JUDGMENT OF THE COURT (Fourth Chamber)

28 February 2008 *

In Case C-263/06,

REFERENCE for a preliminary ruling under Article 234 EC by the Corte suprema di cassazione (Italy), made by decision of 30 March 2006, received at the Court on 16 June 2006, in the proceedings

Carboni e derivati Srl

v

Ministero dell'Economia e delle Finanze,

Riunione Adriatica di Sicurtà SpA,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta, E. Juhász, J. Malenovský and T. von Danwitz (Rapporteur), Judges,

* Language of the case: Italian.

Advocate General: J. Mazák,
Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Italian Government, by I.M. Braguglia, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

— the Commission of the European Communities, by E. Righini and J. Hottiaux, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2007,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 1 of Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine (OJ 1994 L 12, p. 5), read in conjunction with Articles 29 to 31 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) ('the Community Customs Code').

2 The reference has been made in the course of proceedings between Carboni e derivati Srl ('Carboni'), on the one hand, and the Ministero dell'Economia e delle Finanze (Ministry of Economic Affairs and Finance) ('the Ministry'), and Riunione Adriatica di Sicurtà SpA ('RAS'), on the other, concerning the determination, for the purpose of applying a variable anti-dumping duty established by Decision No 67/94, of the customs value of a consignment of hematite pig iron originating in Russia and imported into the European Community.

Legal context

The basic anti-dumping rules and the specific anti-dumping rules

3 Articles 1, 2 and 13 of Commission Decision No 2424/88/ECSC of 29 July 1988 on protection against dumped or subsidised imports from countries not members of the European Coal and Steel Community (OJ 1988 L 209, p. 18) ('the basic decision') provide as follows:

'*Article 1*

Applicability

This Decision lays down provisions for protection against dumped or subsidised imports from countries not members of the European Coal and Steel Community.

Article 2

Dumping

A. PRINCIPLE

1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

2. A product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product.

…

Article 13

General provisions on duties

…

2. Such measures shall indicate in particular the amount and type of duty imposed, the product covered, the country of origin or export, the name of the supplier, if practicable, and the reasons on which the measures are based.

3. The amount of such duties shall not exceed the dumping margin provisionally estimated or finally established or the amount of the subsidy provisionally estimated or finally established; it should be less if such lesser duty would be adequate to remove the injury.

…'

4 On 12 January 1994, the Commission of the European Communities adopted Decision No 67/94 on the basis of Article 11 of the basic decision, which provides, inter alia, for the imposition of provisional anti-dumping duties. Recitals (64) to (67) in the preamble to Decision No 67/94 provide as follows:

'(64) A calculation was made in order to establish the price level at which the imports concerned cease to cause material injury to the Community industry. …

(65) The Commission considers that in addition to restoring fair competition on the hematite pig-iron market, the measures should at the same time enable the exporting countries to secure a better return on their exports of the product concerned.

(66) The Commission considers the introduction of a minimum price more appropriate in this particular case than any other type of measure in order to achieve these aims.

(67) The Commission has found that since the minimum import price considered necessary to remove the injurious effects of the dumping is, in each case, lower than the normal value established for the companies concerned, the provisional anti-dumping duty as provided for in Article 13(3) of Decision No 2424/88/ECSC does not exceed the dumping margins established.'

5 Article 1 of Decision No 67/94 provides as follows:

'1. A provisional anti-dumping duty is hereby imposed on imports of hematite pig iron falling within CN code 7201 10 19, originating in Brazil, Poland, Russia and Ukraine.

2. The amount of the duty shall be the difference between the price of ECU 149 per tonne (cif duty unpaid) and the declared customs value in all cases where the declared customs value is less than the minimum import price.

3. The provisions in force concerning customs duties shall apply.

...'

6 The provisional anti-dumping duty imposed by Decision No 67/94 was confirmed by Commission Decision No 1751/94/ECSC of 15 July 1994 imposing a definitive anti-dumping duty on imports into the Community of hematite pig-iron, originating in Brazil, Poland, Russia and Ukraine (OJ 1994 L 182, p. 37). Article 1(2) thereof provides as follows:

'The amount of the duty shall be the difference between the price of ECU 149/tonne and the accepted customs value (free at EC frontier) in all cases where this value is less than the above price.'

