JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

27 September 2005 *

In Joined Cases T-134/03 and T-135/03,

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

applicant,

v

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

defendant,

ACTION for annulment of Commission Decisions C (2002) 5217 final and C (2002) 5218 final of 20 December 2002 declaring the remission of import duties to be unjustified in a particular case,

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(First Chamber, Extended Composition),

composed of B. Vesterdorf, President, J.D. Cooke, R. García-Valdecasas, I. Labucka and V. Trstenjak, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 25 January 2005,

gives the following

Judgment

Legal context

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

duty imposed (OJ 1994 L 350, p. 20), establishes the following specific anti-dumping duty:

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

for the product ... certified to be produced by Zakłady Azotowe Puławy ... the specific duty [of] ECU 19 per tonne product (Taric additional code: 8795).'

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

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

3 It is apparent from Article 4(24) of the Customs Code that, in the application of that code, 'Committee procedure' means, inter alia, the procedure referred to in Articles 247 and 247a.

4 Article 247 of the Customs Code provides that '[t]he measures necessary for the implementation of this Regulation ... shall be adopted in accordance with the regulatory procedure referred to in Article 247a(2) ...'.

5 Article 247a of the Customs Code provides:

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

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply ...

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

6 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.'

7 Article 5 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23; 'the comitology decision') provides:

'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 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.

...'

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

'1. 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.

2. The case sent to the Commission shall include all the facts necessary for a full examination of the case presented. It shall also include a statement, signed by the applicant for repayment or remission, certifying that he has read the case and stating either that he has nothing to add or listing all the additional information that he considers should be included.

As soon as it receives the case the Commission shall inform the Member State concerned accordingly.

Should it be found that the information supplied by the Member State is not sufficient to enable a decision to be taken on the case concerned in full knowledge of the facts, the Commission may ask for additional information to be supplied.'

9 Article 906 of the implementing regulation provides:

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

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

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

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

11 Article 906a of the implementing regulation provides:

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

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

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

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

'Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.'

Facts of the dispute

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 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

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.

Procedure and forms of order sought

29 By applications lodged at the Registry of the Court of First Instance on 18 April 2003, the applicant brought the present proceedings.

30 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. By way of measures of organisation of procedure, the parties were asked to answer certain questions at the hearing. After hearing the parties, the Court joined Cases T-134/03 and T-135/03 for the purposes of the oral procedure and the judgment.

31 The parties submitted oral argument and answered the questions put by the Court at the hearing on 25 January 2005.

32 The applicant claims that the Court should:

— annul the contested decisions;

— order the Commission to pay the costs.

33 The Commission contends that the Court should:

— dismiss the actions;

— order the applicant to pay the costs.

Law

34 The applicant relies on three pleas in law in support of its applications: infringement of essential procedural requirements and the rights of the defence, manifest error of assessment in the application of Article 239 of the Customs Code, and infringement of the duty to state reasons.

First plea: infringement of essential procedural requirements and the rights of the defence

35 This plea is divided into five parts relating to the infringement of (1) Article 7 EC and Article 5 of the comitology decision; (2) the first paragraph of Article 906 of the implementation regulation; (3) Article 4(1) of the rules of procedure of the Customs Code Committee; (4) Article 3 of Regulation No 1; and (5) the rights of the defence.

First part of the first plea: infringement of Article 7 EC and Article 5 of the comitology decision

— Arguments of the parties

36 The applicant argues in essence that the measures required in order to implement the Customs Code, in particular Article 239, are, pursuant to Article 247 of the code, to be adopted in accordance with the regulatory procedure referred to in Article 247a(2). It notes that Article 247a(2) states that the Commission is to be assisted by the Customs Code Committee and refers specifically to Article 5 of the comitology decision concerning the regulatory committee.

37 The applicant submits that the 'committee' which met on 12 November 2002 (see paragraph 27 above) must have been a regulatory committee within the meaning of Article 5 of the comitology decision.

38 It goes on to state that application to the vote of the 'committee' of the weighting laid down in Article 205 EC prevented the Commission's proposal from reaching the qualified majority of 62 votes required.

39 The applicant therefore takes the view that no opinion was delivered by the 'committee' within the meaning of Article 5(4) of the comitology decision and that the Commission should therefore have submitted its proposal to the Council without delay and informed the European Parliament, which it had failed to do. By nevertheless adopting the contested decisions, the Commission thus exceeded its authority in breach of Article 7 EC and Article 5 of the comitology decision. Therefore, the contested decisions are substantially defective.

40 In response to the Commission's contention (see paragraph 45 below) that the 'committee' in question is in fact a group of experts which it set up for itself by adopting Article 907 of the implementing regulation, the applicant counters that, in adopting Article 907, the Commission did not adopt a measure to implement the Customs Code but usurped authority in breach of Article 7 EC.

41 The applicant adds that the Commission's arguments should be dismissed, as they have the effect of rendering the first paragraph of Article 907 of the implementing regulation unlawful for want of legal basis. Should the Court accept the Commission's arguments, the applicant pleads in its reply, pursuant to Article 241 EC, that the first paragraph of Article 907 of the implementing regulation is unlawful. The applicant also refers to Case T-147/00 *Laboratoires Servier* v *Commission* [2003] ECR II-85, paragraph 45, which says that 'according to well-established case-law, the lack of competence of the institution which has adopted the contested measure constitutes a ground for annulment for reasons of public policy, which must be raised by the Community judicature of its own motion'.

