

2 The second subparagraph of Article 1(3) of Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed (OJ 1994 L 350, p. 20) applies the following specific anti-dumping duty:

'For imports put into free circulation which are not directly invoiced by one of the above exporters or producers located in Poland to the unrelated importer the following specific duty is set:

for the product originating in Poland ... certified to be produced by Zakłady Azotowe Puławy ... the specific duty [of] ECU 19 per tonne product ...'

3 Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17), ('the Customs Code') provides:

'1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:

— to be determined in accordance with the procedure of the committee;

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office ...'

4 Article 4 of the Customs Code provides:

'For the purposes of this Code, the following definitions shall apply:

...

(24) Committee procedure means either the procedure referred to in Articles 247 and 247a, or in Articles 248 and 248a.'

5 Article 247 of the Customs Code provides:

'The measures necessary for the implementation of this Regulation ... shall be adopted in accordance with the regulatory procedure referred to in Article 247a(2) ...'

6 Article 247a(2) of the Customs Code provides:

'1. The Commission shall be assisted by a Customs Code Committee (hereinafter referred to as "the Committee").

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC [Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission; (OJ 1999 L 184, p. 23; "the comitology decision")] shall apply, ...

...

3. The Committee shall adopt its rules of procedure.'

7 Article 4 of the rules of procedure of the Customs Code Committee is worded as follows:

'1. The Chairman shall send the invitation to the meeting, the agenda and proposed measures about which the committee's opinion is required and any other working documents to the Permanent Representations and committee members in accordance with Article 14(2), as a general rule, no later than 14 calendar days before the date of the meeting.

2. In urgent cases, and where the measures to be adopted must be applied immediately, the Chairman may, at the request of a committee member or on his or her own initiative, shorten the period laid down in the above paragraph to five calendar days before the date of the meeting.

3. In cases of extreme urgency, the Chairman may depart from the periods laid down in paragraphs 1 and 2 above. If the placing of another point onto the agenda is requested during the course of a meeting, the approval of a simple majority of committee members is required.'

8 Article 905(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 1677/98 of 29 July 1998 (OJ 1998 L 212, p. 18), ('the implementing regulation') states:

'Where the decision-making customs authority to which an application for repayment or remission under Article 239(2) of the Code has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909.

However, except if the decision-making customs authority is in doubt, it can decide itself to grant repayment or remission of the duties in cases in which it considers that the conditions laid down in Article 239(1) of the Code are fulfilled, provided that the amount concerned per operator in respect of one or more import or export operations, but arising from one and the same special situation, is less than ECU 50 000.

The term "the person concerned" shall be interpreted in the same way as in Article 899.

In all other cases, the decision-making customs authority shall refuse the application.'

9 Article 906 of the implementing regulation provides:

'Within 15 days of receipt of the case referred to in Article 905(2) the Commission shall forward a copy thereof to the Member States.

Consideration of the case in question shall be included as soon as possible on the agenda of a meeting of the Committee provided for in Article 247 of the Code.'

10 After the events in this case, the second paragraph of Article 906 of the implementing regulation was amended as follows by Commission Regulation (EC) No 1335/2003 of 25 July 2003 amending Regulation No 2454/93 (OJ 2003 L 187, p. 16):

'Consideration of the case in question shall be included as soon as possible on the agenda of a meeting of the group of experts provided for in Article 907.'

11 Article 906a of the implementing regulation provides:

'Where, at any time in the procedure provided for in Articles 906 and 907, the Commission intends to take a decision unfavourable towards the applicant for repayment or remission, it shall communicate its objections to him/her in writing, together with all the documents on which it bases those objections. The applicant for repayment or remission shall express his/her point of view in writing within a period of one month from the date on which the objections were sent. If he/she does not give his/her point of view within that period, he/she shall be deemed to have waived the right to express a position.'

12 The first paragraph of Article 907 of the implementing regulation provides:

'After consulting a group of experts composed of representatives of all Member States, meeting within the framework of the Committee to consider the case in question, the Commission shall decide whether or not the situation which has been considered justifies repayment or remission.'

13 Article 5 of the comitology decision, headed 'Regulatory procedure', provides:

'1. The Commission shall be assisted by a regulatory committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) [EC] in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

3. The Commission shall, without prejudice to Article 8, adopt the measures envisaged if they are in accordance with the opinion of the committee.

4. If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken and shall inform the European Parliament.

...'

Facts

14 CMF, a company established in Belgium, operates as a wholesaler dealing in chemical products, particularly nitrogenous solutions (urea and ammonium nitrate). Its group of companies includes, inter alia, Rellmann GmbH ('Rellmann'), established in Hamburg (Germany), a wholly-owned subsidiary of CMF, and Agro Baltic GmbH ('Agro Baltic'), established in Rostock (Germany), a wholly-owned subsidiary of Rellmann. In 1989, CMF acquired Champagne Fertilisants, the company which is its tax representative for its operations in France.

15 The Polish company Zakłady Azotowe Puławy ('ZAP') exports goods and sells them to Agro Baltic. Within CMF's group of companies, Agro Baltic sells the goods on to Rellmann, which in turn sells them on to CMF. Invoices for those transactions are drawn up.

16 In Case T-134/03, Agro Baltic bought three shipments of urea ammonium nitrate solution from ZAP between March and September 1997. Those shipments followed the commercial route described in the preceding paragraph.

17 Cogema, an authorised customs agent, was instructed to arrange for the release of the goods for free circulation in the name of Agro Baltic and their release for consumption ['clearance for home use'] in the name of CMF.

18 The goods were thus initially released for free circulation in the name of Agro Baltic using declaration EU0 with the ZAP invoices to Agro Baltic attached, together with the EUR.1 certificates declaring the goods to be of Polish origin. The goods were at the same time placed under a warehousing procedure, which they left a few minutes later in order to be released for consumption in the name of Champagne Fertilisants.

19 In Case T-135/03, Agro Baltic bought a shipment from ZAP in January 1995, which then followed the commercial route described in paragraph 15 of this judgment.

