OPINION OF ADVOCATE GENERAL MENGOZZI

delivered on 1 March 2007 [1]

1. In these appeal proceedings, Common Market Fertilizers SA ('CMF') seeks to have set aside the judgment of the Court of First Instance of 27 September 2005 ('the judgment under appeal') [2] which dismissed the actions for annulment brought by that company against Commission decisions of 20 December 2002 [3] finding that remission of import duties was not justified in a particular case.

Legislative background

2. Article 1(3) and (4) 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, [4] provides as follows:

'3. The amount of anti-dumping duty for imports originating in Poland shall be the difference between the minimum import price of ECU 89 per tonne product and the cif Community frontier price plus the CCT duty payable per tonne product in all cases where the cif Community frontier price plus the CCT duty payable per tonne product is less than the minimum import price and where the imports put into free circulation are directly invoiced to the unrelated importer by the following exporters or producers located in Poland:

...

1 — Original language: Italian.

2 — Joined Cases T-134/03 and T-135/03 *Common Market Fertilizers* v *Commission* [2005] ECR II-3923.

3 — C(2002) 5217 final and C(2002) 5218 final.

4 — OJ 1994 L 350, p. 20.

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: ECU 22 per tonne product ... with the exception of the product certified to be produced by Zakłady Azotowe Puławy for which the specific duty is ECU 19 per tonne product ... .

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.'

3. Article 239 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, [5] as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 [6] ('the Customs Code'), provides as follows:

'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.

...'

4. Article 4(24) of the Customs Code defines 'Committee procedure' as meaning either the procedure referred to in Articles 247 and 247a, or in Articles 248 and 248a.

5. Article 247 of the Customs Code provides that '[t]he measures necessary for the

5 — OJ 1992 L 302, p. 1.
6 — OJ 2000 L 311, p. 17.

implementation of [the Code] ... shall be adopted in accordance with the regulatory procedure referred to in Article 247a(2) ...'.

6. Article 247a of the Customs Code provides as follows:

'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 shall apply ... .

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

7. Article 4 of the rules of procedure of the Customs Code Committee provides:

'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 2 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing

powers conferred on the Commission [7] ('the comitology decision') 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.'

9. Article 5 of the comitology decision provides as follows:

'Regulatory procedure

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

7 — OJ 1999 L 184, p. 23.

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.

...'

10. Article 905(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of the Customs Code, [8] as amended by Commission Regulation (EC) No 1677/98 of 29 July 1998 [9] ('the implementing regulation'), provides as follows:

'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.'

8 — OJ 1993 L 253, p. 1.
9 — OJ 1998 L 212, p. 18.

11. 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.'

12. 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 the implementing regulation: [10]

'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.'

13. 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.'

Facts

14. The facts of the case, as found by the Court of First Instance, are set out in the following terms in paragraphs 14 to 28 of the judgment under appeal:

'14 The applicant, established in Belgium, is a wholesaler dealing in chemical products, in particular nitrogenous solutions (urea and ammonium nitrate). The applicant's group of companies includes Rellmann GmbH in Hamburg (Germany), a wholly-owned subsidiary of the applicant, and Agro Baltic GmbH, based in Rostock (Germany), a wholly-owned subsidiary of Rellmann. In 1989 the applicant acquired the company Champagne Fertilisants, which is the applicant's tax representative for all its operations in France.

15 The exporter, the Polish company Zakłady Azotowe Puławy ("ZAP"), sells the

10 — OJ 2003 L 187, p. 16.

goods to Agro Baltic. Within the applicant's group of companies, the commercial chain is as follows: Agro Baltic sells the goods on to Rellmann, which in turn sells them on to the applicant. Corresponding invoices 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 cargoes followed the commercial route described in paragraph 15 above.

17 Cogema, an authorised customs agent, was appointed to put the goods into free circulation on behalf of Agro Baltic and to release them for consumption on the applicant's behalf.

18 The goods were thus initially put into free circulation on behalf of Agro Baltic using declaration EU0 with the ZAP invoices to Agro Baltic attached and 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 some minutes later in order to be released for consumption on behalf of Champagne Fertilisants.

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

20 Agro Baltic appointed SCAC Rouen ("SCAC"), an authorised customs agent, to put the goods into free circulation on behalf of Agro Baltic and to release them for consumption on the applicant's behalf. In respect of the same goods, therefore, two customs import declarations were made to the same customs office, referring to two different consignees, so as to enable the payment of customs duties to be separated from that of VAT.

21 SCAC used a simplified customs clearing procedure for putting the goods into free circulation and releasing them for consumption in the sole name of the applicant. To that end, SCAC lodged declaration IM4 in the applicant's name, attaching the Rellmann invoice to the applicant and an EUR.1 certificate declaring the goods to be of Polish origin.

22 Initially, the competent French authorities accepted the declarations relating to these two cases, granted exemption from customs duty on import on the basis of the EUR.1 certificates, and did not demand payment of anti-dumping duties.

23 Following a subsequent check, however, the competent French authorities took the view that the specific duty of ECU 19 per tonne set by the second subparagraph of Article 1(3) of Regulation No 3319/94 should have been applied to all the shipments concerned in the present two cases. In their view, the real importer of the goods was the applicant, which had not been directly invoiced by ZAP, although ZAP had certified the goods at issue. More specifically, in the case which gave rise to Case T-134/03, the competent French authorities took the view that the intermediate warehousing of the goods constituted a legal fiction due to its extremely short duration, and that the goods in the three operations concerned had been acquired by the applicant even before the declarations putting the goods into free circulation on behalf of Agro Baltic were lodged. More specifically, in the case which gave rise to Case T-135/03, the relevant French authorities took the view that a single declaration had been made in order to put the goods into free circulation and release them for consumption on the applicant's behalf.

24 Accordingly, in the case which gave rise to Case T-134/03, officials at the Centre du renseignement d'orientation et de contrôle de Poitiers (Poitiers Policy Information and Control Centre) drew up a minute on 4 December 1998 according to which a total of FRF 3 911 497 (EUR 564 855) in duties and taxes had been avoided. In the case which gave rise to Case T-135/03, the Direction interrégionale des douanes de Rouen (Rouen Interregional Tax Office) drew up a minute on 13 November 1997 which showed that a total of FRF 840 271 (EUR 128 098) in duties and taxes should have been charged.

25 In November and December 1999 the applicant 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, which registered them under reference numbers REM 02/02 (Case T-134/03) and REM 03/02 (Case T-135/03).

26 By letters dated 9 and 10 September 2002, to which the applicant replied on 11 October 2002, the Commission informed the applicant that it intended to take a negative decision in cases REM 02/02 and REM 03/02.

27 On 12 November 2002 the REM/REC group of experts met within the framework of the customs committee's repayments section. According to the report of that meeting which was drawn up on 29 November 2002, the final vote of the group of experts produced the following result as regards cases REM 02/02 and REM 03/02: "six delegations voted in favour of the Commission's proposal, four delegations abstained and five delegations voted against the Commission's proposal".

28 On 20 December 2002, being of the opinion that there had been obvious negligence on the part of the applicant 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 Decision C(2002) 5217 final (REM 02/02) and Decision C(2002) 5218 final (REM 03/02) declaring the remission of import duty not to be justified ("the contested decisions"). The Commission notified the French customs authorities of those decisions; the authorities in turn transmitted them to the applicant on 10 February 2003.'

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

15. By applications lodged at the Registry of the Court of First Instance on 18 April 2003, registered as T-134/03 and T-135/03, CMF sought the annulment of the contested decisions, relying on three pleas in law.

16. By the first plea, CMF alleged inter alia infringement of Article 7 EC and Article 5 of the comitology decision and infringement of Article 4(1) of the rules of procedure of the Customs Code Committee.

17. The second plea alleged manifest errors of assessment by the Commission in finding that the conditions were not met for remission of duties pursuant to Article 239 of the Customs Code.

18. The third plea alleged breach by the Commission of its duty to state reasons in accordance with Article 253 EC.

19. The Court of First Instance joined Cases T-134/03 and T-135/03 and, subsequently, by the judgment under appeal, dismissed the actions and ordered CMF to pay the costs.

