

OPINION OF ADVOCATE GENERAL

POIARES MADURO

delivered on 2 February 2006¹

1. The Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) (Netherlands) has asked the Court for a preliminary ruling on the procedure for processing under customs control laid down in Articles 130 to 136 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code,² as last amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000³ ('the Customs Code'). Friesland Coberco Dairy Foods BV ('Coberco Dairy Foods') objects to the decision by the Inspecteur van de Belastingdienst/Douane Noord/kantoor Groningen (the Tax Inspector /Customs North/Groningen Office) to refuse it authorisation for processing under customs control. The referring court seeks a ruling from the Court, in particular, on the authority and validity of the conclusion of the Customs Code Committee ('the Committee'), since the customs authorities' refusal in this case was based on that conclusion.

I — The facts, the legal framework and the questions

2. Coberco Dairy Foods produces fruit juices. The raw materials used by Coberco Dairy Foods for the preparation of these drinks are fruit juice concentrates, sugars, flavourings, minerals and vitamins acquired from companies, some of which are established in Member States and others in third States. The manufacturing process includes mixing the fruit juices with water and sugar, pasteurising and packaging the product.

3. On 23 July 2002, Coberco Dairy Foods requested authorisation for processing under customs control in accordance with Article 132 of the Customs Code⁴ in respect of three products: apple juice containing added sugar (650 000 kg p.a. to a value of EUR 650 000 p.a.), orange juice containing added sugar

1 — Original language: Portuguese.

2 — OJ 1992 L 302, p. 1.

3 — OJ 2000 L 311, p. 17.

4 — That article provides that: '[a]uthorisation for processing under customs control shall be granted at the request of the person who carries out the processing or arranges for it to be carried out'.

(350 000 kg p.a. to a value of EUR 350 000 p.a.) and white sugar, other than cane sugar (10 000 000 kg p.a. to a value of EUR 3 000 000 p.a.). Two processed products were named in the application: apple juice containing added sugar and orange juice containing added sugar.

4. The object of the procedure for processing under customs control, requested by Coberco Dairy Foods, is described in Article 130 of the Customs Code:

‘The procedure for processing under customs control shall allow non-Community goods to be used in the customs territory of the Community in operations which alter their nature or state, without their being subject to import duties or commercial policy measures, and shall allow the products resulting from such operations to be released for free circulation at the rate of import duty appropriate to them. Such products shall be termed processed products.’

5. In order to benefit from the exemption from import duty on sugar acquired from third countries, which the requested authorisation would afford, Coberco Dairy Foods claims that this would enable it to maintain its processing activities in the Community.

6. The necessary and cumulative conditions for obtaining such authorisation are set out in Article 133 of the Customs Code. In respect of the economic conditions, Article 133(e) provides that authorisation shall be granted only ‘where the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled. The cases in which the economic conditions are deemed to have been fulfilled may be determined in accordance with the committee procedure’.

7. Sugar production and prices in the Community are governed by Council Regulation (EC) No 1260/2001 of 19 June 2001 on the common organisation of the markets in the sugar sector.⁵ However, under Article 552(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation (EEC) No 2913/92,⁶ as last amended by Commission Regulation (EC) No 444/2002 of 11 March 2002,⁷ and Annex 76 thereto, ‘examination of the economic conditions shall take place’ for all goods subject to an agricultural measure. Under Article 552(2) of the implementing regulation, in the case of those goods, ‘the examination of the economic conditions shall take place in the

5 — OJ 2001 L 178, p. 1.

6 — OJ 1993 L 253, p. 1; ‘the implementing regulation’.

7 — OJ 2002 L 68, p. 11.

Committee'. Reference is made in particular to Article 504(4) of the implementing regulation, which provides that '[t]he Committee's conclusion shall be taken into account by the customs authorities'. Under Article 502(3) of the regulation, the examination of the economic conditions is required to establish 'whether the use of non-Community sources enables processing activities to be created or maintained in the Community'.