20 Agro Baltic instructed SCAC Rouen, an authorised customs agent, to arrange for the goods to be released for free circulation in the name of Agro Baltic and to be released for consumption in the name of CMF. That entailed, in respect of the same

goods, making two customs import declarations to the same customs office, referring to two different consignees, so as to separate the payment of customs duties from that of value added tax.

21 SCAC Rouen used a simplified customs clearing procedure for the release of the goods for free circulation and their release for consumption, in the name of CMF alone. To that end, SCAC Rouen lodged declaration IM4 in the name of CMF, attaching the Rellmann invoice and an EUR.1 certificate declaring the goods to be of Polish origin.

22 Initially, both in Case T-134/03 and in Case T-135/03, the French competent authorities accepted the declarations, granted exemption from import duties on the basis of the EUR.1 certificates, and did not demand payment of anti-dumping duties.

23 Following a post-clearance examination, however, they took the view that the specific duty of ECU 19 per tonne provided for under the second subparagraph of Article 1(3) of Regulation No 3319/94 should have been applied to all the shipments. In fact, in their view, the real importer of the goods was CMF, which had not been directly invoiced by ZAP, even though ZAP had certified the goods in question.

24 As regards the shipments at issue in Case T-134/03, the French competent authorities took the view that the interim warehousing of the goods constituted a legal fiction owing to its extremely short duration, and that CMF had acquired the goods in the three operations concerned even before the declarations releasing the goods for free circulation in the name of Agro Baltic had been lodged. Accordingly, they imposed on CMF duties and taxes in the amount of FRF 3 911 497 (EUR 564 855).

25 As regards the shipments at issue in Case T-135/03, the French competent authorities noted that a single declaration, in the name of CMF, had been made for release of the goods for free circulation and for their release for consumption. Accordingly, they imposed on CMF duties and taxes in the amount of FRF 840 271 (EUR 128 098).

26 In November and December 1999, CMF applied to the French customs authorities for remission of duties on the basis of Article 239 of the Customs Code. On 14 February 2002, the authorities transmitted those applications to the Commission.

27 By letters dated 9 and 10 September 2002, the Commission informed CMF that it intended to take a negative decision in each of the two cases.

28 In November 2002, the REM/REC group of experts met in the framework of the Customs Code Committee, Repayments Section. Its final vote produced the following result in the two cases: 'six delegations vote in favour of the Commission's proposal, four delegations abstain and five delegations vote against the Commission's proposal'.

29 On 20 December 2002, on the view that there had been obvious negligence on the part of CMF and that there was no special situation and that therefore the conditions for the application of Article 239 of the Customs Code had not been fulfilled, the Commission adopted the contested decisions. It notified those decisions to the French customs authorities, who in turn transmitted them to CMF on 10 February 2003.

Procedure before the Court of First Instance and the judgment under appeal

30 By applications lodged at the Registry of the Court of First Instance on 18 April 2003, registered as Cases T-134/03 and T-135/03, CMF sought annulment of the contested decisions.

31 In support of its actions, it relied on three pleas in law.

32 The first plea, alleging infringement of essential procedural requirements and rights of the defence, was divided into five parts:

— infringement of Article 7 EC and Article 5 of the comitology decision;

— infringement of the first paragraph of Article 906 of the implementing regulation;

— infringement of Article 4(1) of the rules of procedure of the Customs Code Committee;

— infringement of Article 3 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59);

— infringement of the rights of the defence.

33 The second plea, alleging manifest error of assessment in the application of Article 239 of the Customs Code, was set out in three parts, concerning respectively:

— the Commission's refusal to acknowledge the existence of a special situation;

— CMF's lack of deception;

— the Commission's refusal to find that there was no obvious negligence on the part of CMF.

34 The third plea alleged an infringement of the duty to state reasons as required under Article 253 EC.

35 The two cases, T-134/03 and T-135/03, were joined for the purposes of the oral procedure and the judgment.

36 By the judgment under appeal, the Court of First Instance dismissed the applications and ordered CMF to pay the costs.

Forms of order sought by the parties

37 CMF claims that the Court should:

— set aside the judgment under appeal;

— grant the forms of order sought at first instance;

— order the Commission to pay the costs both of the appeal and of the proceedings at first instance.

38 The Commission contends that the Court should:

— dismiss the appeal;

— order CMF to pay the costs.

Appeal

39 CMF submits four grounds of appeal:

— incomplete presentation of the legal context;

— distortion of the facts;

— misinterpretation of the notion of infringement of essential procedural requirements;

— misapplication of Article 239 of the Customs Code.

Allegedly incomplete presentation of the legal context

Arguments of the parties

— Appellant's arguments

40 Sub-dividing the ground of appeal into two parts, CMF alleges that the Court of First Instance did not refer in its presentation of the legal context of the case to:

— the 39th recital in the preamble to Regulation No 3319/94, according to which, '... given the existence of a number of import channels via third country companies, it is considered appropriate to impose a variable duty at the level which would permit the Community industry to raise its prices to profitable levels for imports invoiced directly by Bulgarian or Polish producers or by parties which have exported the product concerned during the investigation period and a specific duty on the same basis for all other imports in order to avoid the circumvention of the anti-dumping measures';

— Article 2 of the comitology decision, which provides:

'The choice of procedural methods for the adoption of implementing measures shall be guided by the following criteria:

(a) management measures, such as those relating to the application of the common agricultural and common fisheries policies, or to the implementation of programmes with substantial budgetary implications, should be adopted by use of the management procedure;

(b) measures of general scope designed to apply essential provisions of basic instruments, including measures concerning the protection of the health or safety of humans, animals or plants, should be adopted by use of the regulatory procedure; where a basic instrument stipulates that certain non-essential provisions of the instrument may be adapted or updated by way of implementing procedures, such measures should be adopted by use of the regulatory procedure;

(c) without prejudice to points (a) and (b), the advisory procedure shall be used in any case in which it is considered to be the most appropriate.'