42 For the sake of completeness, the applicant claims that the wording of the first paragraph of Article 907 of the implementing regulation, which provides for the meeting of the group of experts within the framework 'of the Committee', not 'of a committee', adds weight to the argument that the committee in question is to be interpreted as the only committee referred to in the implementing regulation, that is, the one referred to in the second paragraph of Article 906 of the implementing regulation, namely the regulatory committee provided for in Article 247 of the Customs Code. The applicant claims furthermore that if the Commission's interpretation is right, the procedure laid down in the second paragraph of Article 906 of the implementing regulation, the effect of which is that the committee provided for in Article 247 of the Customs Code meets before the adoption of any Commission decision concerning the repayment and remission of duties, was not complied with. Thus, the second paragraph of Article 906 of the implementing regulation was infringed.

43 That argument is not undermined by the new wording of the second paragraph of Article 906 of the implementing regulation (see paragraph 10 above), in which the

term 'of the Committee' was replaced by 'the group of experts provided for in Article 907', because that amendment occurred after the meeting of the 'committee' concerned in the present case.

44 Finally, the applicant points to the fact that, following the committee's vote on 12 November 2002, the Commission proceeded on its own initiative to count the votes on the basis of the weighting provided for in Article 205 EC as showing that the 'committee' in question is indeed a regulatory committee within the meaning of Article 5 of the comitology decision. In response to the Commission's claim that the group of experts is distinct from the Customs Code Committee — although linked to it —, as it meets within the framework of that committee under Article 907 of the implementing regulation (see paragraph 49 below), the applicant argues that that group of experts does not have its own budget line, that its composition is identical to that of the Customs Code Committee, and that there is no reference to it in the agenda provisions of the rules of procedure of the Customs Code Committee.

45 The Commission takes the view that the applicant is wrong to classify the group of experts as a regulatory committee within the meaning of Article 5 of the comitology decision. It explains that the group of experts is not a regulatory committee, nor indeed any committee governed by the comitology decision. It is in fact a group of experts which the Commission set up by adopting the first paragraph of Article 907 of the implementing regulation, that being the only provision which governs its legal status, its authority and its operation.

46 The Commission goes on to explain that it is not required by Article 239 of the Customs Code to determine individual cases of remission or repayment with the assistance of the committee provided for in Article 247 of the Customs Code, but that Article 239 refers to 'situations' and 'procedures'. Thus Article 239 of the Customs Code makes the Commission responsible for adopting 'the procedures' in accordance with the committee procedure laid down in Article 247 of the Customs Code.

47 The Commission established precisely those situations and procedures in Article 905 et seq. of the implementing regulation, in accordance with the procedure laid down in Article 247 of the Customs Code, by providing that certain individual applications for remission or repayment are to be determined by the Commission.

48 As a result it is neither necessary nor logical that the group of experts mentioned in Article 907 of the implementing regulation should be a regulatory committee within the meaning of the comitology decision, since the group's function is to give the Commission an opinion on proposals for individual decisions as to remission or repayment, as in the present case, rather than on amendments to customs legislation.

49 According to the Commission, the group of experts meets, in accordance with Article 907 of the implementing regulation, within the committee to which it is linked. That means that the composition of the group of experts is the same as that of the Customs Code Committee but that it has different functions. Individual repayment or remission cases are passed to the committee for consideration in its capacity as a group of experts under the first paragraph of Article 907 of the implementing regulation. The Commission argues that the system whereby groups of experts operate with their own rules within committees within the meaning of the comitology decision has worked for many years in numerous areas of Community activity, albeit that it is in the process of necessary rationalisation. It claims that the inconsistencies noted by the applicant (paragraph 44 above) are not capable of calling into question the role and nature of the group of experts.

50 The Commission therefore submits that the vote-counting rules in Article 205 EC which are peculiar to the regulatory procedure do not apply in the present case. The fact that the votes of the group of experts are weighted should not give rise to any error or misunderstanding about the legal nature and status of the group of experts within the committee. The Commission notes that a majority of the Member States' representatives in the group of experts declared themselves to be in favour of its proposal, so that an opinion had indeed been given by that group. It adds that that opinion is purely advisory in any event, and not binding on the Commission.

— Findings of the Court

51 As regards, first of all, the plea of illegality put forward by the applicant, it must be noted that it was pleaded only in the reply. The Court of Justice has ruled that the action is defined by the application initiating proceedings, and that a plea of illegality is inadmissible at the stage of the reply (Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523, paragraphs 36 and 37). Furthermore, the plea of illegality is 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.

52 The Court cannot of its own motion raise the question of the possible illegality of the first paragraph of Article 907 of the implementing regulation. Such an illegality is not a matter of public policy (see, to that effect, Case 14/59 *Société des fonderies de Pont-à-Mousson* v *High Authority* [1959] ECR 215, at 230). The Court must, as the applicant points out in its reply, indeed establish of its own motion any lack of competence by the party adopting the contested measure. However there is no doubt in the present case that the Commission acted within its powers when it adopted the contested decisions. They were taken on the basis of the first paragraph of Article 907 of the implementing regulation, which was in turn adopted in accordance with the opinion of the Customs Code Committee in conformity with the procedure laid down in Articles 239, 247 and 247a of the code. Furthermore, it does not follow from the case-law that the Court must of its own motion consider whether the Commission exceeded its authority by adopting the substance of the first paragraph of Article 907 of the implementing regulation, the legal basis for the contested decisions. In that regard, *Laboratoires Servier* v *Commission*, cited in paragraph 41 above, on which the applicant relies, cannot be of any assistance to the applicant, in that it concerns the lack of competence of the institution which adopted the contested measure and not the lack of competence of the institution which adopted the act on the basis of which the contested measure was taken.

53 In the light of the above, the applicant's plea of illegality must be dismissed as inadmissible.

54 Next it is necessary to consider whether or not 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.

55 In that regard, it must be noted that it follows from the seventh recital in the preamble to and Article 5 of the comitology decision that the regulatory procedure is to be used for 'measures of general scope designed to apply essential provisions of basic instruments'.

56 It is common ground that the contested decisions are individual decisions and therefore that they are not of general scope.