8. In accordance with that procedure, the Commission sent the Committee a working document on 22 August 2003, from which it appears that 'the company concerned has requested authorisation because there is serious competition from producers in Central and Eastern Europe'. The document, an extract from which is cited in the Commission's written observations, goes on to state that '[g]iven the price level of similar products from these producers and the preferential zero rate (0%) for apple juice concentrate originating in Poland, products are being placed on the Community market which are very competitive with the products of the company concerned'. According to the same document, '[i]f the arrangements for processing under customs control cannot be applied, a decision will probably be taken to do the processing in Central or Eastern Europe rather than in the Netherlands'. Coberco Dairy Foods is planning to make an initial investment of EUR 750 000 in a factory, creating approximately two new jobs.

9. At its meeting on 18 September 2003, the Committee heard evidence from the representative of the Commission's Directorate-General for Agriculture who, according to the minutes of the meeting, pointed out that 'Community producers of sugar are under pressure. Duty-free importation under the procedure for processing under customs control would increase the pressure'. At the end of the meeting, the Committee concluded that the economic conditions referred to in Article 133(e) of the Customs Code were not fulfilled.

10. On 27 October 2003, the Netherlands tax administration, acting on the basis of the Committee's conclusion, rejected Coberco Dairy Foods' application for authorisation. The applicant company's objection to that decision of 27 October 2003 was rejected by the administration on 2 April 2004, so Coberco Dairy Foods lodged an appeal before the *Gerechtshof te Amsterdam* on 10 May 2004 for annulment of the decision.

11. In its pleadings before that court, Coberco Dairy Foods argues that the Inspector should have exercised his discretionary authority to dismiss the Committee's conclusion, which cites the interests of Community sugar producers, whereas in the appellant's view the economic conditions referred to in Article 133(e) of the Customs Code and Article 502(3) of the implementing regulation were fulfilled. Instead of consider-

ing the economic interest of the producers of raw materials for sugar situated in the Community, the Inspector should, in the appellant's opinion, have based his decision on the fact that there is a processing industry in the Community.

processing under customs control also be investigated?

12. The Inspector takes the opposite view, contending that the Committee was right to conclude that the adverse effects on the Community sugar industry could not be offset by the jobs created in connection with processing activities. The Inspector interprets Article 504(4) of the implementing regulation as meaning that the national customs authorities were not at liberty to deviate from a Committee conclusion which was almost unanimous.

- (2) In relation to the assessment of the "processing activities to be created or maintained" under Article 502(3) [of the implementing regulation], is there a specific number of jobs which must, as a minimum, be made possible by the activities? What other criteria also apply to the interpretation of the cited text of the regulation?

- (3) In the light of the answers to Questions 1 and 2, can the Court of Justice examine the validity of a conclusion of the Committee in preliminary ruling proceedings?

13. In this context, the *Gerechtshof te Amsterdam*, before which the action was brought, asked the Court for a ruling on the following points:

- (4) If so, is the conclusion in this case valid with respect to both the reasons and the economic arguments adduced?

(1) How should the words "without adversely affecting the essential interests of Community producers of similar goods" in Article 133(e) [of the Customs Code] be interpreted? Can only the market for the finished product be considered or must the economic situation with regard to the raw materials for

- (5) If the Court of Justice cannot examine the validity of a conclusion, what interpretation should then be given to the words "[t]he Committee's conclusion shall be taken into account by the customs authorities" in Article 504(4) [of the implementing regulation] if — in

the first instance — the customs authorities and/or — on appeal — the national courts consider that the Committee's conclusion cannot justify the rejection of the application for processing under customs control?'

national customs authorities (the third, fourth and fifth questions), I will proceed to the interpretation of Article 133(e) of the Customs Code and Article 502(3) of the implementing regulation, on which the national court has expressed doubts (the first and second questions).

14. By letter of 19 January 2005, the referring court asked the Court to apply the accelerated procedure to the reference for a preliminary ruling, pursuant to the first paragraph of Article 104a of the Rules of Procedure. This request was rejected by order of the President of the Court of 18 March 2005.