20. As far as the alleged infringement of Article 7 EC and Article 5 of the comitology decision was concerned, the Court of First Instance first dismissed as inadmissible CMF's plea of illegality in respect of the first paragraph of Article 907 of the implementing regulation, raised in the context of that plea in law. [11]

21. On this point, the Court of First Instance first observed that the plea of illegality was out of time since it had been raised only in the reply and was not based on any matter of law or of fact which came 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. [12]

22. The Court of First Instance then observed that it could not consider of its own motion the question of the possible illegality of the first paragraph of Article 907 of the implementing regulation because it was not a matter of public policy. [13] While conceding that it is bound to raise of its own motion any lack of competence on the part of the institution adopting the contested measure, the Court of First Instance held that in the case before it the Commission had acted within its powers when it adopted the contested decisions on the basis of the first paragraph of Article 907 of the implementing regulation, which had in turn been adopted in accordance with the opinion of the Customs Code Committee in conformity with the procedure referred to in Articles 239, 247 and 247a of that code. Furthermore, it did not follow from the case-law that the Court of First Instance must of its own motion consider whether the Commission had exceeded its powers by adopting the first paragraph of Article 907 of the implementing regulation, the legal basis for the contested decisions. [14]

23. Secondly, the Court of First Instance dismissed CMF's argument to the effect that the group of experts which meets, pursuant to the first paragraph of Article 907 of the implementing regulation, 'within the framework of the [Customs Code] Committee' constitutes a regulatory committee within the meaning of Article 5 of the comitology decision. [15]

24. In this regard, the Court of First Instance noted that it follows from the seventh recital in the preamble to the comitology decision and from Article 5 thereof that the regulatory procedure is to be used for 'measures of general scope designed to apply essential provisions of basic instruments', whereas the contested decisions were individual decisions and therefore not at all of general scope. In the view of the Court of First Instance, to consider that the regulatory committee within the meaning of Article 5 of the comitology decision was empowered to give an opinion on a proposal for an individual decision as to repayment or remission of customs duties would amount to conflating

11 — Judgment under appeal, paragraph 51.

12 — Ibidem.

13 — The Court of First Instance cited to that effect Case 14/59 *Société des fonderies de Pont-à-Mousson* v *High Authority* [1959] ECR 215, 230.

14 — Judgment under appeal, paragraph 52.

15 — Ibidem, paragraphs 54 and 58.

the notions of decision and measure of general scope, which are on the contrary fundamentally distinct, and would therefore be in breach of Article 249 EC as well as of Article 7 EC and the comitology decision. [16]

25. The Court of First Instance added that if the legislature — in this case the Commission — had intended the Customs Code Committee to be consulted in the context of individual remission or repayment procedures, it would undoubtedly have used the phrase 'after consulting the committee' in the first paragraph of Article 907 of the implementing regulation. The phrase 'within the framework of the Committee' reflects the fact that the group of experts referred to in Article 907 is clearly an entity which is distinct in functional terms from the Customs Code Committee. [17]

26. As regards infringement of Article 4(1) of the rules of procedure of the Customs Code Committee ('CCC') — alleged on grounds of failure to comply with the time-limit laid down therein, in that the working documents had not been sent to the members of the committee no later than 14 days in advance of the meeting — the Court of First Instance rejected CMF's plea.

27. After finding that the members of the group of experts had had 13 calendar days to familiarise themselves with the letter sent by CMF in response to the Commission's letters, the Court of First Instance held that natural or legal persons may not rely on an alleged breach of the provision in question since it is not intended to ensure protection for individuals but to ensure the internal working of that committee while fully respecting the prerogatives of its members. [18]

28. As regards the manifest errors of assessment alleged to have been committed in the application of Article 239 of the Customs Code, the Court of First Instance noted that it was common ground that CMF did not practise any deception, and accordingly considered the second plea only in so far as it related to the alleged absence of negligence on the part of CMF, holding that the Commission did not make any manifest error of assessment in the matter, which meant that it was not necessary to examine the claims relating to the existence of a special situation. [19]

29. The Court of First Instance noted as a preliminary that, according to the case-law, in order to assess whether there is obvious negligence within the meaning of Article 239

16 — Ibidem, paragraphs 55 to 57.
17 — Ibidem, paragraph 59.
18 — Ibidem, paragraphs 77 to 79.
19 — Ibidem, paragraphs 115, 147 and 149.

of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which gave rise to the customs debt, as well as the professional experience of the economic operator and the degree of care which it exercised. [20]

30. With regard to the complexity of the provisions, the Court of First Instance pointed out first that it had already held in a previous ruling [21] that there was no particular difficulty in interpreting the second subparagraph of Article 1(3) of Regulation No 3319/94 and, secondly, that as the Commission had submitted, CMF could not avoid its own liability by relying on the mistake, genuine or otherwise, of its customs agents, having drawn up the arrangements for importing the goods itself and having freely chosen those customs agents. [22]

31. As regards CMF's professional experience, the Court of First Instance found that the Commission was fully entitled to take the view that CMF had the requisite experience in carrying out import and export transactions. [23]

32. As regards, finally, the care taken by the operator, the Court considered that, taken as a whole, CMF's conduct in the course of the transactions concerned could not be regarded as sufficiently careful. Despite claiming a lack of experience of customs clearing operations in respect of the goods concerned, as well as 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. The Court of First Instance further considered that CMF's mistakes in drawing up its invoices also suggested a lack of care on its part. [24]

Procedure before the Court of Justice and the forms of order sought

33. By application lodged at the Registry of the Court of Justice on 14 December 2005, CMF brought an appeal against the judgment in Joined Cases T-134/03 and T-135/03.

34. Counsel for the parties made oral submissions at the hearing held on 5 October 2006.

20 — Ibidem, paragraph 135.

21 — Case T-104/02 *Gondrand Frères* v *Commission* [2004] ECR II-3211, paragraphs 59 to 62 and 66.

22 — Judgment under appeal, paragraphs 137 to 139.

23 — Ibidem, paragraphs 140 and 141.

24 — Ibidem, paragraphs 142 to 144.

35. CMF claims that the Court should:

— set aside the judgment under appeal in its entirety;

— grant the forms of order sought by CMF at first instance;

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

36. The Commission contends that the Court should:

— dismiss the appeal;

— order CMF to pay the costs.

Legal analysis

Preliminary remarks on the grounds of appeal

37. CMF relies on four grounds of appeal. The first two grounds are that the Court of First Instance gave an 'incomplete presentation of the legal context' and an 'incomplete presentation of the facts' respectively. By the third ground, CMF alleges that the Court of First Instance made a number of errors in law in its examination of the merits of the first plea in the action for annulment alleging infringement of essential procedural requirements. The fourth ground concerns an allegedly incorrect application of Article 239 of the Customs Code by the Court of First Instance.

38. The first ground of appeal is clearly not capable of standing alone. In alleging an 'incomplete presentation of the legal context', CMF is claiming that the Court of First Instance erred by failing to mention, in the presentation of the relevant legal context at paragraphs 1 to 13 of the judgment under appeal, either recital 39 to Regulation No 3319/94 or Article 2 of the comitology decision.

39. It seems to me quite clear that a failure to mention, in the part of the judgment that merely recites the legal background, one or more provisions which ought to be considered material to the case cannot in itself constitute a defect invalidating the judgment itself. The claim must therefore be construed instead as alleging failure by the Court of First Instance to *take into consideration* the recital and article in question, as well as errors of law in its judicial analysis consequent upon such failure.

40. And indeed in its submissions in the appeal in relation to the first ground CMF argues that as a result of the omissions in question the Court of First Instance had, in the first place, misinterpreted the second subparagraph of Article 1(3) of Regulation No 3319/94 in finding that the fact that CMF had not circumvented the anti-dumping measures did not preclude the imposition of the specific anti-dumping duty and, in the second place, mistakenly concluded that the regulatory procedure provided for in the comitology decision had to be followed only for the adoption of measures of general scope.

41. These are arguments, however, which are raised more specifically in the context of the fourth and third grounds of appeal respectively. [25] They will therefore be considered in the discussion of those grounds.

42. In relation to the alleged 'incomplete presentation of the facts', which is the second ground of appeal, CMF argues that in paragraphs 14 to 28 of the judgment under appeal the Court of First Instance made an 'incomplete and inaccurate' presentation of the facts, thereby distorting those facts and erring in law. [26] As a result of that distortion, the Court of First Instance had wrongly found a situation of indirect invoicing, which justified the application of the specific duty provided for under the second subparagraph of Article 1(3) of Regulation No 3319/94.