57 To consider, as the applicant does, that the regulatory committee within the meaning of Article 5 of the comitology decision is empowered to give an opinion on a proposal for an individual decision as to repayment or remission of customs duties would amount purely and simply to conflating the notions of decision and measure of general scope, which are however fundamentally distinct according to Article 249 EC and the case-law (see, to that effect, Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs de fruits et légumes and Others* v *Council* [1962] ECR 471), and would therefore be in breach of Article 249 EC as well as of Article 7 EC and the comitology decision.

58 That ground alone is sufficient for the Court to conclude that the group of experts referred to in Article 907 of the implementing regulation is not a regulatory committee within the meaning of Article 5 of the comitology decision.

59 That conclusion is supported by the wording of 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 a distinct entity in functional terms from the Customs Code Committee. 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'.

60 It follows that the first part of the first plea must be rejected.

Second part of the first plea: infringement of the first paragraph of Article 906 of the implementing regulation

— Arguments of the parties

61 The applicant claims that the Commission committed a substantial breach of the procedural rules laid down by the first paragraph of Article 906 of the implementing regulation in omitting to send the Member States a copy of the cases transmitted by the French customs authorities within 15 days of their receipt by the Commission. It claims that the cases in question were transmitted to the Member States only a few days before the meeting of the group of experts mentioned in paragraph 27 above, several months after the expiry of the time-limit laid down in the first paragraph of Article 906 of the implementing regulation.

62 The Commission claims in essence that, for the purposes of applying the first paragraph of Article 906 of the implementing regulation, the applicant incorrectly

conflates the application for remission, which was transmitted to the Commission by the French customs authorities, with the Commission's proposal for a negative decision. It claims, with supporting evidence, to have sent the application, which it received on 14 February 2002, to the Member States on 28 February 2002. Accordingly, the procedural defect alleged by the applicant has not been established.

63 The Commission adds that even if the procedural defect were established, it cannot in any event be described as 'substantial', that is to say, as having influenced the contested decisions and necessarily leading to their annulment.

64 Moreover, the Commission seriously doubts whether an economic operator can validly invoke a breach of Article 906 of the implementing regulation for the purpose of having the contested decisions annulled. It observes that that article is intended to ensure that Member States are informed promptly so that they can prepare to contribute to the decision-making process. So, while it creates a positive right as regards the Member States, Article 906 does not introduce any such right for the benefit of private persons.

— Findings of the Court

65 It must be pointed out that the applicant, who failed to respond in its reply to the arguments put forward by the Commission in its defence, has failed to establish that the Commission did not send the Member States in its letter of 28 February 2002 the whole of the case mentioned in the first paragraph of Article 906 and referred to in Article 905(2) of the implementing regulation, or consequently that the Member States were inadequately informed. It is apparent from the minutes of the meeting of the group of experts referred to in paragraph 27 above that there was consultation on the key points of the application for repayment. Those minutes also show that the applicant's lawyers forwarded documents directly to all the Member States'

representatives within the group of experts. Accordingly, the applicant has failed to establish an infringement of Article 906 of the implementing regulation. In any event, the applicant has not shown that the alleged omission influenced the contested decisions.

66 It follows that the second part of the first plea must be rejected.

Third part of the first plea: infringement of Article 4(1) of the rules of procedure of the Customs Code Committee

— Arguments of the parties

67 The applicant claims that the contested decisions are vitiated by a substantial procedural defect in that they were taken in breach of Article 4(1) of the rules of procedure of the Customs Code Committee, which provides that 'any other working documents' must, as a general rule, be sent no later than 14 calendar days before the date of the Committee's meeting.

68 It is clear from the direct contacts between the applicant's lawyers and the Member States' representatives within the group of experts that those representatives were sent the applicant's reply of 11 October 2002 to the Commission's letters of 9 and 10 September 2002 referred to in paragraph 26 above only seven calendar days before the meeting. The additional time which the members of the group of experts were given before proceeding to a vote extended that period to 11 days, which is less than the period of 14 days laid down in Article 4(1) of the Customs Code Committee's rules of procedure. The applicant argues that the Commission's delay in forwarding

the applicant's arguments in response to the letters of 9 and 10 September 2002 constitutes an infringement of the rights of the defence, as a result of which the applicant is entitled to rely on a breach of Article 4(1) of the Customs Code Committee's rules of procedure.

69 In support of its case, the applicant refers to Case C-263/95 *Germany* v *Commission* [1998] ECR I-441, paragraphs 31 and 32, in which the Court of Justice held that the time-limit for sending a case in the context of proceedings before a regulatory committee could not be shortened, and ruled that the failure to observe that time-limit constituted an infringement of essential procedural requirements, leading to the annulment of the decision taken by the Commission. In response to the Commission's objection (see paragraph 72 below) that that judgment is not relevant to the present case because it was delivered on the application of a Member State whose rights had been infringed, the applicant states that the judgment does not specifically preclude legal persons from adducing infringements committed during the consultation of the committee concerned.

70 In response to the Commission's argument that an operator cannot validly rely on breach of Article 4 of the Customs Code Committee's rules of procedure (see paragraph 73 below), the applicant cites Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555.

71 In response to the Commission's claim that, in any event, the time-limits laid down in Articles 4(2) and 4(3) of the Customs Code Committee's rules of procedure were observed, taking into account the urgency in the present cases (paragraph 75 below), the applicant states that there was no urgency. It argues that the Commission's argument is contradicted by the fact that, despite the alleged urgency, the Commission gave the members of the group of experts additional time to take a view on the Commission's proposal for a negative decision even though that proposal had been sent within the prescribed time-limits.

72 The Commission claims that the applicant's reference to *Germany* v *Commission*, cited in paragraph 69 above, is irrelevant to the present case. It notes that in that case the applicant was a Member State which had been unable to exercise its powers within the committee because of the delay in sending documents. In the present cases, on the other hand, a delay — if established — in sending documents to the group of experts did not affect the applicant's rights.