A — The scope of the provision, contained in Article 504(4) of the implementing regulation, that the Committee's conclusion shall be taken into account by the customs authorities (the fifth question)

15. A hearing took place on 8 December 2005, in the course of which Coberco Dairy Foods, the Greek and Netherlands Governments and the Commission stated their views. The Italian Government also intervened in the procedure, in writing.

17. The referring court's fifth question concerns the interpretation to be given to the words contained in Article 504(4) of the implementing regulation, which provides that '[t]he Committee's conclusion shall be taken into account by the customs authorities concerned and by any other customs authorities dealing with similar authorisations or applications'. According to the Greek and Netherlands Governments, the Committee's conclusion is binding on the national authorities.

II — Analysis

16. After examining the Gerechtshof's questions about the role of the Committee and the nature of its conclusion, and about the consequences of its conclusion for the

18. However, the wording of the article in question does not state that the conclusion is binding. On the contrary, if that were the case, the regulation would have provided that the Committee's conclusion was to be binding on the national customs authorities. The wording of Article 504(4) of the implementing regulation does not therefore

preclude the national customs authorities from delivering a ruling other than that recommended in the Committee's conclusion.

authorisation for processing under customs control. The Netherlands authorities' practice of automatically agreeing with the Committee's conclusion when the conclusion is negative therefore cannot be reconciled with the interpretation of Article 504(4) of the implementing regulation.

19. The scope of the Committee's conclusion is not clearly defined. The object of setting up the Committee, as stated in the seventh recital in the preamble to the Customs Code, is to 'ensure close and effective cooperation between the Member States and the Commission'. Such cooperation is not to be confused with a provision for Community decisions in which the Committee's conclusion would be binding on the Member States.⁸

21. In the light of the foregoing considerations, it is therefore suggested that the Court's reply to the fifth question referred by the national court should be that the words '[t]he Committee's conclusion shall be taken into account by the customs authorities' in Article 504(4) of the implementing regulation do not mean that the conclusion is binding on the national authorities when they rule on a request for authorisation for processing under customs control.

20. In order to fulfil the requirement to take the Committee's conclusion into account, the competent national authorities must nevertheless justify their decision if they propose to deviate from that conclusion. Although they are required to take the Committee's conclusion into account, the national authorities cannot dispense with the examination of the economic conditions in accordance with Article 133(e) of the Customs Code. Article 504(4) of the implementing regulation does not therefore in any way require the national authorities to agree with the Committee's conclusion as a matter of course. On the contrary, in the exercise of their discretion, they are ultimately responsible for deciding whether to grant or refuse

B — As to whether a conclusion of the Committee can be examined in preliminary ruling proceedings (the third and fourth questions)

22. The referring court also asks about the legal nature of a conclusion of the Committee. Its third question is whether the Court can examine the validity of such a conclusion in preliminary ruling proceedings. If the

8 — See, by analogy, Case C-120/97 *Upjohn* [1999] ECR I-223, paragraph 47, and Advocate General Léger's Opinion in that case, point 64. See also Case C-198/03 P *Commission v CEVA and Pfizer* [2005] ECR I-6357, paragraph 89, and Advocate General Jacobs's Opinion in that case, points 75 and 76.

conclusion is legally binding, the Court may have jurisdiction to rule on its validity under Article 234 EC. Otherwise, the Court's role is confined to one of interpretation.

sion and the Italian Government argue that, since consulting the Committee is optional, it follows that the Committee's conclusion is not binding, while the Netherlands Government takes the opposite view.

23. Article 234(b) EC provides that the Court shall have jurisdiction to rule on 'the validity and interpretation of acts of the institutions of the Community and of the ECB'. In its judgment in *Grimaldi*,⁹ the Court held that 'Article 177 [of the EC Treaty, now Article 234 EC] confers on the Court jurisdiction to give a preliminary ruling on the validity and interpretation of all acts of the institutions of the Community, without exception'. Without going into the question of whether or not an act of the Committee can be ascribed to a Community institution, it is clear that such an act is not binding and cannot therefore be the subject of a ruling on interpretation or validity under Article 234 EC.