43. CMF claims that contrary to the view taken by the French customs authorities and the Commission there was not a situation of indirect invoicing. In support of that claim, however, it puts forward a series of arguments of a legal nature, but fails to demonstrate even the slightest error in terms of *fact finding* on the part of the authorities in question or the Commission, let alone by the Court of First Instance.

44. But there is in any case no need, for the purposes of this case, to enter into these arguments.

45. In the first place, the Court of First Instance did not consider, in the judgment under appeal, the issue as to whether a situation of indirect invoicing *had arisen in the case before it.* It was entirely normal and proper for the Court of First Instance not to do so, since there is nothing on the record of

25 — The fact that the allegation of failure to take into account recital 39 to Regulation No 3319/94 pertains to the fourth ground of appeal is even made explicit in paragraphs 10 and 151 of the notice of appeal. Similarly, the fact that the allegation of failure to take into account Article 2 of the comitology decision pertains to the third ground of appeal is made explicit in paragraphs 16 and 75 of the notice of appeal.

26 — Notice of appeal, paragraphs 18, 20, 21, 38 and 39.

the case at first instance to indicate that CMF had pleaded an infringement by the Commission of the second subparagraph of Article 1(3) of Regulation No 3319/94. That issue cannot therefore be raised for the first time on appeal, where the jurisdiction of the Court of Justice is confined to review of the findings of law in relation to the pleas argued before the Court of First Instance. [27]

46. In the second place, by denying that any customs debt is due, CMF is not only raising a new argument but one which is utterly inconsistent with the subject-matter of the action for annulment brought before the Court of First Instance.

47. It has to be remembered that by the contested decisions the Commission decided on applications by CMF for remission of duties pursuant to Article 239 of the Customs Code and Article 905 of the implementing regulation.

48. But, as the Commission rightly pointed out, the sole aim of those provisions, which were conceived in the interests of fairness, [28] is to enable certain economic operators, in certain special situations and where there is no obvious negligence or deception involved, to be exempted from payment of duties due from them, not to enable them to contest the actual principle of a customs debt being due. [29] It follows that, in relation to the contested decisions, CMF could properly rely only on arguments seeking to show the existence in this case of a special situation and the absence of obvious negligence or deception on its part, and not on arguments seeking to show that the decisions of the competent national authorities requiring it to pay the duties at issue were unlawful. [30]

49. In other words, applications submitted to the Commission under Article 239 of the Customs Code in conjunction with Article 905 of the implementing regulation are unrelated to the question whether or not the provisions of substantive customs law have been correctly applied by the national customs authorities. Under Article 236 of the Customs Code such a question falls within the competence of the national customs

27 — Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59.

28 — Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraph 21, and Case C-253/99 *Bacardi* [2001] ECR I-6493, paragraph 56.

29 — See, with reference to the provision equivalent to Article 239 of the Customs Code formerly in force — Article 13(1) of Council Regulation (EEC) No 1430/79 of 2 July 1979 on the repayment or remission of import or export duties (OJ 1979 L 175, p. 1), as amended by Article 1(6) of Council Regulation (EEC) No 3069/86 of 7 October 1986 (OJ 1986 L 286, p. 1) — Joined Cases 244/85 and 245/85 *Cerealmangimi and Italgrani* v *Commission* [1987] ECR 1303, paragraph 11, and Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 43.

30 — See *Cerealmangimi and Italgrani* v *Commission*, paragraph 13, and *CT Control (Rotterdam) and JCT Benelux* v *Commission*, paragraph 44.

authorities, whose decisions may be challenged before the national courts, without prejudice to the possibility for those courts to make a reference to the Court of Justice pursuant to Article 234 EC. [31]

The alleged errors of law made in the examination as to whether essential procedural requirements had been infringed

The alleged errors of law on the part of the Court of First Instance in determining that there had been no breach of Article 7 EC or of Article 5 of the comitology decision

50. Since the making of such applications to the Commission presupposes the existence of a customs debt, [32] which CMF cannot dispute in an action for the annulment of the contested decisions, the legal arguments put forward in relation to the second ground of appeal must be dismissed for this reason also. [33]

— CMF's arguments

52. By the first two parts of this ground of appeal, which concern, respectively, the 'infringement of Article 7 EC and the issue of the illegality of the first paragraph of Article 907 of the [implementing] regulation' and the 'legal nature of the committee consulted by the Commission', CMF claims that the Court of First Instance made a series of errors in law in dismissing the part of its first ground of annulment concerning the alleged infringement of Article 7 EC and Article 5 of the comitology decision. The two parts should be considered together, in my view, since both essentially concern the issue of the procedure that the Commission ought to have followed in dealing with CMF's applications for remission of duty and accordingly the issue of whether the Commission exceeded its powers.

51. The Court's attention must therefore focus on the third and fourth grounds of appeal.

31 — As held by the Court of First Instance in Case T-195/97 *Kia Motors and Broekman Motorships* v *Commission* [1998] ECR II-2907, paragraph 36. See also *Gondrand Frères* v *Commission*, paragraph 25, and Case T-53/02 *Ricosmos* v *Commission* [2005] ECR II-3173, paragraph 165.

32 — *Gondrand Frères* v *Commission*, paragraph 25.

33 — CMF stated at the hearing that it could accept that a customs debt existed in the present case, adding that it had applied for the remission as a matter of fairness on the basis of Article 239 of the Customs Code. Incongruously, however, CMF continued at the hearing to dispute the lawfulness of the specific anti-dumping duty imposed on it, arguing that, in its opinion, there had been no indirect invoicing and that no circumvention had been found.

53. The file shows that CMF's argument before the Court of First Instance to the effect that the Commission had exceeded its powers rested essentially on the premiss that the committee that met on 12 November 2002 (see point 26 above) has to be regarded, in the light of Articles 247 and 247a of the Customs Code, as a regulatory committee within the meaning of Article 5 of the comitology decision. According to CMF, since it was the regulatory procedure governed by that article that therefore applied, the result of the vote by the representatives of the Member States at the meeting of the committee held on 12 November 2002 meant, in terms of that article, that no opinion had been delivered, in consequence of which the Commission was not free to decide by itself on CMF's applications for remission but was required to submit its legislative proposal to the Council without delay and to inform the European Parliament accordingly.

54. In its defence, however, the Commission pointed out that the first paragraph of Article 907 of the implementing regulation empowers it to decide by itself on applications for remission after consulting not a regulatory committee but a group of experts which it had freely chosen to set up, when it adopted the implementing regulation, to assist it in adopting decisions on the repayment or remission of duties.

55. CMF countered, in its reply, that the interpretation of the first paragraph of Article 907 of the implementing regulation proposed by the Commission could not be upheld since it would render the provision in question invalid. According to the Commission's own interpretation of Article 907, its adoption of that provision did not signify the adoption of a measure to implement the Customs Code, but rather the undue conferral of powers upon itself, in breach of Article 7 EC. In the alternative, if the first paragraph of Article 907 of the implementing regulation were interpreted as meaning that the group of experts mentioned there is not a regulatory committee, CMF argued — for the purposes of Article 241 EC — that the provision itself was illegal as contrary to Article 7 EC.

56. In the judgment under appeal, the Court of First Instance dismissed both CMF's main argument, as unfounded, and the plea of illegality, as inadmissible, on the grounds I have summarised in points 20 to 25 above.

57. The arguments raised by CMF in the first two parts of this ground of appeal may be summarised as follows.

58. In the first place, the Court of First Instance, by holding that the first paragraph of Article 907 of the implementing regulation allowed the Commission to decide by itself — that is, without going through the regulatory committee procedure — on appli-

cations for remission, had misinterpreted that provision and, as a consequence, wrongly decided that the contested decisions were not invalidated by any lack of competence on the part of the adopting institution. That interpretation of the provision in question was incorrect as it would render it contrary to the basic regulation (the Customs Code) and to Article 7 EC because of the lack of a legal basis.

59. In the second place, CMF argues that having interpreted the first paragraph of Article 907 of the implementing regulation to the effect that it empowered the Commission to decide on applications for remission without going through the regulatory committee procedure, the Court of First Instance had erred by failing to examine the merits of the plea alleging that that provision is illegal, being contrary to the basic regulation and to Article 7 EC.