73 The Commission is doubtful moreover whether an economic operator can validly plead a breach of an internal rule (such as that in Article 4(1) of the Customs Code Committee's rules of procedure) in order to substantiate an application for annulment of decisions such as the contested decisions. It relies in that respect on Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraphs 49 to 51. The Commission adds in its rejoinder that the applicant cannot rely to any purpose on *Commission* v *BASF*, cited in paragraph 70 above, since, by contrast with the provision allegedly infringed in the case in which that judgment was given, Article 4 (1) of the Customs Code Committee's rules of procedure is not intended to protect the rights of undertakings.

74 The Commission goes on to argue that the crucial document for the purpose of applying Article 4 of the Customs Code Committee's rules of procedure, namely its proposal for a negative decision, was sent to the members of the group of experts within the prescribed period. Those members were also sent, as early as 23 September 2002, the 'rights of the defence' letters sent to the applicant on 9 and 10 September 2002.

75 Furthermore, even if the view were to be taken that the period of 14 calendar days laid down in Article 4(1) of the Customs Code Committee's rules of procedure was not observed, that period applies as a general rule but may be shortened in urgent cases, pursuant to Article 4(2) and (3) of those rules of procedure. There was urgency in the present case because the Commission had to take the contested decisions within the period prescribed by the second paragraph of Article 907 of the

implementing regulation, since a failure to respond within that period would have meant that the applicant's request would have been approved.

76 In addition, the applicant does not show how its rights were affected by the delayed transmission of its letter of 11 October 2002. Accordingly, there was no infringement of Article 4(1) of the Customs Code Committee's rules of procedure.

— Findings of the Court

77 Without there being any need to rule on whether the applicant's response of 11 October 2002 to the Commission's letters of 9 and 10 September 2002 constitutes a working document within the meaning of Article 4(1) of the Customs Code Committee's rules of procedure, or whether there was a case of urgency within the meaning of Article 4(2) and (3), it must be observed that it is clear from the case-file that the members of the group of experts had 13 calendar days (from 6 to 18 November 2002) to familiarise themselves with the applicant's response.

78 As regards *Germany* v *Commission*, cited in paragraph 69 above, on which the applicant relies, it is sufficient to observe that as the group of experts is not a regulatory committee, the conclusion reached in that judgment cannot apply in the present cases.

79 Moreover, it must be noted that the purpose of Article 4(1) of the Customs Code Committee's rules of procedure is to ensure the internal working of that committee while fully respecting the prerogatives of its members. It follows that natural or legal

persons may not rely on an alleged breach of that rule, since it is not intended to ensure protection for individuals (see, to that effect, *Nakajima*, cited in paragraph 73 above, paragraphs 49 to 51). As the applicant is a third party, unlike Germany in *Germany* v *Commission*, cited in paragraph 69 above, the conclusions reached in that judgment cannot apply to the present case for that reason also.

80 It follows that the third part of the first plea must also be rejected.

Fourth part of the first plea: infringement of Article 3 of Regulation No 1

— Arguments of the parties

81 The applicant argues that certain Member States' representatives within the group of experts did not receive copies of certain documents from the Commission file in their own language. That is particularly regrettable given the complexity and technical nature of the documents in the present case, as well as the short time which the Member States' representatives were given to study them. The applicant observes in that regard that certain representatives of the Member States complained that they had not received the documents in question in their own language. Accordingly, the contested decisions were adopted in breach of Article 3 of Regulation No 1 and thus of an essential procedural requirement.

82 In its reply, the applicant argues that the Commission's approach, set out in paragraph 85 below, implies that any judicial control is precluded where the breach of the rule in question is not raised by a Member State.

83 The Commission states that it is the administrative practice of the group of experts (which it points out has not been given a legislative function) to send the 'rights of the defence' letter (referred to in paragraph 26 above) to the Member States' representatives in their own language, other documents being sent in French and English.

84 The Commission then submits that the applicant does not show how that practice affects its own legal position. The Commission concedes that that practice could affect the rights of the Member States to whom the documents in question are addressed, but submits that, in such a case, it is for the Member States to assert their rights.

85 Accordingly an individual cannot validly rely on the infringement of a Member State's right where that Member State has not made any complaint. In the present case, the process did not elicit any challenge by the representatives of the Member States, nor any request for a translation.

— Findings of the Court

86 The purpose of Article 3 of Regulation No 1 is to ensure that documents which are addressed by an institution to a Member State or to a person falling within the jurisdiction of a Member State are drafted in the language of that State. In the present case, it was not the applicant who was sent the relevant documents from the Commission's file but the Member States' representatives comprising the group of experts referred to in Article 907 of the implementing regulation. Therefore, as the purpose of that provision in this instance is not to safeguard the rights of the applicant or its own legal position in the administrative procedure for remission of import duties, the applicant cannot rely on an alleged breach of that rule.

87 In addition, and in any event, the applicant did not produce evidence that any of the members of the group of experts had difficulty contributing to the drafting of that group's opinion because a particular language version of one of the documents sent by the Commission was not available. First, the applicant's evidence in that regard is confined to a statement drawn up and signed by the applicant itself. Second, the information contained in the file as a whole does not permit such a conclusion to be drawn.

88 It follows that the fourth part of the first plea must also be rejected.

Fifth part of the first plea: infringement of the rights of the defence

— Arguments of the parties

89 The applicant claims that the Commission did not respect the rights of the defence in that it did not grant the applicant a hearing or provide the applicant with easy and the widest possible access to the documents requested.