41 By making no mention of recital 39 of Regulation No 3319/94, the Court of First Instance did not, as it should have done, link its interpretation of the second subparagraph of Article 1(3) of the Regulation to that recital. Had it done so, it

would have reached the conclusion that a specific duty cannot be imposed where, as in the present case, anti-dumping law has not in fact been circumvented.

42 By failing to refer to Article 2 of the comitology decision, which provides non-binding criteria for the choice of procedure to be followed, the Court of First Instance incorrectly stated in paragraph 55 of the judgment under appeal that the regulatory procedure may be used only for measures of general scope.

— Arguments of the Commission

43 The Commission takes the view that reference to recital 39 of Regulation No 3319/94 is irrelevant for the purposes of the interpretation of the second subparagraph of Article 1(3) of that regulation, which provides for a specific duty in the presence of two objective conditions, namely, indirect invoicing and the import of a ZAP product.

44 As to Article 2 of the comitology decision, the Commission disputes CMF's claim that the Court of First Instance stated that the regulatory procedure may be used only for measures of general scope.

Findings of the Court

45 Neither of the two parts of this ground of appeal nor, in consequence, the ground of appeal itself, is capable of standing alone.

46 Indeed, by those two parts of the ground of appeal, which ostensibly amount to a complaint about the purely formal lack of reference, in the presentation of the legal context of the judgment under appeal, to a recital in the preamble to a regulation and to an article of a decision, CMF is in fact claiming that the Court of First Instance failed to take those provisions into consideration at the stage of interpreting the law at issue, that is, at the stage of the legal analysis.

47 However, as the Advocate General observes in point 41 of his Opinion, the arguments relating to the two parts of this ground of appeal are presented in closer detail in the context of the fourth and third grounds of appeal respectively, in which it is specifically the legal analysis of the Court of First Instance that is challenged.

48 The two parts are thus indissociable from the fourth and third grounds of appeal.

49 Consequently, there is no need to consider them separately.

Alleged distortion of the facts

Arguments of the parties

— Appellant's arguments

50 CMF claims that, in paragraphs 14 to 28 of the judgment under appeal, in which the facts of the case are presented, the Court of First Instance adopted the wholly false inferences drawn by the national competent authorities as to the existence of indirect invoicing.

51 According to CMF, that presentation is incomplete and incorrect, and involves a distortion of the facts. That led the Court of First Instance to take the view, wrongly, that the circumstances amounted in effect to indirect invoicing, and to misapply the second subparagraph of Article 1(3) of Regulation No 3319/94.

— Arguments of the Commission

52 The Commission maintains that the ground of appeal is irrelevant and thus nugatory.

53 Indeed, the dispute between CMF and the Commission did not, and could not, concern the issue as to whether the duties were actually payable. It related only to the question whether the conditions for remission of the debt were fulfilled.

Findings of the Court

54 Contrary to CMF's claim, the Court of First Instance did not rule on the existence of indirect invoicing in the present case; nor, in consequence, did it rule on the existence of the customs debt.

55 The contested decisions involved the rejection of applications based on Article 239 of the Customs Code for remission of customs debts which — necessarily — existed.

56 A plea alleging a manifest error of assessment in the application of Article 239 of the Customs Code was raised before the Court of First Instance and considered in paragraphs 135 to 150 of the judgment under appeal.

57 In its assessment, the Court of First Instance analysed one of the cumulative conditions required under that article, namely, the absence of obvious negligence on the part of the person concerned.

58 Having concluded that that condition was not fulfilled, it rejected the plea.

59 That ground of appeal must therefore be rejected as being nugatory.

Alleged misinterpretation of the notion of infringement of essential procedural requirements

Arguments of the parties

— Appellant's arguments

60 CMF alleges that the Court of First Instance misinterpreted the first paragraph of Article 907 of the implementing regulation in deciding that that article allowed the Commission to determine matters concerning the remission and repayment of customs duties on its own.

61 It takes the view that if such an interpretation were sound, the provision in question would be unlawful.

62 CMF submits that the first paragraph of Article 907 is part of an implementing regulation, the basic regulation which it implements being the Customs Code.

63 CMF notes that Article 247 of the Customs Code provides that the measures necessary for the implementation of the Code are to be adopted in accordance with the regulatory procedure referred to in Article 247a(2) thereof.

64 Accordingly, the only measures that could be laid down in the implementing regulation are implementing measures.

65 However, the Commission's conferral upon itself of power to determine matters concerning the remission and repayment of customs duties on its own and to create a group of experts out of nothing is not in the nature of a measure implementing the basic regulation.

66 The first paragraph of Article 907 of the implementing regulation cannot therefore provide the legal basis for such a conferral of power. Accordingly, the Court of First Instance could not conclude on the basis of that provision that the Commission had acted within its powers.

67 Nor is the power in question expressly provided for under the EC Treaty.

68 Article 7 EC, under which each institution is to act within the limits of the powers conferred on it by the Treaty, has thus been infringed.

69 CMF claims that it raised a plea of illegality in respect of the first paragraph of Article 907 of the implementing regulation before the Court of First Instance.

70 It criticises the Court of First Instance for holding, in paragraph 51 of the judgment under appeal, that that plea of illegality was inadmissible because it had been raised at the stage of the reply without being based on any matter of law or of fact which had come to light in the course of the procedure within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance.

71 CMF acknowledges that the debate concerning the possible illegality of the first paragraph of Article 907 of the implementing regulation was brought about by the interpretation given to that provision by the Commission in its defence, according to which the group of experts referred to in that provision is not a committee governed by the comitology decision.

72 However, it maintains that the Commission's interpretation is a matter of law which came to light in the course of the procedure.

73 CMF criticises the Court of First Instance for going on to find, in paragraph 52 of the judgment under appeal — on the (mistaken, according to CMF) ground that that plea was not a matter of public policy — that the Court was not obliged to raise of its own motion the question of the possible illegality of the first paragraph of Article 907 of the implementing regulation.