25. The Commission considers that a conclusion of the Committee is not binding in this context because, under Article 503 of the implementing regulation, the Committee is to be consulted only on an optional basis. That article provides that:

'An examination of the economic conditions involving the Commission may take place:

(a) if the customs authorities concerned wish to consult before or after issuing an authorisation;

24. Only provisions which are intended to produce binding legal effects can be the subject of a review of legality.¹⁰ In order to answer the question referred by the national court, it is therefore necessary to establish the legal nature of a conclusion of the Committee. The observations submitted to the Court differ on this point. The Commis-

(b) if another customs administration objects to an authorisation issued;

(c) on the initiative of the Commission.'

⁹ — Case C-322/88 [1989] ECR 4407, paragraph 8.

¹⁰ — In the context of Article 230 EC, this was established in Case 22/70 *Commission v Council*, known as '*AETR*' [1971] ECR 263, paragraph 42.

26. However, Article 552(2) of the implementing regulation, read in conjunction with Annex 76 thereto,¹¹ which is applicable in the present case, provides that the Committee must be consulted on goods subject to an agricultural measure. That article constitutes a *lex specialis* derogating from the general provision contained in Article 503 of the implementing regulation, cited by the Commission. Thus, contrary to the argument presented by the Commission and the Italian Government in their written observations, it cannot be deduced from Article 503 alone that consulting the Committee is always optional. On the contrary, Article 552(2) of the implementing regulation, read in conjunction with Annex 76, defines an exception to that general rule. The fact that consulting the Committee is generally optional does not necessarily mean that its conclusions are not binding. Consequently, that argument does not in itself justify the view that the Court has no jurisdiction to determine the validity of a conclusion of the Committee.

27. The Court has already had occasion to rule on the legal nature of the opinions of various committees. In its judgment in *Dittmeyer*,¹² it held that the opinions of the Committee on Common Customs Tariff Nomenclature 'constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States and as such they may be considered as a valid aid to the interpretation of the Tariff' but that such opinions 'do not have legally binding force so that, where appropriate, it is necessary to consider whether their content is in accordance with the actual

provisions of the Common Customs Tariff and whether they alter the meaning of such provisions'. That case-law was confirmed, with respect to explanatory notes to the nomenclature of the Customs Cooperation Council, in the judgments in *Chem-Tec*¹³ and *Develop Dr Eisbein*¹⁴ and, with respect to additional notes to the Combined Nomenclature, in the judgment in *Algemene Scheeps Agentuur Dordrecht*.¹⁵

28. In its judgment in *Wagner*,¹⁶ the Court took a similar line when the Tribunal administratif (Administrative Tribunal), Paris, asked for a ruling on the validity of Note 2 to Annex I of the Commission's notice of 11 March 1981 on import and export licences and advance-fixing certificates for agricultural products (OJ 1981 C 52, p. 2). In view of the explanatory nature of the note, which meant that it was not legally binding, the Court considered that there was no need to examine its validity but that it was necessary to ascertain whether it complied with the provisions of Community law applicable at the material time.¹⁷

29. Whether or not the acts of a committee are binding depends on the function of the committee in question. In order to determine whether the case-law cited above is applicable by analogy to a conclusion of the Committee, as the Commission maintains in

11 — Cited in point 7 of this Opinion.

12 — Joined Cases 69/76 and 70/76 [1977] ECR 231, paragraph 4.

13 — Case 798/79 [1980] ECR 2639, paragraph 11.

14 — Case C-35/93 [1994] ECR I-2655, paragraph 21.

15 — Case C-311/04 [2006] ECR I-609, paragraphs 27 and 28.

16 — Case C-94/91 [1992] ECR I-2765.