60. On the one hand, CMF denies that the plea of illegality was raised only in the reply and argues that in any case it could properly be raised at the reply stage because of a matter of law which came to light in the course of the proceedings within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance, that matter of law being the interpretation of the first paragraph of Article 907 of the implementing regulation put forward by the Commission in the defence.

61. On the other hand, CMF argues that the Court of First Instance was wrong to hold that the question of the possible illegality of the first paragraph of Article 907 of the implementing regulation was not a matter of public policy and could not therefore be raised by the Court of its own motion. The distinction drawn by the Court of First Instance — in relation to whether matters may be raised by the Court of its own motion — between lack of legislative competence in the party that adopted the contested measure and lack of legislative competence in the party that adopted the act which constitutes the legal basis for the contested measure is artificial and wrong, and the judgment cited by the Court of First Instance in support of that distinction [34] is not only rather dated now and in any event irrelevant, since it relates to the ECSC Treaty and not to the EC Treaty, but if anything is authority for the opposite of what the Court of First Instance inferred from it.

62. In the third place, CMF argues that the Court of First Instance wrongly decided, on the assumption that the contested decisions were individual in scope and in the light of the criteria set out in the comitology decision for the choice of procedures to be followed in the exercise of the implementing powers conferred on the Commission, that the regulatory procedure could not be used in that case.

63. On that point, CMF maintains first that the Court of First Instance misinterpreted those criteria, having failed to have regard to Article 2 of the comitology decision which makes it clear that use of the regulatory

34 — *Société des fonderies de Pont-à-Mousson* v *High Authority*.

procedure is not confined solely to the adoption of measures of general scope but is possible also for the adoption of measures adapting or updating non-essential provisions of basic instruments, in other words measures which, according to CMF, are by definition not of general scope. CMF also points out that, according to the case-law of the Court of Justice, [35] the criteria set out in Article 2 of the comitology decision for the choice of procedures are not binding.

64. Secondly, CMF denies that the contested decisions are individual decisions devoid of general scope. The decisions are not wholly individual but also have general scope since they relate to a customs debt and thus directly affect the Community's own resources.

65. In the fourth place, CMF submits that Article 239 of the Customs Code, which it claims the Court of First Instance wrongly failed to take into account in its examination of the legal nature of the committee in question, makes clear that it was the intention of the Community legislature — more specifically, of the Council — that the regulatory procedure was to be required for the adoption of decisions on the repayment or remission of duties.

66. According to CMF, that is indicated by the dual reference in Article 239(1) to the 'Committee procedure' or the 'procedure of the committee' and the use, in the first and second indents respectively of that provision, of different expressions — 'to be determined' and 'shall be defined' — in relation to the situations which may give rise to repayment or remission. It is only by interpreting the first indent as referring to the taking of the decision as such and as requiring that to be done in accordance with the committee procedure that sense can be made of that dual reference, which otherwise would constitute a needless repetition by the legislature.

67. In the fifth place, CMF criticises the judgment under appeal on the ground that the Court of First Instance failed to rule on the issue raised by CMF during the course of the hearing as to the operation by the committee in question outside any budget line or, in consequence, on the issue of the non-compliance of the contested decisions with the Community budget rules. It cites case-law of the Court of Justice [36] to the effect that, in the system of the Treaty, any

35 — Case C-378/00 *Commission* v *Parliament and Council* ('*LIFE*') [2003] ECR I-937, paragraphs 43 to 48.

36 — Case C-106/96 *United Kingdom* v *Commission* [1998] ECR I-2729, paragraph 22.

implementation of expenditure by the Commission presupposes the entry of the relevant appropriation in the budget and an act of secondary legislation from which the expenditure derives.

68. In the sixth place, CMF argues that the Court of First Instance again erred in law by making no ruling as to the precise legal nature of the committee in question and thus failing to rule on the legal basis on which that committee could legitimately have been established.

— Discussion

69. Having thus identified the various arguments put forward in the first two parts of the present ground of appeal, all of which the Commission maintains are unfounded, I now turn to consider them together, leaving to last the argument concerning the failure to consider on the merits the issue of the possible illegality of the first paragraph of Article 907 of the implementing regulation.

70. Chapter 3 of the implementing regulation sets out '[s]pecific provisions relating to the application of Article 239 of the [Customs] Code'. It is common cause that this case falls within the scope of Section 2 of that chapter, which deals with '[d]ecisions to be taken by the Commission', not that of Section 1, which concerns '[d]ecisions to be taken by the customs authorities of the Member States'.

71. In accordance with Article 905(1) of the implementing regulation, the decision on CMF's applications for remission had therefore to be adopted 'under the procedure laid down in Articles 906 to 909 [of that regulation]'.

72. The second paragraph of Article 906, in the version that was in force at least up to the adoption of the contested decisions, provides, inter alia, that '[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 [Customs] Code'. Article 907 then provides that the Commission is to decide on the application for repayment or remission '[a]fter 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'.

73. CMF's argument is that the body which the Commission is required to consult under the procedure set out in Articles 906 to 909 of the implementing regulation is the committee referred to in Article 247 of the Customs Code and that this is a regulatory committee within the meaning of Article 5 of the comitology decision.

74. I would first observe, as did the Court of First Instance, that the wording of Article 907 — and in particular the phrase 'within the framework of the Committee' — already suggests that the group of experts referred to in that article is not the Customs Code Committee as such, but an entity distinct from that committee, at least in terms of its function. [37]

75. The obligation, relied upon by CMF, of construing Article 907 in a manner consistent with the basic regulation (the Customs Code) does not, in my view, lead to a different conclusion.

76. As far as Article 239 of the Customs Code is concerned, there is nothing therein to support CMF's submission that it prescribes the use of the regulatory procedure for the adoption of decisions on individual applications for repayment or remission. Although the article is not clearly drafted, it is none the less plain, to my mind, that both of the references there to the 'committee procedure' [one of those references is to the 'procedure of the committee'] relate in any case to the 'determining' or 'defining' of the 'situations' in which duties may be repaid or remitted, in other words to the determination *in the abstract* of the circumstances in which repayment or remission is permitted. Article 239 therefore, when it mentions the 'committee procedure' [or the 'procedure of the committee'], is referring, as with respect to defining 'the procedures to be followed', to an exercise of a legislative nature rather than to decision-making.

77. Nor is there in Articles 247 and 247a of the Customs Code, on a proper construction, anything to lend weight to CMF's submissions. Granted, Article 247 states that the 'measures necessary for the implementation of [the Customs Code]' are to be adopted in accordance with the regulatory procedure referred to in Article 247a(2), in other words the procedure set out in Article 5 of the comitology decision. It is also true that the phrase 'measures necessary for the implementation of [the Customs Code]' could, on a broad interpretation, be taken to cover inter alia the adoption of decisions in individual cases. It is clear from the legislative context, however, that that phrase has to be construed more narrowly, that is to say, as referring to the detailed provisions designed to complement the rules laid down in the Customs Code itself.

78. I would point out in this regard that the wording of Articles 247 and 247a of the Customs Code that is material to this case — in other words, the version in force at the time of the administrative procedure — is the result of amendments made to the Customs Code by Regulation No 2700/2000, the 14th recital to which states

37 — Judgment under appeal, paragraph 59. The reference in Article 906 to the meeting of the committee provided for in Article 247 of the Customs Code is not incompatible with that conclusion. That reference in effect concerns only a formal requirement — the inclusion of the case on the agenda for consideration — and appears to be the result of a drafting error, duly corrected by Regulation No 1335/2003 (see point 12 above).

that '[t]he measures necessary for the implementation of [the Customs Code] should be adopted in accordance with [the comitology decision]'.

79. It is therefore in the light of the comitology decision that the scope of Articles 247 and 247a has to be determined.