74 CMF maintains moreover that, for the purposes of determining the legal nature of the committee consulted by the Commission, the Court of First Instance misinterpreted (in paragraph 55 of the judgment under appeal) the criteria set out in Article 2 of the comitology decision for choosing between the management procedure and the regulatory procedure (see paragraph 40 of this judgment), by holding that the regulatory procedure is used for measures of general scope designed to implement essential provisions of basic instruments.

75 According to CMF, 'measures of general scope' is not the sole criterion for use of the regulatory procedure.

76 Furthermore, the criteria set out in Article 2 of the comitology decision are not binding. Accordingly, the Council was entitled to provide that the regulatory procedure had to be followed in the case of measures concerning the remission or repayment of customs duties.

77 Furthermore, the interpretation of the Court of First Instance in paragraph 56 of the judgment under appeal, according to which the contested decisions are individual decisions and not of general scope, is itself incorrect. In fact, those decisions, too, are of general scope since, in concerning a customs debt, they directly affect the European Community's own resources.

78 CMF asserts that the intention of the Community legislature in Article 239(1) of the Customs Code was to impose the regulatory committee procedure for the adoption of decisions concerning the remission or repayment of customs duties.

79 It notes that Article 239(1) makes two references to the 'committee procedure', once where it refers to 'situations ... to be determined in accordance with the procedure of the committee', then, a second time, when it states that '[t]he situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure'.

80 The first reference concerns the taking of the substantive decision as to repayment or remission. The second relates to the provisions implementing Article 239(1) of the Customs Code, which must be adopted and defined in the implementing regulation. Any other explanation for that dual reference would lead to the conclusion that the Community legislature repeated itself for no reason.

81 CMF complains that, in the judgment under appeal, the Court of First Instance ignored the fact that, as CMF had pointed out, the group of experts consulted had in fact operated for years outside any budget line. In its view, the contested decisions were thus taken in direct breach of Community budgetary law. That breach should be added to the lack of any legal basis for the contested decisions and reinforces the total illegality of the context in which those decisions were taken.

82 CMF complains also that, in paragraph 59 of the judgment under appeal, the Court of First Instance stated that the group of experts referred to in the first paragraph of Article 907 of the implementing regulation is an entity quite distinct in functional terms from the Customs Code Committee, without specifying the precise nature of that entity. By thus dismissing the question as to the legal basis for the creation of the group of experts, the Court of First Instance made an error of law.

83 Finally, CMF complains that, in paragraphs 78 and 79 of the judgment under appeal, the Court of First Instance held that natural or legal persons may not rely on an alleged breach of Article 4 of the rules of procedure of the Customs Code Committee.

84 In CMF's view, the Court of First Instance should have taken account of the line of authority established by the judgments in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, and in Case C-263/95 *Germany* v *Commission* [1998] ECR I-441, paragraphs 31 and 32, which CMF had cited.

85 CMF takes the view that compliance with the time-limit of 14 days laid down in Article 4 of the rules of procedure of the Customs Code Committee was particularly important. Since the Court of First Instance noted in paragraph 77 of the judgment under appeal that the members of the group of experts had 13 calendar days to familiarise themselves with CMF's response, it should have held that there had been an infringement of essential procedural requirements.

— Arguments of the Commission

86 The Commission contends that the first paragraph of Article 907 of the implementing regulation must be interpreted as meaning that the group of experts referred to in that provision is not a regulatory committee for the purposes of Article 5 of the comitology decision. Its legal status does not derive from powers delegated by the Council, but from a provision — Article 907 of the implementing regulation — adopted by the Commission.

87 The Commission was thus empowered to take the contested decisions on the basis of Article 907 of the implementing regulation.

88 Accordingly, the Court of First Instance did not err in law in concluding that the Commission was empowered under the first paragraph of Article 907 of the implementing regulation to adopt the contested decisions.

89 The plea alleging the illegality of that provision, which was raised before the Court of First Instance, is distinct from the plea initially relied upon in the application. The Court of First Instance correctly held that it was inadmissible because it was put forward at the stage of the reply, and that, since the illegality alleged is not a matter of public policy, the question did not have to be raised of the Court's own motion.

90 As to the merits, the Commission notes that the contested decisions are individual decisions, notwithstanding their budgetary consequences.

91 In its view, it is Article 907 of the implementing regulation itself which, pursuant to Article 239 of the Customs Code, had to be and was adopted in accordance with the opinion of the Customs Code Committee, not the individual decisions subsequently taken on the basis of Article 907. Consequently, the Court of First Instance did not infringe Article 239 of the Customs Code.

92 As regards the fact that the group of experts operated for a number of years without its own budgetary line, the Commission explains that it provided that information itself in response to the written questions of the Court of First Instance for the hearing.

93 At that hearing, CMF then raised the question of the budgetary line purely for the sake of completeness to reinforce its principal plea that the group of experts was in reality the regulatory committee.

94 The Commission contends that, although CMF now takes the view that the alleged lack of a budgetary line is a separate plea, that plea should be regarded as inadmissible because it was not raised in the applications initiating proceedings at first instance.

95 Furthermore, as it is irrelevant, that plea is nugatory. The contested decisions do not concern expenditure incurred by the Commission after it had consulted the group of experts. As regards the argument that the Court of First Instance failed to clarify the precise nature of the group of experts after asserting that it was a distinct entity, the Commission observes that there was no need for such clarification since the Court of First Instance was required to rule only on the issue as to whether or not the group of experts was a regulatory committee.

96 As to the alleged infringement of Article 4 of the rules of procedure of the Customs Code Committee, the Commission takes the view that *Commission* v *BASF and Others*, is irrelevant, as the Court found in that case that the precise and specific objective of the procedural requirement of authentication, at issue in that case, was to ensure legal certainty for the addressee of the measure.

97 However, in the judgment under appeal, the Court of First Instance examined the nature of the procedural requirement imposed by Article 4 of the rules of procedure of the Customs Code Committee, and went on to conclude that that requirement was intended to ensure the internal working of the committee, not to protect the interests of the addressee of the measure to be adopted.