17 — See *Wagner*, paragraph 17.

its observations, it is necessary to explain the role assigned to the Committee under the Customs Code. The seventh recital in the preamble to the Code states that 'a Customs Code Committee should be set up in order to ensure close and effective cooperation between the Member States and the Commission'. Article 4(24) of the Customs Code defines the committee procedure as the procedure provided for or referred to in Articles 247 and 247a, or in Articles 248 and 248a of the Code. The jurisdiction of the Committee, as defined in Article 249, extends to any question concerning customs legislation. In general terms, a rapid review of the Customs Code confirms that the Committee is to determine the cases in which and the arrangements under which certain customs procedures operate,¹⁸ the cases in which and specific conditions under which certain provisions may apply,¹⁹ and the scope of certain exceptions and derogations.²⁰ The committee procedure may also cover cases not specifically mentioned in the Code,²¹ time-limits,²² and amounts or levels of duty.²³ Lastly, the economic conditions to be fulfilled in order to obtain authorisation for certain customs procedures may be determined by the Committee in accordance with Articles 117(c) on inward processing and 133(e) on processing under customs control. The Committee may intervene in various situations within the framework of management or regulatory procedures, or in accordance with the consultation procedure.²⁴ In the present case, the question

referred by the national court concerns intervention by the Committee in an individual decision to grant or refuse authorisation for the specific procedure for processing under customs control.

30. The question is whether, in the light of the aforementioned case-law on the legal value of committees' conclusions, the interpretation of Community law suggested by the Committee is binding on the competent customs authorities. Suffice it to say in this connection that Article 504(4) of the implementing regulation merely provides that the Committee's conclusion is to be 'taken into account' by the customs authorities and consequently does not imply that the conclusion is binding on the national authorities.

31. It is impossible in this connection to take the line, suggested by the Netherlands Government at the hearing, that the obligation to consult the Committee laid down in Article 552 of the implementing regulation means that the conclusion delivered by the Committee in this context is binding. An obligation to consult the Committee is not the same thing as an obligation to agree with the conclusion it reaches.

32. If the competent customs authorities are not under an obligation to agree with the

18 — Article 147(2) on inward processing.

19 — Articles 131 on processing under customs control, 141 on the temporary importation procedure, and 164 on internal transit.

20 — Articles 124(3), 142(2), 148(b), 182(2), 178(2) and 200.

21 — Articles 239(1) on reimbursement of customs duties and 197 on types of security.

22 — Articles 118(4), 128(3) and 172(2).

23 — Articles 214(3), 217(1)(c) and 240.

24 — See document TAXUD/741/2001 laying down the Rules of Procedure of the Customs Code Committee, adopted on 5 December 2001.

Committee's conclusion, there is no need to call into question the validity of that conclusion as distinct from the final decision adopted by the customs authorities, which is the only definitive decision producing binding legal effects. As the Commission rightly pointed out at the hearing, a conclusion of the Committee is not a final decision. Thus, the validity of a conclusion of the Committee, which precedes the adoption of a final decision by the competent authorities, can be examined by the national court only indirectly, in the course of an examination of the final decision.²⁵

33. The fact that a conclusion of the Committee is not binding precludes the plea, submitted by the Netherlands Government in its written observations, that there is no review of the legality of the conclusion. It follows that the validity of a conclusion of the Committee cannot be examined in preliminary ruling proceedings. It is nevertheless important that the competent authority ruling on a request for authorisation for processing under customs control should be able to derogate from the Committee's conclusion and, where appropriate, adopt a solution other than the one recommended if, on completion of its own examination of the circumstances at issue, it reaches a different conclusion.

34. The Netherlands authorities' practice of automatically agreeing with the Committee's conclusion when the conclusion is negative

is not mandatory under Community law. On the contrary, Article 133(e) of the Customs Code is to be interpreted as meaning that the national customs authorities have jurisdiction to examine and rule on requests for processing under customs control. Their discretionary authority is limited only in so far as they are required, under Article 504(4) of the implementing regulation, to take the Committee's conclusion into account. If the Community legislature had wished to design a system under which the national customs authorities were required to agree with a conclusion of the Committee recommending that authorisation for processing under customs control be refused, provision would have had to be made for an individual to challenge the Committee's conclusion, which would then be in the nature of a definitive decision with regard to that individual. If the national authorities only had to agree with a conclusion of the Committee in order to justify their decisions and if that conclusion was not subject to judicial review, individuals would have no judicial protection and that would be unacceptable. That cannot be the case, however, in the system established by the Customs Code.