80. I also note that the comitology decision was adopted on the basis of the third indent of Article 202 EC, under which the Council may impose certain procedural requirements in respect of the exercise of powers for the implementation of the rules that the Council lays down, and those procedures must be consonant with the principles and rules that the Council lays down in advance (an example being the comitology decision). Those principles and rules, the Court has pointed out, may also apply to the methods for choosing between the various procedures to which the Commission's exercise of the implementing powers conferred on it may be subject. [38]

81. It is certainly true that, according to the Court, the concept of implementation for the purposes of the third indent of Article 202 EC covers both the drawing-up of implementing rules and the application of rules to specific cases by means of acts of individual application. The Court has noted in this regard that since the Treaty uses the term 'implementation' without restricting it by the addition of any further qualification, that term cannot be interpreted as excluding acts of individual application. [39]

82. It is also true that, as CMF pointed out, the Court has explained that the criteria laid down in Article 2 of the comitology decision for the choice of procedures are not binding, even though the Community legislature must give reasons for its choice if it departs from those criteria in the choice of a committee procedure. [40]

83. However, it was the Court itself which also explained that acts of individual application can be covered only by point (a) of Article 2 of the comitology decision, which provides for the use of the management procedure, while measures of general application may come under either point (a) or point (b) of that article and may therefore be adopted, as the case may be, in accordance with the management procedure or the regulatory procedure. [41]

38 — *LIFE*, paragraph 41.

39 — Case 16/88 *Commission* v *Council* [1989] ECR 3457, paragraph 11, and Case C-122/04 *Commission* v *Parliament and Council* [2006] ECR I-2001, paragraph 37.

40 — *LIFE*, paragraphs 43 to 48 and 50 to 55, and *Commission* v *Parliament and Council*, paragraph 32.

41 — *Commission* v *Parliament and Council*, paragraph 38.

84. This refutes CMF's argument that use of the regulatory procedure is not confined by Article 2 of the comitology decision solely to the adoption of measures of general scope.

85. Thus, if Article 247 of the Customs Code is to be interpreted in conformity with the comitology decision, the reference in that article to 'measures necessary for the implementation of [the Customs Code]' must be construed as a reference to measures of general scope only.

86. CMF's other argument, to the effect that the contested decisions are not measures of individual application, appears manifestly unfounded. It is quite obvious, as noted by the Commission, that those decisions concerned whether or not the conditions laid down in Article 239 of the Customs Code for remission of duties were satisfied *in a specific case relating to CMF* and are not measures applicable to objectively determined situations and vis-à-vis categories of persons viewed in a general and abstract manner. [42] The fact, argued by CMF, that the contested decisions have an impact on the Community's own resources is clearly of no relevance and does not turn those decisions into measures of general application.

87. The Court of First Instance did not err in law therefore in holding that the contested decisions were 'individual decisions and therefore ... not of general scope' and that they could not, under the comitology decision, be adopted in accordance with the regulatory procedure set out in Article 5 of that decision.

88. Articles 247 and 247a of the Customs Code, interpreted in the light of and in conformity with the comitology decision, thus offer no support for CMF's argument that in order to interpret the first paragraph of Article 907 of the implementing regulation in conformity with those higher-ranking rules of the Customs Code, the group of experts mentioned in the latter provision must be regarded as a regulatory committee within the meaning of Article 5 of the comitology decision.

89. The pleas to the effect that the Court of First Instance failed to rule, first, on the precise legal nature of the group of experts

42 — See, in relation to the concept of a measure of general application, among the many judgments in point, Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471 (see, in particular, p. 478), cited in the judgment under appeal itself at paragraph 57.

referred to in the first paragraph of Article 907 of the implementing regulation or, in consequence, on the legal basis on which that group of experts was established and, secondly, on the alleged operation of that group of experts outside any budget line should also, in my view, be dismissed.

90. In the first case, I would point out — as does the Commission — that having correctly concluded that the group of experts is not a regulatory committee within the meaning of Article 5 of the comitology decision [43] and that it is 'a distinct entity in functional terms from the Customs Code Committee', [44] the Court of First Instance was not required to specify further the legal nature of the group, given that CMF's reasoning was predicated on that group being classified as a regulatory committee. Moreover, it is made sufficiently clear in the judgment under appeal [45] that the legal basis for the establishment of the group of experts under the first paragraph of Article 907 of the implementing regulation is provided by the combined provisions of Articles 239, 247 and 247a of the Customs Code, from which it follows, in effect, that the 'procedures to be followed' for the purposes of repayment or remission under Article 239 are defined in accordance with the regulatory procedure set out in Article 5 of the comitology decision. The Court of First Instance did not even omit to point out that Article 907 of the implementing regulation was in fact approved in accordance with the above procedure, [46] a fact which was not disputed by CMF.

91. In the second case, suffice it to note, along with the Commission, that the issue as to whether the group of experts operates on a proper accounting basis has not the slightest bearing on the legality of the contested decisions, but, if anything, goes to the validity of decisions on expenditure appropriations which are not the subject of CMF's action for annulment.

92. I turn finally to the pleas concerning the failure to consider on the merits the plea of illegality entered in respect of the first paragraph of Article 907 of the implementing regulation.

93. At the outset, I would point out that the unfoundedness on the merits of that plea of illegality is already clearly evident from the above discussion, in which I have shown that the establishment of the group of experts did not lack a legal basis and was not contrary to the provisions of the Customs Code relied upon by CMF.

43 — Judgment under appeal, paragraph 58.

44 — Ibidem, paragraph 59.

45 — Ibidem, paragraph 52.

46 — Ibidem.

94. I have some doubts, however, as to whether the Court may for that reason, by substituting other grounds, [47] refrain from ruling on the plea concerning the failure to consider the plea of illegality. A substitution of grounds in the judgment on appeal would appear to presuppose a prior finding of an error in law on the part of the Court of First Instance.

95. It is therefore only in that perspective that I will now also consider the above plea, in relation to which I would make the following points.

96. First, while disputing the view of the Court of First Instance that the plea of illegality was raised only at the reply stage, CMF does not actually put forward any argument to rebut that view. CMF confines itself, in effect, to stating that the discussion as to the legality of the first paragraph of Article 907 of the implementing regulation came about as a result of the interpretation, with which CMF disagreed, given by the Commission to that provision in its defence and that that discussion would not have arisen if the interpretation given by CMF itself in its originating application had been followed. Those comments thus confirm, as a matter of fact, that the plea of illegality was indeed raised only at the reply stage. I would also note that it is in fact incorrect of CMF to state that it put forward its own interpretation of the first paragraph of Article 907 of the implementing regulation in its originating application. A simple perusal of that document reveals that the provision in question is not even mentioned there. [48]

97. Secondly, I find equally unfounded CMF's argument that the plea of illegality entered in respect of the first paragraph of Article 907 of the implementing regulation should be regarded as an issue based on a matter of law which came 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. In my view, the interpretation of the first paragraph of Article 907 of the implementing regulation set out by the Commission in the notice of defence that it lodged with the Court of First Instance cannot constitute a matter of law which came to light during the procedure, within the meaning of Article 48(2), since it did not have the effect of altering the legal

47 — According to the case-law of the Court of Justice, where the grounds of a judgment of the Court of First Instance disclose an infringement of Community law but the operative part of the judgment is shown to be well founded for other legal reasons, an appeal against that judgment must be dismissed (of the many cases in point, see Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28; Case C-320/92 P *Finsider* v *Commission* [1994] ECR I-5697, paragraph 37; and Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 58).

48 — In its notice of appeal, however, CMF does not raise the issue as to whether the plea of illegality of the first paragraph of Article 907 of the implementing regulation might be deemed admissible as merely 'amplifying a submission made previously ... in the original application', within the meaning of Case 108/81 *Amylum* v *Council* [1982] ECR 3107, paragraph 25, and Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraph 9. The Court is therefore not required to rule on the issue.

situation as it existed on the date on which the action for annulment was brought,[49] contrary to what might be concluded, for example, in the event of a supervening amendment, repeal, annulment or declaration of illegality of a measure having a bearing on the outcome of the case.

98. Thirdly, I believe, on the other hand, that the Court of First Instance did indeed err in law in holding that the issue raised by CMF as to the possible illegality of the first paragraph of Article 907 of the implementing regulation was not a matter of public policy.

99. In this regard, I first of all agree with CMF that the judgment in *Société des fonderies de Pont-à-Mousson* v *High Authority*,[50] cited as authority by the Court of First Instance, does not offer any support for its conclusion on the matter.