Findings of the Court

98 The ground of appeal under consideration may be divided into five parts:

— misinterpretation of the first paragraph of Article 907 of the implementing regulation, in so far as the Court of First Instance conceded that, under that provision, the Commission itself may adopt the contested decisions without first obtaining the opinion of the Customs Code Committee delivered by the majority laid down in Article 5(2) of the comitology decision, which refers back to the majority laid down in Article 205(2) EC;

— infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance, in so far as the Court of First Instance held that CMF's plea of illegality in respect of the first paragraph of Article 907 of the implementing regulation was inadmissible;

— failure to take account of the fact that the illegality alleged by CMF as an objection was a matter of public policy, in so far as the Court of First Instance did not address of its own motion the possible illegality of the first paragraph of Article 907 of the implementing regulation;

— infringement of Community budgetary law, in so far as the contested decisions were adopted after consultation of a group of experts which operated outside any budgetary line;

— infringement of Article 4 of the rules of procedure of the Customs Code Committee, in so far as the Court of First Instance held that a failure to take account of that provision cannot be invoked by individuals.

These must now be examined in the same order.

— First part: misinterpretation of the first paragraph of Article 907 of the implementing regulation

99 The first paragraph of Article 907 of the implementing regulation provides for the Commission to consult 'a group of experts composed of representatives of all Member States, meeting within the framework of the Committee'.

100 In the light of that wording, the Court of First Instance correctly held in paragraph 59 of the judgment under appeal that '[t]he phrase "within the framework of the Committee" reflects the fact that the group of experts referred to in Article 907 is clearly a distinct entity in functional terms from the Customs Code Committee'.

101 That interpretation is not inconsistent with the second paragraph of Article 906 of the implementing regulation, under which '[c]onsideration of the case in question shall be included as soon as possible on the agenda of a meeting of the Committee provided for in Article 247 of the Code'.

102 In fact, the second paragraph of Article 906 must be interpreted as meaning that matters are not placed before the Customs Code Committee as such — for the purposes of obtaining an opinion from that Committee itself — but as a body in the framework of which the group of experts, which is distinct from that body, will be led to express its opinion.

103 CMF is therefore wrong to criticise the Court of First Instance for failing to hold that the contested decisions should have been adopted in accordance with the opinion of the Customs Code Committee.

104 It cannot reasonably claim that the Court of First Instance failed to clarify the precise nature of the group of experts. As it is, the Court of First Instance was required to rule only on the issue as to whether or not the group of experts was a regulatory committee.

105 Accordingly, the first part of this ground of appeal must be rejected.

— Second part: infringement of Article 48(2) of the Rules of Procedure of the Court of First Instance

106 Under the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance, '[n]o new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'.

107 It is common ground that, before the Court of First Instance, CMF invoked the illegality of the first paragraph of Article 907 of the implementing regulation following the Commission's reply.

108 Contrary to CMF's submission, the mere interpretation of that provision given by the Commission in its reply does not constitute a matter of law which came to light in the course of the procedure, for the purposes of the first subparagraph of Article 48(2) of the Rules of Procedure of the Court of First Instance.

109 The Court of First Instance therefore rightly held in paragraphs 51 and 53 of the judgment under appeal that the plea of illegality was inadmissible.

110 Therefore, the second part of this ground of appeal must be rejected.

— Third part: failure to take account of the public policy nature of the illegality invoked by CMF as an objection, in so far as the Court of First Instance did not address of its own motion the possible illegality of the first paragraph of Article 907 of the implementing regulation

111 In paragraph 52 of the judgment under appeal, the Court of First Instance did indeed hold that the possible illegality of the first paragraph of Article 907 of the implementing regulation is not a matter of public policy, going on to add that it does not follow from the case-law that it must of its own motion consider whether the Commission exceeded its powers by adopting the content of that article, which is the legal basis for the contested decisions.

112 However, in the same paragraph of the judgment under appeal, it noted that:

'... there is no doubt in the present case that the Commission acted within its powers when it adopted the contested decisions. They were taken on the basis of the first paragraph of Article 907 of the implementing regulation, which was in turn adopted in accordance with the opinion of the Customs Code Committee ...'

113 However, in so ruling, the Court of First Instance correctly held that the first paragraph of Article 907 of the implementing regulation was not vitiated by the illegality alleged, by implicitly but necessarily holding that only the adoption of that provision, and not the subsequent adoption of individual decisions by the Commission, was subject to the regulatory committee procedure.

114 In that regard, it should be noted that the third indent of Article 202 EC empowers the Council to confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down, making the exercise of those powers subject, where appropriate, to certain procedural requirements, or reserving the right, in specific cases, to exercise implementing powers directly itself.

115 The concept of 'implementation' for the purposes of that article comprises both the drawing-up of implementing rules and the application of rules to specific cases by means of acts of individual application (Case C-122/04 *Commission* v *Parliament and Council* [2006] ECR I-2001, paragraph 37 and the case-law cited).

116 On the basis of the third indent of Article 202 EC, the Council adopted the comitology decision, which lays down the procedures for the exercise of the implementing powers conferred on the Commission.

117 Article 2 of that decision (see paragraph 40 of this judgment) sets out the criteria on the basis of which the choice is to be made between three types of procedure, namely, the management procedure, the regulatory procedure and the advisory procedure.

118 The three procedures are defined in Articles 3 to 5 of the comitology decision.

119 It is clear from the wording of Article 2 of the comitology decision that the criteria relating to the choice of committee procedure are not binding, which is expressly confirmed in the fifth recital in the preamble to that decision.

120 Thus, without prejudice to the possibility of recourse to the advisory procedure, measures of general scope may come under point (a) or point (b) of Article 2 of the comitology decision (see *Commission* v *Parliament and Council*, paragraph 38).

121 They may be covered by the management procedure where they are closely linked to measures of individual application and part of a framework sufficiently developed by the basic instrument itself (see *Commission* v *Parliament and Council*, paragraph 41).