90 First, as regards the hearing, the applicant states that it asked the Commission on 2 October 2002 for an oral hearing regarding the present cases. That request was refused by letter of 8 October 2002 on the grounds that the applicable procedure under Article 906a of the implementing regulation provided that the party concerned was to express his point of view in writing, and that the applicant had had three meetings with the Commission before the initial application for remission was lodged. In addition, the Commission emphasised in the contested decisions that the applicant had not proved that its point of view could be expressed only orally.

91 The applicant submits that the Commission's refusal constitutes an infringement of the right to be heard and a manifest error of assessment.

92 The applicant notes that, according to settled case-law, respect for the rights of the defence in any proceedings which are initiated against a person and which are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed even in the absence of any specific rules governing the procedure in question (Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraph 44; Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraph 39; Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21; and Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others* v *Commission* [2001] ECR II-1337, paragraph 151). The applicant goes on to state that the Court of Justice has consistently recognised the principle of the right to an oral procedure (audi alteram partem) as an essential procedural rule, in particular in relation to administrative procedures (Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063; Case 85/76 *Hoffman-La Roche* v *Commission* [1979] ECR 461; and Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033). It adds that in view of the margin of assessment enjoyed by the Commission when it adopts a decision pursuant to the general equitable provision contained in Article 239 of the Customs Code, it is all the more important that observance of the right to be heard be guaranteed (Case T-346/94 *France-aviation* v *Commission* [1995] ECR II-2841, paragraph 34; Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraph 77; Case T-50/96 *Primex Produkte Import-Export and Others* v *Commission* [1998] ECR II-3773, paragraph 60; Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 46; and *Kaufring,* cited above, paragraph 152).

93 Therefore the applicant submits in essence that the right to be heard must be interpreted broadly, that is, that it has a right to be heard both in writing and orally. The fact that the implementing regulation provides only for a written procedure in Article 906a does not mean that an oral procedure is expressly ruled out. The

applicant points in that regard to the areas of competition law and anti-dumping law, both of which include provision for written and oral procedures. It adds that in the area of State aid the principle of an oral hearing has been accepted in the case-law, notwithstanding the absence of formal provision for it in the rules.

94 The applicant claims that, according to the case-law of the Court of Justice, the person concerned must be enabled effectively to make known his point of view during the administrative procedure (Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 12). In practice the result is that the person concerned has the opportunity to be heard orally. In the same way Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms should be given a broad interpretation, as including the right to be heard not only in writing, but also orally.

95 In those circumstances, the applicant submits that by refusing its request to be heard orally on the ground that it had not proved that its point of view would have been better expressed orally, the Commission disregarded the abovementioned case-law, and did so without any justification. The applicant maintains further that it is not for the applicant to produce such proof.

96 Lastly, the applicant suggests that the only relevant question is whether, during the procedure, it was in a position effectively to make known its point of view in response to the Commission's complaints. That was not the case. The applicant states that it did indeed have meetings with the Commission on three occasions, but those discussions took place long before the application for remission was passed to the Commission and with different officials. In addition, the applicant was not yet aware in those discussions of any of the arguments raised by the Commission, for the simple reason that the procedure before the Commission itself had not yet been started. Above all, the applicant submits that it was not possible for certain essential points to be clarified just through the written exchanges between the applicant and the French authorities and the Commission. Those points could have been dealt with in a more direct and dynamic procedure, such as a hearing by the Commission,

which would have enabled the rights of the defence to be upheld. By way of example, the applicant states that in Case T-134/03 it was not able through written statements alone to remove the doubts of the French customs authorities as to the fact that a technical error had been made by Cogema, those doubts having led the authorities to conclude that there was no special situation. In Case T-135/03, the Commission essentially failed to deal with the issue of whether or not the applicant had circumvented the anti-dumping legislation, although that was crucial for establishing whether there might be a special situation for the purposes of Article 239 of the Customs Code.

97 Second, as regards access to the file, the applicant refers to Article 1 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) and alleges that its legitimate request for access to certain documents was granted by the Commission only with difficulty and only in part by the day the applications were lodged.

98 More specifically, the applicant states that on 23 January 2003 it asked the Commission for access to the report of the group of experts' meeting of 12 November 2002, and then had to rephrase its request on 24 February and 20 March 2003 because the information imparted by the Commission by letter of 3 February 2003 was extremely brief.

99 First, as regards the hearing, the Commission submits that the applicant was fully able to make known its point of view, as evidenced by its comprehensive and detailed responses of 11 October 2002 in case REM 02/02. The Commission points out moreover that it displayed considerable openness in meeting with the applicant on three occasions. It claims further that the applicant's arguments might have some relevance if the applicant could show that it had not been in a position effectively to

make known its point of view. The applicant had completely failed to show that having to rely on written statements alone had reduced the effectiveness of its defence.

100 The Commission goes on to claim that the case-law cited by the applicant concerns a situation that preceded the entry into force of Regulation No 1677/98, which inserted inter alia a new Article 906a into the implementing regulation providing that the applicant for repayment or remission is to communicate its objections to the Commission in writing where the Commission intends to take an unfavourable decision.

101 The Commission notes that those new provisions were applied in *Kaufring*, cited in paragraph 92 above. It emphasises that the Court did not annul the Commission's decision in that case on the ground that there was no hearing, and that it regarded as sufficient the possibility given in Article 906a of the implementing regulation of submitting observations in writing.

102 Second, as regards access to the file, the Commission submits that the applicant's arguments are immaterial. It states that it sent the applicant all the documents requested. The Commission goes on to note that as far as concerns the only document to which the applicant did not have immediate access, namely the report of the group of experts' meeting, the relevant request for access was made on 23 January 2003, after the date on which the contested decisions were adopted. Accordingly, even assuming that access to the file was refused, which is not the case, that refusal is inherently incapable of affecting the validity of the contested decisions.

103 For the sake of completeness, the Commission argues that the delay recorded in forwarding that report was justified in the light of Regulation No 1049/2001. The document in question contained sensitive information connected to commercial interests and the applicant's lawyer did not immediately provide proof of his authority to act when lodging the request for access.