100. In the passage of that judgment referred to by the Court of First Instance, the Court stated that in its second submission the applicant could have attacked the individual High Authority decision affecting it only by pleading the illegality of a particular measure of general scope of which that decision was an application. The defect complained of was, if at all, to be found in that measure and not in the individual decision complained of. The Court held that, although '[t]he applicant ha[d] not expressly [pleaded illegality] and it could only with difficulty be accepted that such a complaint has been made by implication', it was nevertheless 'inappropriate to allow doubt as to the legality of [the measure of general scope] to persist, in so far as the answer to [that] question [was] relevant to [those] proceedings' and for this reason was 'of the opinion that ... the merits of the second submission must be considered'. I therefore fail to see how the Court of First Instance could have found a basis in that judgment for the view that the possible illegality of the first paragraph of Article 907 of the implementing regulation was not a matter of public policy. I would add, moreover, in order to demonstrate further the irrelevance of the precedent cited by the Court of First Instance, that in the case decided by that judgment the doubt as to the legality of the measure of general scope did not arise in relation to the legislative competence of the body which adopted the act, but in relation to other matters, concerning the act's internal legitimacy.

101. Nor does the argument that *Laboratoires Servier* v *Commission*,[51] which was relied upon by CMF at first instance, concerns the lack of competence of the institution which adopted the contested measure, not the lack of competence of the

49 — See Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17.

50 — Cited above.

51 — Case T-147/00 [2003] ECR II-85, paragraph 45.

institution which adopted the act on the basis of which the contested measure was adopted, [52] constitute a valid basis for refusing to treat as a matter of public policy the question of the possible illegality — on the ground that the Commission did not possess the requisite competence — of the first paragraph of Article 907 of the implementing regulation. There was an obligation on the Court of First Instance to state the reasons why, aside from the absence of a precedent in point, the lack of competence of the institution which adopted the act on the basis of which the contested measure was adopted cannot be regarded as a matter of public policy.

102. As regards the criteria for determining whether an issue is one of public policy, I think it appropriate to refer to those identified by Advocate General Jacobs in points 141 and 142 of his Opinion in *Salzgitter* v *Commission.* [53] According to these criteria, it must be determined:

— 'whether the rule infringed is designed to serve a fundamental objective of the Community legal order and whether it plays a significant role in the achievement of that objective'

— and 'whether the rule infringed was laid down in the interest of third parties or the public in general and not merely in the interest of the persons directly concerned'. [54]

103. As the Court of First Instance itself rightly observed in the judgment under appeal, [55] the lack of competence of the institution which adopted the contested measure must, according to the case-law, be raised by the Community judicature of its own motion. [56] That is a matter of public policy. [57] The defect in question appears to me *in principle* to satisfy both of the above criteria: the rules on competence are designed to serve a fundamental objective, or in any case a fundamental value, of the Community legal order — institutional balance — and are normally adopted in the interest of the public in general. I say *in principle* because the better approach would seem to be to consider case by case, with reference to the particular rule on competence suspected of having been infringed,

52 — Judgment under appeal, paragraph 52.

53 — Cited above.

54 — I do not believe, however, that the condition as to the breach of Community law being manifest, described in point 143 of Advocate General Jacobs's Opinion, pertains properly to the question of whether an issue is one of public policy. It is, in my view, a condition rather for the existence of an obligation on the Court to raise a matter of public policy of its own motion. See, to that effect, Vesterdorf, B., 'Le relevé d'office par le juge communautaire', in *Une Communauté de droit: Festschrift für G. C. Rodríguez Iglesias*, Nomos, 2003, p. 551, in particular pp. 560 and 561.

55 — Paragraph 52.

56 — To that effect, see Case 19/58 *Germany* v *High Authority* [1960] ECR 225, at 233; *Amylum* v *Council*, paragraph 28; *Salzgitter* v *Commission*, paragraphs 56 and 57; Joined Cases T-79/89, T-84/89 to T-86/89, T-89/89, T-91/89, T-92/89, T-94/89, T-96/89, T-98/89, T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315, paragraph 31; Case T-182/94 *Marx Esser and Del Amo Martinez* v *Parliament* [1996] ECR-SC I-A-411 and II-1197, paragraph 44; *Laboratoires Servier* v *Commission*, paragraph 45; and Case T-315/01 *Kadi* v *Council and Commission* [2005] ECR II-3649, paragraph 61.

57 — To that express effect, see the Opinion of Advocate General Lagrange in Case 66/63 *Netherlands* v *High Authority* [1964] ECR 533, at 553, and the judgments of the Court of First Instance cited in the preceding footnote.

whether the above criteria, including therefore that of the significant role of the rule in the achievement of the fundamental objective or value in question, are satisfied. [58]

104. I do not believe that, for the purposes of determining whether a plea alleging infringement of the rules on competence is one of public policy, there is any merit in the distinction, made in the judgment under appeal, between the competence of the institution which adopted the contested measure and the competence of the institution which adopted the measure implemented by the contested measure.

105. What needs to be asked in this case is instead whether the criteria stated in point 102 above are met by the rules of the Customs Code which, according to CMF, the Commission infringed by establishing, by the first paragraph of Article 907 of the implementing regulation, a procedure different to that laid down in those rules, moreover a procedure which allows the Commission to decide by itself, in a case such as this, on an application for remission of duties pursuant to Article 239 of the Customs Code and Article 905 of the implementing regulation.

106. I would point out in this regard that Articles 239, 247 and 247a of the Customs Code have to be taken into account as the rules which lay down the procedures for the exercise of the implementing powers in relation to the substantive provisions on repayment and remission of duties established by the Council in Article 239 of the Customs Code. As such, they play a significant role in maintaining the institutional balance (in relations between the Community institutions inter se and between those institutions and the Member States), that is to say, in safeguarding a fundamental value of the Community legal order, and they were certainly laid down in the interest of the public in general and not merely in the interest of the persons directly concerned.

107. The issue of the possible illegality of the first paragraph of Article 907 of the implementing regulation, which was raised out of time by CMF at first instance, is therefore, in my view — contrary to the view taken by the Court of First Instance in the judgment under appeal — a matter of public policy.

108. That does not, however, of itself mean that there was an obligation on the Court of First Instance to examine the issue of its own motion. It is my view that such an obligation arises only in particular circumstances. In particular, an obligation for the Court to raise of its own motion grounds of public

58 — The Court has held, for example, in an action between the Commission and one of its agents, that the powers of a head of department to adopt management decisions do not fall within the category of questions which the Court can raise of its own motion (Case 280/87 *Hecq* v *Commission* [1988] ECR 6433, paragraph 12).

policy can arise only in the light of the factual evidence adduced before it.[59] A requirement that the alleged breach should be manifest, meaning that the Community Court can easily detect it and identify it as such,[60] could constitute a further condition for such an obligation to arise. The question could also arise — for the purposes of identifying the circumstances in which a court is bound to raise of its own motion a matter of public policy in relation not to the contested measure itself but to the measure it implements — as to whether or not it is essential for both measures to have been adopted by the same institution, in other words, whether the institution which adopted the 'senior' act must already be a party to the proceedings as defendant.

109. It is not necessary, however, to examine the question as to whether there was an obligation on the Court of First Instance, in the circumstances of the case before it, to raise of its own motion the public policy issue as to whether the first paragraph of Article 907 of the implementing regulation was illegal on grounds of lack of competence. If the Court arrives at the conclusion — as I would propose — that the Court of First Instance erred in law in holding that the issue was not a matter of public policy, it could simply confine itself, by substituting alternative grounds, to holding that the issue was unfounded on the merits. A finding to that effect, as pointed out above, follows from the correct interpretation of the relevant rules of the Customs Code, and it is necessary in any case to arrive at that interpretation in the course of examining the other issues raised by CMF, along with the issue now under discussion, in the first two parts of the present ground of appeal.

110. I therefore take the view that, if alternative grounds are substituted in respect of the point that has just been considered, the judgment under appeal does not fall to be set aside on the strength of the first two parts of the present ground of appeal.

The alleged error of law on the part of the Court of First Instance in rejecting the plea alleging infringement of Article 4(1) of the CCC rules of procedure

111. By the third part of the present ground of appeal, CMF claims that the Court of First Instance erred in law in that, having established that the members of the group of experts had only 13 calendar days to familiarise themselves with CMF's response to the Commission's letters, it went on to rule that CMF could not successfully plead the resulting breach of Article 4(1) of the CCC rules of procedure. CMF argues that, in focusing on the fact that the provision was not one intended to ensure protection for individuals, the Court of First Instance

59 — See Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 212, and Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraph 134.

60 — Opinion of Advocate General Jacobs in *Salzgitter* v *Commission*, point 143.

disregarded the inferences to be drawn from the judgment of the Court of Justice in *Commission* v *BASF and Others*,[61] which makes it clear that rules of procedure contained in internal regulations constitute essential procedural requirements breach of which may be relied upon by the parties directly concerned by the relevant decision.