122 By contrast, again without prejudice to the possibility of recourse to the advisory procedure, measures of individual application may be covered only by point (a) of Article 2 of the comitology decision (*Commission* v *Parliament and Council*, paragraph 38).

123 In the present case, it must be noted that Article 239 of the Customs Code is contained in an act of the Council.

124 Under that provision, the Council conferred on the Commission, in accordance with the third indent of Article 202 EC, implementing powers for the purposes of determining, first, the situations in which customs duties may be repaid or remitted, and, second, the procedures to be followed to that end.

125 In the light of Articles 4(24), 247 and 247a of the Customs Code, the reference to the committee procedure in Article 239 of the Customs Code implies the use of the regulatory procedure, which applies to measures of general scope.

126 Contrary to CMF's assertion, a decision of the Commission in relation to the repayment or remission of customs duties does not have general scope, despite the fact that it affects the Community's own resources.

127 It constitutes an individual decision, just like a decision of the Commission imposing fines in competition matters, which also affects those resources.

128 Accordingly, the Council could have made its adoption subject only to the management procedure, an option which it did not use in Articles 239, 247 or 247a of the Customs Code.

129 CMF is therefore wrong to maintain, first, that the Council could require the adoption of decisions concerning individual operators to be subject to the regulatory procedure and, second, that the Court of First Instance misinterpreted the criteria set out in Article 2 of the comitology decision for the choice between the management procedure and the regulatory procedure.

130 In the context of an interpretation of Article 239(1) of the Customs Code that is as literal as it is consistent, it must be held that 'situations' refers, in both instances in which it is used, to situations defined in the abstract rather than to the situations of individual operators specifically assessed in the context of individual decisions.

131 That conclusion is supported by the balanced juxtaposition in the second sentence of that article of 'situations in which this provision may be applied' and the 'procedures to be followed', which themselves relate to measures of general scope.

132 In adopting the first paragraph of Article 907 of the implementing regulation — a measure of general scope — the Commission exercised the implementing power delegated by Article 239 of the Customs Code in relation to the procedures to be followed.

133 It is common ground that, to that end, it duly obtained the opinion of the Customs Code Committee.

134 Since it was not obliged under Article 239 of the Customs Code to use any particular procedure for the actual consideration of the applications for repayment or remission of customs duties, the Commission could legitimately:

— confer upon itself a power to take decisions following an advisory opinion of a group of experts that is distinct in functional terms from the Customs Code Committee, just as it could have granted itself the same power to be exercised without the assistance of such a group, and, moreover, just as it was able to provide in the second subparagraph of Article 905(1) of the implementing regulation that the customs authority may itself decide to repay or remit duties where the amount applied for is below a certain threshold;

— not make the opinion of the group of experts dependent upon a qualified majority.

135 The first paragraph of Article 907 of the implementing regulation does not, therefore, fail to take account of Article 239 of the Customs Code, which was itself adopted in accordance with the third indent of Article 202 EC.

136 Nor, therefore, does it infringe Article 7 EC.

137 It follows from the foregoing that CMF's complaint concerning one of the grounds of the judgment under appeal — that the possible illegality of the first paragraph of Article 907 of the implementing regulation is not a matter of public policy — is directed against a ground which was included in the judgment purely for the sake of completeness and which, being in consequence nugatory, cannot lead to the judgment being set aside (see, in particular, Case C-164/01 P *Van den Berg* v *Council and Commission* [2004] ECR I-10225, paragraph 60, and also Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 148).

138 In fact, the question whether a possible illegality is a matter of public policy is irrelevant where the Court of First Instance correctly holds that the measure at issue is untainted by illegality and consequently does not raise the issue of illegality of its own motion.

139 The third part of the ground of appeal must therefore be rejected.

— Fourth part: infringement of Community budgetary law

140 It is not necessary to consider whether CMF actually relied upon an infringement of Community budgetary law in support of its claim before the Court of First Instance for annulment of the contested decisions; it is sufficient to point out that the present case does not involve any expenditure by the Commission in respect of the operation of the group of experts.

141 In those circumstances, the question whether or not a budgetary line exists has no bearing on the legality of the contested decisions, which relate to applications for the remission of customs duties.

142 It follows that the fourth part of this ground of appeal, which is nugatory in any event, must be rejected.

— Fifth part: infringement of Article 4 of the rules of procedure of the Customs Code Committee

143 Article 4 of the rules of procedure of the Customs Code Committee provides, inter alia, that proposed measures about which the committee's opinion is required and any other working documents are to be sent to committee members, as a general rule, 14 calendar days before the date of the meeting. That period may be reduced to five calendar days in urgent cases or reduced even further in cases of extreme urgency.

144 The Court of First Instance correctly held in paragraph 79 of the judgment under appeal that the purpose of the rule set out in that provision is to ensure the internal working of the Customs Code Committee while fully respecting the prerogatives of its members.

145 It went on to note that natural or legal persons may not rely on an alleged breach of that rule, since it is not intended to ensure protection for individuals (see, to that effect, Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 49 and 50).

146 Above all, having found that the group of experts was not a regulatory committee and that, furthermore, CMF was a third party, the Court of First Instance quite rightly ruled out the application of the case-law resulting from the judgment in *Germany* v *Commission*, which was delivered on the application of a Member State in relation to a standing committee on construction comprising representatives appointed by each Member State, and which annulled the contested decision because of a failure to observe the time-limit set under the committee's rules of procedure for documents to be sent to its members.

147 Nor did the Court of First Instance err in law in failing to apply by analogy the case-law resulting from the judgment in *Commission* v *BASF and Others*, which related to the first paragraph of Article 12 of the Commission's rules of procedure then in force, under which the authentic language version or versions of acts adopted by the Commission at a meeting or by the written procedure were required to be authenticated by the signatures of the President and the Executive Secretary.