104 Finally, the Commission emphasises that the applicant does not rely on an infringement of Article 906a of the implementing regulation.

— Findings of the Court

105 It must be pointed out at the outset that the principle of observance of the rights of the defence requires that any person who may be adversely affected by a decision must be placed in a position in which he may effectively make his views known, at least as regards the evidence on which the Commission has based its decision (see, to that effect, *Fiskano*, cited in paragraph 92 above, paragraph 40; *Lisrestal*, cited in paragraph 92 above, paragraph 21; and *Kaufring*, cited in paragraph 92 above, paragraph 153).

106 Where decisions are taken by the Commission pursuant to Article 239 of the Customs Code, the procedure provided for in Article 906a of the implementing regulation (see paragraph 11 above) ensures that the rights of the defence of the applicant for remission are observed.

107 In the present case, that procedure was followed by means of a 10-page memorandum annexed to the letter of 9 September 2002 (see paragraph 26 above)

explaining the factual and legal elements on which the Commission's intention to take a negative decision in cases REM 02/02 and REM 03/02 was based. Moreover, the applicant exercised its right to make known its point of view on the Commission's objections by sending the letter of 11 October 2002 comprising 24 pages supplemented by 14 annexes in case REM 02/02, and 21 pages supplemented by 10 annexes in case REM 03/02, in which it expounded its comments and arguments.

108 As regards, first, the refusal of the applicant's request to be given a hearing, it is sufficient to state that neither the specific provision concerning the administrative procedure in question, namely Article 906a of the implementing regulation, nor the general principle of observance of the rights of the defence gives the applicant for remission the right to such a hearing.

109 Furthermore, the specific nature of the decision taken by the Commission pursuant to Article 239 of the Customs Code does not make it at all necessary for the applicant for remission to be given the opportunity to express his observations orally in addition to the written submission of his point of view.

110 The Court therefore considers that by its detailed letter of 11 October 2002 the applicant made full use of its opportunity to express its point of view to the Commission. That finding is not affected by the examples which the applicant puts forward (see paragraph 96 above) in support of the contrary argument, as those examples do not reveal anything that the applicant could not have argued in writing.

111 Second, as regards access to the case-file, it must be stated, as the Commission rightly observes, that the request for access was made after the adoption of the contested decisions, while the present actions were in preparation. So, even if the infringement of Regulation No 1049/2001 alleged by the applicant were established, it could not affect the validity of the contested decisions, which must be assessed as at the date of their adoption. Furthermore, the Court notes that the applicant has failed to show that it did not have access to the documents requested. The Commission supplied the full text of the report of the group of experts' meeting.

112 It follows that both limbs of the fifth part of the first plea must be rejected.

113 As none of the five parts of the first plea has been upheld, the plea must be rejected.

Second plea: manifest error of assessment in the application of Article 239 of the Customs Code

114 The second plea alleges that the Commission committed a manifest error of assessment in taking the view that the conditions for the application of Article 239 of the Customs Code had not been fulfilled. It is set out in three parts. The first part relates to the Commission's refusal to acknowledge the existence of a special situation. The second part relates to the applicant's lack of deception. The third part relates to the Commission's refusal to find that there was no obvious negligence on the part of the applicant.

115 It is common ground that the applicant did not practise any deception, which means that there is no need to consider the second part. The third part, relating to the alleged absence of negligence on the part of the applicant, should be considered first.

Arguments of the parties

116 The applicant notes that one of the cumulative conditions for the application of Article 239 of the Customs Code is the absence of obvious negligence of the trader. It adds that, according to the case-law (*Kaufring*, cited in paragraph 92 above, paragraph 278), obvious negligence corresponds to the detectability of the error for the purposes of Article 220(2) of the Customs Code.

117 In order to assess the detectability of the error for the purposes of that provision, regard must be had in particular to the precise nature of the error, the professional experience of the operator concerned and the degree of care which he exercised (Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535, paragraph 24; Case C-371/90 *Beirafio* [1992] ECR I-2715, paragraph 21; Case C-187/91 *Belovo* [1992] ECR I-4937, paragraph 17; and Case C-250/91 *Hewlett Packard France* [1993] ECR I-1819, paragraph 22). That assessment must be made in the light of the particular circumstances of the case (Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465, paragraph 101).

118 In the light of those principles, the applicant submits that the Commission committed a manifest error of assessment in taking the view that the condition relating to the absence of obvious negligence was not fulfilled in the present case.

119 First, as regards the precise nature of the error, this should be assessed, according to the case-law, with regard inter alia to the length of time for which the relevant authorities persisted in the error.

120 According to the applicant, the Commission wrongly dismissed the criterion of length of time by considering solely, and then denying, the possibility of error on the part of the customs authorities. Rather, in the present cases the errors of the customs agent should have been considered: in Case T-134/03, Cogema's fictitious warehousing of the goods and, in Case T-135/03, SCAC's failure to comply with the instructions which it was given, instead selecting a simplified customs clearing procedure.

121 The applicant claims that in spite of its professional experience and the care exercised, it could neither foresee nor detect the mistakes of the customs agents.

122 Second, as regards the professional experience of the economic operator, the applicant states that, according to Case C-48/98 *Söhl & Söhlke* [1999] ECR I-7877, paragraph 57, it is necessary to examine whether that operator's activities consist mainly in import and export transactions and whether he has previous experience in the conduct of such transactions.

123 The applicant submits that it frequently imports goods covered by Regulation No 3319/94. That does not mean that it is a specialist in the procedures for clearing those goods through French customs. That is precisely why it instructed an authorised customs agent and why it was not in a position to detect the mistake made by the agent.