112. For my part, I would first note that in stating, at paragraph 77 of the judgment under appeal, that 'the members of the group of experts had 13 calendar days (from 6 to 18 November 2002) to familiarise themselves with CMF's response', the Court of First Instance does not make clear whether by this it means that the time-limits laid down in Article 4(1) of the CCC rules of procedure were none the less observed. Furthermore, I do not quite understand how that statement can be reconciled with the actual date on which, according to the judgment under appeal, the meeting of the group of experts took place, that is, 12 November 2002.[62]

113. However, it is not necessary to establish whether the time-limits laid down in Article 4(1) of the CCC rules of procedure were complied with in the present case (or what, in fact, the finding of the Court of First Instance was on the matter), given that the Court of First Instance based its rejection of the plea alleging breach of Article 4(1) of the CCC rules of procedure on the ground that the provision was not one that may be relied upon by individuals.

114. I agree with the Commission that this conclusion is legally correct. CMF disputes it by relying on *Commission* v *BASF and Others*, which, however, in no way implies that breach of any formal requirement laid down in the rules of procedure of an institution or of a committee means that the decision adopted is tainted with illegality which can be relied upon by individuals in court proceedings. In that judgment, the Court held that the authentication of acts referred to in the first paragraph of Article 12 of the Commission's Rules of Procedure constitutes an essential procedural requirement breach of which may provide the grounds on which an individual can bring an action for annulment, *inasmuch as it is intended to guarantee legal certainty* by ensuring that the text adopted by the College of Commissioners becomes fixed in the authentic language versions, so that, in the event of a dispute, it is possible to verify that the texts notified or published correspond precisely to that text.[63]

115. It was therefore in the light of the nature and purpose of the formal requirements infringed that the Court examined, in *Commission* v *BASF and Others*, whether those requirements were essential within the

61 — Case C-137/92 P [1994] ECR I-2555.

62 — Judgment under appeal, paragraphs 27, 37, 44 and 98.

63 — *Commission* v *BASF and Others*, paragraphs 75 and 76.

meaning of Article 230 EC and whether individuals could rely on an infringement thereof in an action for annulment.

116. In the judgment under appeal, the Court of First Instance noted that the purpose of Article 4(1) of the CCC rules of procedure is to ensure the internal working of that committee while fully respecting the prerogatives of its members and that it is not therefore intended to ensure protection for individuals. CMF does not put forward any argument in its appeal to refute that statement, apart from a vague assertion as to the 'particular importance' of compliance with the rules on consultation of the committee and the unfounded assumption that every rule of procedure amounts to an essential procedural requirement. The view expounded by the Court of First Instance is in any case in accordance with the rule — *which is to be regarded as a principle* and is certainly applicable by analogy to a committee such as the Customs Code Committee — stated by the Court of Justice in *Nakajima* v *Council*,[64] according to which, given that 'the purpose of the rules of procedure of a Community institution is to organise the internal functioning of its services in the interests of good administration', '[t]he rules laid down ... have ... as their essential purpose to ensure the smooth conduct of the procedure while fully respecting the prerogatives of each of the members of the institution' and 'are not intended to ensure protection for individuals'.

64 — Case C-69/89 [1991] ECR I-2069, paragraphs 49 and 50, expressly referred to by the Court of First Instance at paragraph 79 of the judgment under appeal.

117. The time-limits specified in Article 4(1) of the CCC rules of procedure are obviously intended to afford the committee members ample time to study the cases submitted for their consideration. It is, in my view, a matter solely for the Member States, which are represented on the committee, to assess whether or not a period of time shorter than that laid down in that provision may yet be sufficient to enable their representatives on the committee to carry out an appropriate examination of the case on which they have been called to express an opinion.

118. I therefore take the view that the Court of First Instance correctly held that CMF was not entitled to rely on the breach of the provision in question.

119. The third part of this ground of appeal must therefore also be dismissed, in my opinion.

The alleged misapplication of Article 239 of the Customs Code

120. CMF argues that the Court of First Instance erred in law in holding that the condition of no obvious negligence laid down in Article 239 of the Customs Code was not satisfied.

121. By the first part of this ground of appeal, CMF argues that the Court of First Instance misinterpreted the second subparagraph of Article 1(3) of Regulation No 3319/94 and consequently concluded that it did not involve particular difficulties of interpretation.

122. Essentially, CMF claims that, contrary to the view taken by the Court of First Instance and in line with recital 39 to Regulation No 3319/94,[65] the provision in question does not require the imposition of a specific duty in all cases of indirect invoicing because of the attendant risk of circumvention of the anti-dumping measures, but only in cases in which circumvention is found to have taken place.

123. According to CMF, the misinterpretation by the Court of First Instance of the second subparagraph of Article 1(3) of Regulation No 3319/94 also shows that, contrary to the view taken in the judgment under appeal, that provision is difficult to interpret.

124. I share the Commission's view that these pleas cannot be upheld.

125. In the first place, it must be pointed out that the alleged misinterpretation of the second subparagraph of Article 1(3) of Regulation No 3319/94 cannot be given consideration as a separate plea — for the reasons I have set out in points 45 to 50 above — but only as a point in support of the plea impugning the appraisal made by the Court of First Instance as to the degree of complexity of the provision. The latter is one of the factors which, according to the case-law, is relevant for the purposes of determining whether or not the condition of no obvious negligence within the meaning of Article 239 of the Customs Code is met.[66]

126. I am of the opinion, however, that this plea is inadmissible, on the basis that the appraisal of a provision's complexity is in the nature of a finding of fact which is not open

65 — That recital states inter alia that '... 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'.

66 — Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 56, and Case C-156/00 *Netherlands* v *Commission* [2003] ECR I-2527, paragraphs 92 to 95.

to review by the Court of Justice in an appeal against a judgment of the Court of First Instance.[67]

127. I would add, moreover, that the plea is also in any case manifestly unfounded. It rests solely on a rejection of the interpretation by the Court of First Instance of the second subparagraph of Article 1(3) of Regulation No 3319/94, an interpretation which seems to me to be absolutely correct. It is perfectly clear from a reading of the provision — even taking account of recital 39 as relied upon by CMF — that a prerequisite for the application of the specific duty imposed by that provision is the existence of indirect invoicing, but not also proof that the purpose or effect of the indirect invoicing was circumvention of the variable duty imposed by the preceding subparagraph. CMF therefore fails utterly to show that, contrary to what was held in the judgment under appeal, the second subparagraph of Article 1(3) of Regulation No 3319/94 was difficult to interpret.

128. By the second part of this ground of appeal, CMF argues, first, that the ruling by the Court of First Instance that CMF could not avoid its own liability by relying on the mistake, genuine or otherwise, of its customs agents is at variance with Community case-law, according to which customs agents have professional liability, and, secondly, that the Court of First Instance was wrong to uphold the Commission's contention that CMF possessed the requisite professional experience.

129. The relevance or otherwise, for the purposes of verifying the absence of obvious negligence within the meaning of Article 239 of the Customs Code, of a mistake made by a customs agent is a question of law which may accordingly be raised on appeal.

130. In this regard, I would point out that CMF does no more than assert that in two judgments — in *Van Gend & Loos and Bosman* v *Commission*[68] and *Mehibas Dordtselaan* v *Commission*[69] — it was stated that 'a customs agent, by the very nature of

67 — In my Opinion delivered on 11 January 2007 in Case C-282/05 P *Holcim (Deutschland)* v *Commission* [2007] ECR I-2941, point 65, I made a similar point in relation to the appraisal of the difficulty of applying or interpreting legislative provisions, which is important when seeking to establish, for the purposes of determining the non-contractual liability of the Community within the meaning of the second paragraph of Article 288 EC, whether or not an infringement of Community law by an institution is sufficiently serious. I must point out, however, that a different approach was taken by the Court in Case C-499/03 P *Biegi Nahrungsmittel and Commonfood* v *Commission* [2005] ECR I-1751 (see, in particular, paragraphs 42 to 44 and 49 to 55), in relation to the appraisal of the complexity of the relevant customs rules in the context of establishing, for the purposes of Article 220(2)(b) of the Customs Code, whether a person liable for payment acting in good faith could have detected an error made by the competent customs authority.