35. I therefore propose that the Court's reply to the third question referred by the national court should be that the validity of a conclusion of the Committee, delivered in accordance with Article 133(e) of the Customs Code, cannot be examined in preliminary ruling proceedings. There is therefore no need to answer the fourth question.

²⁵ — Judgment in Case C-263/95 *Germany v Commission* [1998] ECR I-441.

C — The interpretation of the words ‘without adversely affecting the essential interests of Community producers of similar goods’ in Article 133(e) of the Customs Code (the first question)

36. The referring court seeks to ascertain whether, in the course of an examination to determine whether to grant authorisation for processing under customs control in accordance with Article 133(e) of the Customs Code, only the market for the finished product is to be considered or whether the economic situation with regard to the raw materials used to manufacture the finished product must also be investigated.

37. The Commission and the Greek and Netherlands Governments conclude that Article 133(e) of the Customs Code implies that the interests of manufacturers of processed products and those of producers of goods similar to those used in the manufacturing process must both be examined. Coberco Dairy Foods, on the contrary, considers that only the interests of Community producers of finished products are relevant.

38. In order to decide between these two interpretations, I note first that the procedure for processing under customs control derogates from the general law. The conditions on which it is authorised must therefore be interpreted restrictively.

39. The wording of Article 133(e) of the Customs Code, which refers to ‘the essential interests of Community producers of similar goods’, does not make clear whether it is referring only to manufacturers of finished products or whether it includes producers of the raw materials used to manufacture the finished products. The Commission suggests, on the basis of the French, Greek, Italian and Spanish versions of the text, that the use of the term ‘goods’ refers to goods similar to those to be processed. This argument is not convincing, however, because there is nothing in the wording of the article to preclude the possibility that the term ‘similar goods’ refers on the contrary to processed products. It is precisely this ambiguity in the wording that prompted the referring court to ask the Court for an interpretation.

40. The interpretation of Article 133(e) of the Customs Code cannot therefore be based solely on the wording of the article but must take the context and object of the provision into account.²⁶

41. Coberco Dairy Foods cites the context of Article 133(e) of the Customs Code to support the interpretation it proposes. In this connection, it compares the economic conditions for authorisation to use the inward processing procedure mentioned in

²⁶ — See, for example, Case 283/81 *CILFIT* [1982] ECR 3415, paragraph 20, and Case 292/82 *Merck* [1983] ECR 3781, paragraph 12.

Article 117(c) of the said Code, which refers to 'the essential interests of Community producers', with the provisions relating to the outward processing procedure contained in Article 148 of the Code, which stipulates that 'the essential interests of Community processors' must be taken into account. According to Coberco Dairy Foods, the use of a different term in Article 133(e) of the Customs Code means that it refers only to manufacturers of finished products. However, I do not think any such conclusion can be drawn from the difference in the terms used in these articles of the Customs Code. On the contrary, the comparison suggests that each article must be interpreted with due regard to the specific customs procedure to which it applies, since neither Article 133(e) nor Article 117 states precisely which Community producers they cover.

42. The object of the procedure for processing under customs control is indicated in the preamble to Council Regulation (EEC) No 2763/83 of 26 September 1983 on arrangements permitting goods to be processed under customs control before being put into free circulation,²⁷ which established the procedure. It was designed to offset the effects of certain tariff anomalies: 'in certain particular cases, the charging of goods in accordance with their tariff description or their state at the time of their importation leads to a higher charge than can be economically justified and one that tends to encourage certain economic activities to

move outside the Community'.²⁸ The procedure for processing under customs control was therefore introduced to prevent processing activities being moved outside the Community because the cost of importing the raw materials was higher than the cost of exporting the finished product for which the raw materials had been used.