124 Third, as regards the care taken by the applicant, it states that, according to *Söhl & Söhlke*, cited in paragraph 122 above (paragraph 58), where an operator is doubtful as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, he must make inquiries and seek all possible clarification to ensure that he does not infringe those provisions.

125 In the present cases, the applicant demonstrated all the necessary care. Following adoption of the regulation, it first of all amended the clearing procedure which had been used until then, so as not to be invoiced indirectly. The applicant goes on to claim that the isolated and minor invoicing errors identified by the Commission are within normal commercial parameters, and that no negligence can be attributed to the applicant as those errors have been rectified.

126 In its reply, the applicant argues that there is no connection, having regard to established case-law (see paragraph 124 above), between the supposed impracticability of the instructions which it gave to Cogema and to SCAC and the fact that it did not avail itself of the opportunity for repayment provided by Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended, and the demonstration of alleged lack of care.

127 Therefore, according to the applicant, it cannot be accused of any lack of care. It follows that no obvious negligence can be attributed to it.

128 The Commission points out, as regards, first, the precise nature of the mistake, that the applicant's arguments in mitigation of its own liability on the basis of the mistake allegedly made by the customs agent are ineffective. In the context of a remission procedure, an operator cannot be absolved of liability because of a mistake, genuine or otherwise, by his agent. The latter's potential contractual liability falls outside the procedure which led to the adoption of the contested decision.

129 Furthermore, the Commission claims that the applicant is confusing the agent's mistake with that of the customs authority; it is only the latter that is liable to contribute to the creation of a special situation.

130 Second, as regards the applicant's professional experience, the Commission argues first of all that its professional experience should not be assessed in terms of a single Member State. In the light of the case-law, for the applicant to be regarded as having the requisite professional experience, it is sufficient for it to have carried out some import transactions in respect of the same goods as those in question within the European Union, and for it generally to be involved in import and export transactions. That is the case here, all the more so given that the applicant has acquired its tax representative in France, Champagne Fertilisants, so that the applicant must, from the very first delivery of the goods in question, be regarded as an experienced economic operator.

131 The Commission adds that the applicant showed a lack of care in giving its customs agents precise instructions despite its alleged inexperience, rather than seeking their advice, particularly as difficulties in the application of Regulation No 3319/94 do arise.

132 Third, as regards the degree of care exercised by the applicant, while admitting that invoicing mistakes are possible, the Commission responds by saying that the applicant failed in other respects also to exercise care, as is apparent from paragraphs 79 to 82 of decision REM 02/02 and from paragraphs 75 to 79 of decision REM 03/02.

133 In particular, the applicant gave its customs agents impracticable instructions and did not satisfy itself that they were adhered to.

134 In addition, the applicant did not try to avail itself of the possibility of repayment provided for in Article 11(8) of Regulation No 384/96, and allowed the relevant time-limit to expire.

Findings of the Court

135 It must be noted at the outset that in order to assess whether there is obvious negligence within the meaning of Article 239 of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which resulted in the customs debt being incurred, as well as the professional experience of the economic operator and the degree of care which he exercised (*Söhl & Söhlke*, cited in paragraph 122 above, paragraph 56, and Case C-156/00 *Netherlands* v *Commission* [2003] ECR I-2527, paragraph 92).

136 It is moreover settled case-law that the Commission has a discretion when adopting a decision pursuant to Article 239 of the Customs Code (*Mehibas Dordtselaan*, cited

in paragraph 92 above, paragraphs 46 and 78). It must also be noted that the repayment or remission of import duties, which can be granted only subject to certain conditions and in specific circumstances, is an exception to the general system of import and export arrangements, and the provisions which govern such repayment are therefore to be interpreted strictly. In particular, as the absence of obvious negligence is an essential prerequisite for being able to claim repayment or remission of import duties, it follows that that concept must be interpreted in such a way that the number of cases of repayment or remission remains limited (*Söhl & Söhlke*, cited in paragraph 122 above, paragraph 52).

137 First, as regards the complexity of the provisions non-compliance with which resulted in the customs debt being incurred, it suffices to point out that the Court has already held that there is no particular difficulty in interpreting the second subparagraph of Article 1(3) of Regulation No 3319/94 (Case T-104/02 *Gondrand Frères* v *Commission* [2004] ECR II-3211, paragraphs 59 to 62 and 66).

138 Furthermore, as regards the precise nature of the mistake, the Court considers that the case-law on which the applicant relies (paragraph 117 above) is not relevant as it is only the alleged mistake of the agents and not that of the customs authorities that is at issue in the present case.

139 However, it should be emphasised that the Commission is right to submit that the applicant cannot avoid its own liability by relying on the mistake, genuine or otherwise, of its agents. In that regard, it must be observed that the arrangements for importing the goods in question were drawn up by the applicant alone, which, furthermore, freely chose its own customs agents, so that it is of no importance for the purposes of applying Article 239 of the Customs Code whether it was the operator or his agent who made any mistake that resulted in the customs debt being incurred. In any event, such a mistake cannot be borne by the Community budget

(see, to that effect, concerning the existence of a special situation, *Mehibas Dordtselaan*, cited in paragraph 92 above, paragraphs 76 to 78 and 82 to 83).

140 Second, as regards the applicant's professional experience, the Court notes that it must be examined whether the economic operator concerned is one whose business activities consist mainly in import and export transactions and whether he has already gained some experience in the conduct of such transactions (*Söhl & Söhlke*, cited in paragraph 122 above, paragraph 57).

141 In that regard, the applicant clearly itself admits that it has a certain amount of experience of importing the nitrogenous products covered by Regulation No 3319/94. Furthermore, as the Commission rightly argues, the applicant had already imported the same products before the events underlying the present cases. Accordingly, the Commission is fully entitled to take the view that the applicant had the requisite professional experience from the very first delivery in case REM 02/02.