148 Indeed, in paragraphs 75 to 78 of that judgment, the Court of Justice upheld a plea put forward by a legal person alleging infringement of the first paragraph of Article 12 of the rules of procedure on the grounds (which cannot be applied to the present case) that the authentication of acts provided for in that provision was intended to guarantee legal certainty by ensuring that the text adopted by the College of Commissioners became fixed in the authentic language versions, and that therefore that authentication was an essential procedural requirement.

149 In those circumstances, the fifth part of this ground of appeal must be rejected.

150 It follows from the foregoing that the ground of appeal itself must be rejected in its entirety.

Alleged misapplication of Article 239 of the Customs Code

Arguments of the parties

— Appellant's arguments

151 In CMF's view, the Court of First Instance misinterpreted Article 239 of the Customs Code in holding that the condition relating to the absence of obvious negligence was not fulfilled.

152 CMF's ground of appeal may be divided into three parts.

153 By the first part of that ground of appeal, CMF criticises the Court of First Instance for having wrongly taken the view — by reference to its judgment in Case T-104/02 *Gondrand Frères* v *Commission* [2004] ECR II-3211, paragraph 66 — that the second subparagraph of Article 1(3) of Regulation No 3319/94 presents no particular interpretative difficulty, having been laid down with the aim of preventing the risk of circumvention of anti-dumping measures through recourse to triangular import arrangements and implying a presumption as to the risk of circumvention where imports are not directly invoiced by the producer or the exporter to the unrelated importer.

154 However, the second subparagraph of Article 1(3) of Regulation No 3319/94 does not impose a specific duty where there is a risk of circumvention. If the Court of First Instance had interpreted that provision in conjunction with recital 39 of that regulation (see paragraph 40 of this judgment), it would have reached the conclusion that a specific duty is payable only where circumvention has been established.

155 The interpretation of the Court of First Instance shows that the provision in question was a complex provision to interpret.

156 By the second part of this ground of appeal, CMF complains that the Court of First Instance took the view that CMF could not avoid liability on the ground that mistakes were made by its customs agents, and that it had sufficient professional experience in the relevant sector.

157 CMF submits that the professional liability of customs agents has been recognised in Community law (Joined Cases 98/83 and 230/83 *Van Gend & Loos and Expeditiebedrijf Wim Bosman* v *Commission* [1984] ECR 3763, paragraph 16).

158 It further maintains, as regards its professional experience, that it operates as a wholesaler dealing in chemical products and in agricultural supplies, particularly nitrogenous solutions, and that, as a result, it frequently buys the products covered by Regulation No 3319/94, very often originating in Poland and Lithuania.

159 However, that does not mean that it is a specialist in the procedures for clearing those products through customs in France. It specifically engaged French customs experts to deal with the complex customs clearing formalities.

160 CMF could therefore be described as an economic operator experienced in the import and export of nitrogenous solutions, but not as an operator experienced in customs clearing procedures.

161 The mistakes made by the customs agents do not therefore render it liable.

162 By the third part of this ground of appeal, CMF claims that the Court of First Instance wrongly took the view, on the basis of a misinterpretation of the facts, that CMF did not exercise sufficient care in its conduct.

163 In paragraphs 143 and 144 of the judgment under appeal, it wrongly took the view that CMF had failed to seek advice from its customs agents and that it had made mistakes in drawing up its invoices.

164 CMF emphasises that, by letter of 7 March 2000, it asked the French customs authorities for clarification in respect of Regulation No 3319/94.

165 Moreover, the invoicing errors referred to in general terms by the Court of First Instance in fact concerned only Case T-134/03 and, furthermore, only one of the three shipments involved in that case.

166 Of the two mistakes made — and quickly rectified — one involved invoicing in French francs instead of dollars, the other, failing to enter the agents' fees in respect of the shipment.

167 Such mistakes are among the normal commercial hazards of that type of operation. They cannot be characterised as indicating a lack of care on the part of CMF.

— Arguments of the Commission

168 The Commission takes the view that the Court of First Instance did not make an error of assessment in ruling that the second subparagraph of Article 1(3) of Regulation No 3319/94 presented no particular interpretative difficulty. There is no subjective element in that provision that would involve consideration of the intention of the operator concerned. The fulfilment of the two objective conditions laid down in that provision is all that is required for the provision to apply.

169 As regards the mistakes which CMF attributes to its customs agents, the Commission contends that any liability on their part does not preclude the liability of CMF, which must assume such liability where appropriate.

170 As regards an operator's professional experience, the Commission maintains that it should be assessed by reference to his experience of commercial import and export transactions rather than to his experience of customs clearing procedures (Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 57).

171 As for the issue of the care taken by CMF, the Commission notes, first of all, that CMF sought clarification from the national authorities after the events in the present case had taken place.

172 The Commission goes on to contend that the challenge of the assessment by the Court of First Instance of the invoicing errors is inadmissible, since it calls into

question an assessment of the facts, which — save where the clear sense of the evidence has been distorted — does not constitute a matter of law which, as such, is amenable to review by the Court on appeal.

173 In any event, the challenge concerns only some of the facts examined by the Court of First Instance. The fact remains that CMF gave its customs agents precise but impracticable instructions and belatedly sought clarification from the national authorities.

Findings of the Court

174 The Court of First Instance correctly noted in paragraph 135 of the judgment under appeal that, in order to assess whether there is obvious negligence within the meaning of Article 239 of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader (*Söhl & Söhlke*, paragraph 56, and Case C-156/00 *Netherlands* v *Commission* [2003] ECR I-2527, paragraph 92).

175 It also rightly noted in paragraph 136 of the judgment under appeal that the repayment or remission of import or export duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export rules and, consequently, the provisions which provide for such repayment or remission are to be interpreted strictly (*Söhl & Söhlke*, paragraph 52).

— First part: complexity of the second subparagraph of Article 1(3) of Regulation No 3319/94

176 In paragraph 137 of the judgment under appeal, referring to its earlier judgment in *Gondrand Frères* v *Commission* (paragraph 66), the Court of First Instance held that the second subparagraph of Article 1(3) of Regulation No 3319/94 presented no particular interpretative difficulty.