43. The principal object of the procedure is therefore to protect Community producers of finished products. However, as the Commission points out in its observations, if authorisation of this exceptional procedure were granted too freely, it might give rise to a conflict of interest between Community producers of finished products and Community producers of primary products, by giving the former an advantage over the latter. The procedure for processing under customs control is not intended to establish any such hierarchy among producers. On the contrary, in view of the need to reconcile customs duty with the Community's agricultural policy,²⁹ the Customs Code lays down stricter conditions on granting authorisation for processing under customs control in the case of products subject to common organisation of the market. For this type of product, consultation of the Committee is mandatory under Article 552 of the implementing regulation. As the Greek Government has rightly pointed out, that need can

27 — OJ 1983 L 272, p. 1.

28 — First recital in the preamble to Regulation No 2763/83.

29 — Fourth recital in the preamble to the Customs Code.

be satisfied only by an interpretation of Article 133(e) of the Customs Code that requires the interests of both producers of raw materials and producers of finished products to be taken into account.

44. Also, as the Italian Government notes in its observations, the procedure for processing under customs control benefits non-Community producers of raw materials by relieving them of the obligation to pay import duty on their products. It therefore seems logical to examine the situation of Community producers of these goods in order to determine whether to authorise the procedure. Contrary to what Coberco Dairy Foods asserted at the hearing, it is therefore relevant to take the situation of Community sugar producers into account, even though Coberco Dairy Foods does not intend to use sugar produced in the Community in the manufacture of its drinks.

45. I should add that the object of the procedure for processing under customs control might be circumvented if the only interests to be taken into account were those of Community producers of finished products. That is why, like the inward processing procedure which it supplements, the procedure for processing under customs control can be authorised only if it is established that the essential interests of Community producers as a whole, that is to say both producers of finished goods and producers of primary products, are not affected.

46. I therefore suggest that the Court's reply to the national court should be that Article 133(e) of the Customs Code should be interpreted as meaning that the interests of both producers of raw materials and producers of finished products must be examined for the purpose of granting authorisation for processing under customs control.

D — *The interpretation of the phrase 'processing activities to be created or maintained' in Article 502(3) of the implementing regulation (the second question)*

47. The referring court also seeks a ruling from the Court on the interpretation of Article 502(3) of the implementing regulation, which refers to 'processing activities to be created or maintained'. To be precise, the question seeks to ascertain whether the number of jobs created is relevant in this connection.

48. Coberco Dairy Foods maintains that the number of jobs created or maintained is irrelevant for the purposes of Article 502(3) of the implementing regulation. The Netherlands and Greek Governments and the Commission consider that a general investigation is required, covering the risk to the

sector concerned, the extent to which it is regulated, the size of the investment and the number of jobs created or maintained by the processing activity.

49. The investigation to establish whether a processing activity can be created or maintained must be specific and must take the existing circumstances into account. As the regulation contains no specific criterion

concerning the number of jobs created, it cannot be supposed that any such criterion exists. Nevertheless, contrary to what Coberco Dairy Foods maintains, the creation or maintenance of jobs is certainly an important factor to be taken into account by the national customs authorities. Their general investigation of all the circumstances of the request submitted to them also involves an assessment of the value of the investment that has been made, the permanence of the activity and any other relevant factors relating to the creation or maintenance of a processing activity.

III — Conclusion

50. In the light of the foregoing considerations, I suggest that the Court give the following answers to the questions referred by the national court:

- (1) The words '[t]he Committee's conclusion shall be taken into account by the customs authorities' in Article 504(4) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, as last amended by Commission Regulation (EC) No 444/2002 of 11 March 2002, do not mean that the conclusion is binding on the national authorities when they rule on a request for authorisation for processing under customs control.

- (2) The validity of a conclusion of the Customs Code Committee, which has consultative value only, cannot be examined in preliminary ruling proceedings under Article 234 EC. It follows from the consultative nature of such conclusions that the national authorities must be able to deviate from them.

- (3) Article 133(e) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, as last amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000, requires that the economic situation of producers of raw materials and producers of finished products be taken into account.

- (4) The investigation of the creation or maintenance of a processing activity, conducted under Article 502(3) of Regulation No 2454/93, includes not only the number of jobs created but also any other relevant factor such as, in particular, the value and durability of the investment.