142 Third, as regards the care taken by the operator, the Court notes that where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the operator to make inquiries and seek all possible clarification to ensure that he does not infringe those provisions (*Söhl & Söhlke*, cited in paragraph 122 above, paragraph 58).

143 As the Commission rightly emphasises, it follows from the case-file that the applicant, which nevertheless claims 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, not only failed to seek advice from its customs agents, but also gave them very precise instructions. It must be noted that the Commission did not fail in the contested decisions to explain why the applicant should have had doubts as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred (see, to that effect, *Kaufring*, paragraph 92 above, paragraph 296).

144 Furthermore, the applicant's mistakes in drawing up its invoices also suggest a lack of care on its part.

145 On the other hand, the applicant cannot be criticised for having failed to avail itself of the opportunity afforded by Article 11(8) of Regulation No 384/96. The review procedure applies if there is a change in the circumstances on the basis of which the values applied in the regulation imposing the anti-dumping duties were established. The purpose of the review procedure is therefore to adapt the duties imposed to take account of an evolution in the factors which gave rise to them, and the procedure therefore presupposes that those factors have altered (Case T-7/99 *Medici Grimm* v *Council* [2000] ECR II-2671, paragraph 82).

146 Taken as a whole, the applicant's conduct in the course of the transactions concerned cannot therefore be regarded as sufficiently careful.

147 It follows that the Commission did not make a manifest error of assessment in taking the view in the contested decisions that the condition relating to the absence

of obvious negligence on the part of the applicant was not fulfilled. Therefore, the third part of the second plea must be rejected as unfounded.

148 Moreover, it is clear from the wording of Article 905 of the implementing regulation that the repayment of import duties is subject to the fulfilment of two cumulative conditions, namely the existence of a special situation and the absence of obvious negligence or deception on the part of the person concerned. Consequently, repayment of duties must be refused if either of those conditions is not met (*Mehibas Dordtselaan*, cited in paragraph 92 above, paragraph 87; Case T-282/01 *Aslantrans* v *Commission* [2004] ECR II-693, paragraph 53; and *Gondrand Frères*, cited in paragraph 137 above, paragraph 57).

149 As the condition relating to the absence of obvious negligence is not met, it is not necessary to examine the first part of the second plea relating to the existence of a special situation.

150 The second plea must therefore be rejected as unfounded.

Third plea: infringement of the duty to state reasons

Arguments of the parties

151 The applicant claims that the Commission did not comply with the duty to state reasons as it is required to do under Article 253 EC.

152 More specifically, the applicant complains that the Commission did not state why no account was taken in the contested decisions of the fact that the anti-dumping legislation had not been circumvented. The applicant submits that the indirect invoicing situation, which in its view was artificially created through the fault of the customs agents, cannot by itself justify the imposition of the specific duty provided for in the second subparagraph of Article 1(3) of Regulation No 3319/94.

153 The applicant goes on to state that Article 239 of the Customs Code is a general equitable provision intended to be applied in circumstances in which it would be unfair to impose on a particular economic operator a loss, such as the imposition of a specific duty, to which he would not normally have been subject. It adds that the contested decisions cannot be regarded as reasonable in so far as it would not have been liable for the specific duty had mistakes not been made by Cogema and SCAC. By failing to specify in what respect its decisions were reasonable, the Commission failed in its duty to state reasons.

154 Finally, the applicant argues that, despite the Commission itself being of the view that case REM 1/98 is not comparable with cases REM 02/02 and 03/02, it failed to explain why, in case 1/98 and contrary to the stance taken in the present cases, it took into account the fact that the import price was higher than the minimum price set by Regulation No 3319/94.

155 In that regard the Commission refers back to the arguments put forward in relation to the first part of the second plea, concerning the alleged mistake of the customs agents and the comparison of the present cases with case REM 1/98.

Findings of the Court

156 According to settled case-law, the statement of reasons required by Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Community Court to exercise its power of review. However, It is not necessary for the reasoning to go into all the relevant points of fact and law. Whether the statement of reasons for a decision meets those requirements must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Mehibas Dordtselaan*, cited in paragraph 92 above, paragraph 92 and the case-law cited).

157 In the case of decisions to refuse the applications for remission pursuant to Article 239 of the Customs Code, the Commission's duty to state reasons consists in explaining why the conditions laid down in that provision have not been fulfilled.

158 It follows from a reading of the contested decisions that the Commission clearly set out the reasons why it took the view that the conditions laid down in Article 239 of the Customs Code were not fulfilled. It suffices to note that, as regards Case T-134/03, the Commission set out in what respect the conditions as to the existence of a special situation and the absence of obvious negligence were not fulfilled in paragraphs 35 to 68 (pages 10 to 21) and in paragraphs 69 to 86 (pages 21 to 26) respectively of decision REM 02/02. It did the same in decision REM 03/02 (Case

T-135/03) in paragraphs 34 to 65 (pages 10 to 21) and in paragraphs 66 to 80 (pages 21 to 25).

159 Furthermore, the Court finds that it was able to review the legality of the contested decisions. It notes also that it follows from the file of the administrative procedure, from the application and the reply and from the hearing that the applicant understood perfectly well the proposals for a negative decision just as it did the contested decisions, and that it was able to develop a robust and detailed argument, so far as concerns the merits, in support of its applications for remission and subsequently of its applications for annulment of the contested decisions.

160 Accordingly, the third plea must be rejected as unfounded.

161 It follows from all the foregoing that the applications must be dismissed.

Costs

162 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the Commission's costs, as applied for by the defendant, in addition to bearing its own.

On those grounds,

THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

hereby:

1. Dismisses the applications;

2. Orders the applicant to bear its own costs and pay those incurred by the Commission.

Vesterdorf Cooke García-Valdecasas

Labucka Trstenjak

Delivered in open court in Luxembourg on 27 September 2005.

H. Jung B. Vesterdorf

Registrar President