68 — Joined Cases 98/83 and 230/83 [1984] ECR 3763, paragraph 16.

69 — Case T-290/97 [2000] ECR II-15, paragraph 83.

his work, assumes liability for the payment of import duties and for the validity of the documents which he presents to the customs authorities'.

131. In the first place, however, the relevance of that case-law appears to me doubtful, since in the present case it was from CMF and not from its customs agents that the French customs authorities sought payment of the relevant duty. I would note, in this regard, that the facts as found in the judgment under appeal disclose that CMF's customs agents carried out the customs clearance operations *not in their own names but in the names of Agro Baltic and CMF.* [70] According to paragraph 5 of *Van Gend & Loos and Bosman* v *Commission*, however, the customs agent (who was the applicant in that case) had declared the goods with a view to putting them into free circulation *in its own name* but on behalf of another [71] and on that account the Commission had concluded that the agent had assumed an obligation to pay any import duty which might be payable in respect of the goods. [72]

132. In any event, even if it were to be assumed that the customs agent is liable for the payment of the import duties and for the veracity of the documents submitted to the customs authorities even where he has made the customs declarations not in his own name but in that of the importer, that would not of itself relieve the importer of the same liability. And it was in fact CMF's liability that the French customs authorities relied upon. Moreover, CMF has not in any way stated or implied that the French customs authorities ought to have sought payment of the specific anti-dumping duty from its customs agents. In any case, if ever such a claim were to be made, it would have to be made in the context of an action before the national courts challenging the decisions made by those authorities to charge CMF the relevant duty.

133. Since CMF puts forward no other argument, other than a brief reference to the case-law cited in point 130 above, to dispute the view taken by the Court of First Instance that CMF could not avoid its own liability by relying on the mistake, genuine or otherwise, of its customs agents, the judgment under appeal cannot be set aside in respect of that issue.

134. A further argument in favour of that conclusion, which I think it worthwhile mentioning even if it was not mentioned in the judgment under appeal, is that the third

70 — It is therefore a case of direct representation, within the meaning of Article 5(2) of the Customs Code.

71 — It was therefore a case of indirect representation, within the meaning of Article 5(2) of the Customs Code.

72 — It is not specified in *Mehibas Dordtselaan* v *Commission*, on the other hand, whether the customs agent in that case had made the customs declarations in its own name and on the importer's behalf or both in the name and on behalf of the importer. The fact remains, however, that it was from the customs agent and not from the importer that the Dutch customs authorities demanded payment of the supplementary agricultural levies of which the agent was seeking repayment under Article 13 of Regulation No 1430/79.

subparagraph of Article 905(1) of the implementing regulation states that 'the term "the person concerned"' — in other words, the person in respect of whom it has to be decided, for the purposes of Article 239 of the Customs Code and the first subparagraph of Article 905(1) of the implementing regulation, whether there was deception or obvious negligence — 'shall be interpreted in the same way as in Article 899' of that regulation. That article specifies in this regard that '"[t]he person concerned" shall mean the person or persons referred to in Article 878(1) [that is, the person who paid or is liable to pay those duties, or the persons who have taken over his rights and obligations], or their representatives, and any other person who was involved with the completion of the customs formalities relating to the goods concerned or gave the instructions necessary for the completion of these formalities'. Now that list would certainly seem to include the customs agents who completed the customs formalities for CMF. Even supposing, therefore, that, as CMF maintains, the imposition of the duty is attributable to mistakes made by its customs agents in completing those formalities, the obvious negligence on the part of those customs agents would still have the effect of precluding any entitlement to remission of duty on the part of CMF.

135. As regards the requisite professional experience, CMF claims that while it is certainly an economic operator with expertise in the import and export of nitrogenous solutions, it is definitely not a specialist in customs clearance procedures in France for such goods.

136. That criticism is also admissible on appeal as it raises, in effect, a question of law concerning the scope of the activity in relation to which the degree of professional experience of an operator seeking remission of duties under Article 239 of the Customs Code has to be appraised.

137. To me it seems obvious that the scope in question cannot be that of actual customs clearance operations, since otherwise the condition as to the operator's professional experience — which is one of the factors to be taken into account in deciding whether or not there is obvious negligence within the meaning of Article 239 of the Customs Code[73] — would be automatically satisfied by every importer who was not a customs agent.

138. The Court of First Instance was perfectly correct, therefore, and fully in line with

73 — See the case-law cited in footnote 66 above.

the judgment of the Court of Justice in *Söhl & Söhlke*, [74] in stating that it must be decided whether the economic operator concerned is one whose business activities consist mainly in import and export transactions and whether it has already gained some experience in the conduct of such transactions.

139. It seems to me, therefore, that the present plea is also unfounded.

140. By the third part of the present ground of appeal, CMF submits that the Court of First Instance was wrong in holding that CMF's conduct in the course of the transactions concerned could not be regarded as sufficiently careful.

141. The Court of First Instance based this view on an assessment of CMF's conduct as a whole, giving particular weight, on the one hand, to the fact that CMF — despite claiming to be inexperienced in customs clearance operations for the goods concerned, and alleging difficulties in applying Regulation No 3319/94 — had not only failed to seek advice from its customs agents but had actually given them very precise instructions, and, on the other hand, to the errors made by CMF in its invoices. [75]

74 — Paragraph 57.

75 — Judgment under appeal, paragraphs 143 and 144.

142. In relation to the first point, CMF submits that, contrary to the view taken by the Court of First Instance, it had indeed sought clarification as to the application of the provisions of the regulation concerned.

143. However, the arguments put forward by CMF on that point fail to show any distortion of the facts or of the clear sense of the evidence on the part of the Court of First Instance. CMF does no more than assert that by letter of 7 March 2000 it enquired of the French customs authorities whether the manner in which it was proposing to carry out customs clearance operations of the same kind as those carried out in 1997 constituted a situation of direct or indirect invoicing in terms of the second subparagraph of Article 1(3) of Regulation No 3319/94.

144. It is thus CMF itself which confirms that the operations which gave rise to the present dispute were carried out in 1997. CMF's enquiry to the French customs authorities was therefore made long after those operations took place and was even subsequent to the minutes establishing the

circumvention of duties [76] and CMF's applications for remission. [77]

145. The fact relied upon by CMF is therefore manifestly irrelevant for the purposes of determining the degree of care exercised by it in carrying out the operations which are the subject of this dispute.

146. As regards the invoice errors, CMF submits that the Court of First Instance implied, by its vague reference to such errors, that they were numerous, which was not in fact the case. It points out that there were just two errors over a total of four customs clearance operations, each of which involved three separate transactions, and that the errors related solely to Case T-134/03.

147. I would point out in this regard that the Court of First Instance in no way stated or implied that the invoice errors detected were numerous. It merely asserted, at paragraph 144 of the judgment under appeal, that 'CMF's mistakes in drawing up its invoices also suggest[ed] a lack of care on its part'.

148. CMF thus fails to show that the Court of First Instance distorted the facts or the clear sense of the evidence in this matter. As regards the significance which the Court of First Instance attached to the invoice errors in question — which even at the appeal stage CMF itself accepts were made — I would point out that this is a matter of fact within the purview of the Court of First Instance and not amenable to review by the Court of Justice on appeal.

149. In the light of the foregoing considerations, I am therefore led to conclude that CMF has failed to show any defects such as would invalidate the finding by the Court of First Instance that the Commission did not make a manifest error of assessment in the contested decisions when it found that CMF did not satisfy the condition of no obvious negligence.

150. I therefore propose that the Court reject this ground of appeal also.

76 — According to the judgment under appeal (paragraph 24), those minutes were drawn up on 13 November 1997 in respect of the operations at issue in Case T-135/03, and on 4 December 1998 in respect of the operations at issue in Case T-134/03.

77 — According to the judgment under appeal (paragraph 25), those applications were made in November and December 1999.

Costs

151. Under the first paragraph of Article 122 of the Rules of Procedure, where an appeal is unfounded the Court has to make a decision as to costs. Under Article 69(2) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for.

152. Since I am proposing to the Court that the appeal be dismissed and since the Commission sought an order as to costs against CMF, I am of the opinion that CMF should be ordered to pay the costs.

Conclusion

153. In the light of the foregoing, I propose that the Court should:

— dismiss the appeal;

— order Common Market Fertilizers SA to pay the costs.