177 In doing so, the Court of First Instance carried out a legal classification of the facts in order to determine whether the customs rules in question could be regarded as 'complex' for the purposes of applying Article 239 of the Customs Code (see, by analogy, Case C-499/03 P *Biegi Nahrungsmittel and Commonfood* v *Commission* [2005] ECR I-1751, paragraphs 42 and 43).

178 In that regard, it should be noted that the second subparagraph of Article 1(3) of Regulation No 3319/94 refers to indirect invoicing and the import of a ZAP product as the only conditions for the imposition of a specific duty.

179 Furthermore, evidence of an intention on the part of the operator to circumvent the anti-dumping duty is not required under that provision.

180 Recital 39 of Regulation No 3319/94 does not conflict with that last statement. It states that the aim is 'to avoid' the circumvention of the anti-dumping measures. That intention clearly amounts to a general objective of preventing situations of established circumvention rather than of taxing them.

181 In ruling that the second subparagraph of Article 1(3) of Regulation No 3319/94 presented no particular interpretative difficulty, inasmuch as it should be understood as being intended to 'prevent the risk of circumvention', the Court of First Instance did not therefore err in its legal classification of those matters capable of constituting one of the conditions for the application of Article 239 of the Customs Code.

182 It follows that the first part of this ground of appeal must be rejected.

— Second part: (1) ruling out the possibility that CMF could avoid liability on account of mistakes made by the customs agents, and (2) taking into account the sufficiency of CMF's professional experience in the relevant sector

183 In paragraph 139 of the judgment under appeal, the Court of First Instance held that CMF cannot avoid its own liability by relying on the mistake, genuine or otherwise, of its agents.

184 In that regard, it should be noted that, according to Article 5(2) of the Customs Code, representation of an operator for the performance of the acts and formalities laid down in the customs rules may be either direct, where the representative acts in the operator's name and on his behalf, or indirect, where the representative acts in his own name but on behalf of another person.

185 It should further be noted that:

— under Article 4(18) of the Customs Code, the declarant is the person making the customs declaration in his own name or the person in whose name a customs declaration is made;

— under Article 201(3) of the Customs Code, in the case of a customs debt the debtor is the declarant and, in the event of indirect representation, also the person on whose behalf the customs declaration is made.

186 It follows from those provisions that an operator who uses a customs agent, whether for direct or indirect representation, is in any event the debtor in respect of the customs debt as far as the customs authorities are concerned.

187 Therefore, the Court of First Instance did not err in law in ruling out any possibility that CMF could avoid liability on account of mistakes that may have been made by its customs agents, whose liability, if any, with regard to CMF relates only to their contractual relationship with CMF.

188 As regards the condition linked to the operator's professional experience, the Court of First Instance rightly noted in paragraph 140 of the judgment under appeal that it is necessary to examine whether or not the operator is a trader whose business activities consist mainly in import and export transactions and whether he had already gained some experience in the conduct of such transactions (*Söhl & Söhlke*, paragraph 57).

189 Having gone on to find, in paragraph 141 of that judgment, that CMF itself admitted that it had a certain amount of experience in importing the nitrogenous products covered by Regulation No 3319/94, which is confirmed, moreover, in its appeal (see paragraph 160 of this judgment), the Court of First Instance correctly concluded that the Commission was entitled to take the view that CMF had the requisite professional experience.

190 It follows that the second part of this ground of appeal must be rejected.

— Third part: error in the consideration of the condition linked to the care taken by the operator

191 In paragraph 142 of the judgment under appeal, the Court of First Instance noted, principally, that where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions (*Söhl & Söhlke*, paragraph 58).

192 It went on to note in paragraph 143 of that judgment that, in spite of CMF's claim as to inherent difficulties in applying Regulation No 3319/94, CMF had not only failed to seek advice from its customs agents, but had also given them very precise instructions.

193 In paragraph 144 of the judgment under appeal, it added: 'Furthermore, [CMF's] mistakes in drawing up its invoices also suggest a lack of care on its part.'

194 In paragraph 146 of the judgment under appeal, the Court of First Instance held that CMF's conduct in the course of the transactions concerned could not be regarded as sufficiently careful.

195 In that regard, it should be noted first that, in doing so, the Court of First Instance carried out a legal classification of the facts in order to decide whether the 'care' requirement was fulfilled (see, by analogy, *Biegi Nahrungsmittel and Commonfood* v *Commission*, paragraphs 42 and 43). Consequently, contrary to the Commission's assertion, CMF's challenge concerning the invoicing errors is admissible.

196 However, it must be observed that the conclusion reached is already sufficiently justified by the finding that CMF failed to seek any information or clarification relevant to the customs clearing procedures in question, in spite of its claim as to the 'complexity' of Regulation No 3319/94.

197 In fact, given the wording of the second subparagraph of Article 1(3) of that regulation, CMF must have had doubts as to the possible application of the specific duty to its chosen import arrangement, which involved the intervention of two companies between the Polish exporter and CMF itself.

198 Accordingly, although CMF took the view that, rather than a general objective of prevention, recital 39 of Regulation No 3319/94 articulated the need for evidence of actual circumvention in addition to the only two conditions set out in the second subparagraph of Article 1(3) of that regulation, CMF clearly should have obtained information and sought all possible clarification in advance of the customs clearing procedures in question, rather than during the year 2000 as it has claimed in these proceedings.

199 It follows that, even if it were well founded, CMF's complaint concerning the invoicing errors (which the Court of First Instance treated as somewhat ancillary factors in the analysis) is not capable of vitiating by an error of law the conclusion drawn in the judgment under appeal regarding the condition linked to the care exercised by the operator.

200 In conclusion, since none of the grounds of appeal are well founded, the appeal itself must be dismissed.

Costs

201 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought to that effect by the Commission.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the appeal;

2. Orders Common Market Fertilizers SA to pay the costs.

[Signatures]