The Community Customs Code and its implementing provisions

7 Articles 28 to 31 of the Community Customs Code provide as follows:

'*Article 28*

The provisions of this Chapter shall determine the customs value for the purposes of applying the Customs Tariff of the European Communities and non-tariff measures laid down by Community provisions governing specific fields relating to trade in goods.

Article 29

1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided:

…

(d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for customs purposes under paragraph 2.

2. (a) In determining whether the transaction value is acceptable for the purposes of paragraph 1, the fact that the buyer and the seller are related shall not in itself be sufficient grounds for regarding the transaction value as unacceptable. Where necessary, the circumstances surrounding the sale shall be examined and the transaction value shall be accepted provided that the relationship did not influence the price. If, in the light of information provided by the declarant or otherwise, the customs authorities have grounds for considering that the relationship influenced the price, they shall communicate their grounds to the declarant and he shall be given a reasonable opportunity to respond. If the declarant so requests, the communication of the grounds shall be in writing.

…

Article 30

1. Where the customs value cannot be determined under Article 29, it is to be determined by proceeding sequentially through subparagraphs (a), (b), (c) and (d) of paragraph 2 …

2. The customs value as determined under this Article shall be:

(a) the transaction value of identical goods …

(b) the transaction value of similar goods …

(c) the value based on the unit price at which the imported goods [or] identical or similar imported goods are sold within the Community in the greatest aggregate quantity to persons not related to the sellers;

(d) the computed value, …

Article 31

1. Where the customs value of imported goods cannot be determined under Articles 29 or 30, it shall be determined, on the basis of data available in the Community, using reasonable means consistent with the principles and general provisions of:

— the agreement on implementation of Article VII of the General Agreement on Tariffs and Trade,

— Article VII of the General Agreement on Tariffs and Trade,

— the provisions of this chapter.

2. No customs value shall be determined under paragraph 1 on the basis of:

…

(b) a system which provides for the acceptance for customs purposes of the higher of two alternative values;

…

(g) arbitrary or fictitious values.'

8 Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1) ('the implementing regulation') contains an Annex 23 entitled 'Interpretative Notes on Customs Value'. Point 2 of the notes in that annex concerning Article 31(1) of the Community Customs Code provides as follows:

'The methods of valuation to be employed under Article 31(1) [of this Code] should be those laid down in Articles 29 and 30(2) [thereof], but a reasonable flexibility in the application of such methods would be in conformity with the aims and provisions of Article 31(1).'

9 In that regulation, the Commission laid down a series of provisions for the implementation for the Community Customs Code. In particular, Article 147(1) of that regulation, as it was in force in June 1994, that is to say, at the moment when the consignment of hematite pig iron originating in Russia which is at the origin of the main proceedings was imported, provided as follows:

'For the purposes of Article 29 of the [Community Customs] Code, the fact that the goods which are the subject of a sale are declared for free circulation shall be regarded as adequate indication that they were sold for export to the customs territory of the Community. This indication shall also apply in the case of successive sales before valuation; in such case each price resulting from these sales may, subject to the provisions of Articles 178 to 181, be taken as a basis for valuation.'

10 Articles 178 to 181 of the implementing regulation concern the declaration of particulars and the documents to be furnished relating to customs value. Commission Regulation (EC) No 3254/94 of 19 December 1994 amending Regulation No 2454/93 (OJ 1994 L 346, p. 1), added to the implementing regulation an Article 181a, which is worded as follows:

'1. The customs authorities need not determine the customs valuation of imported goods on the basis of the transaction value method if, in accordance with the procedure set out in paragraph 2, they are not satisfied, on the basis of reasonable doubts, that the declared value represents the total amount paid or payable as referred to in Article 29 of the [Community Customs] Code.

2. Where the customs authorities have the doubts described in paragraph 1 they may ask for additional information in accordance with Article 178(4). If those doubts continue, the customs authorities must, before reaching a final decision, notify the person concerned, in writing if requested, of the grounds for those doubts and provide him with a reasonable opportunity to respond. A final decision and the grounds therefor shall be communicated in writing to the person concerned.'

The main proceedings and the question referred to the Court

11 In May 1994, Carboni acquired from Commercio Materie Prime CMP SpA ('CMP'), which has its seat in Genoa (Italy), a consignment of hematite pig iron originating in Russia which CMP had itself acquired from OME-DTECH Electronics Ltd, a company with its seat in Limassol (Cyprus) ('OME-DTECH'). In June 1994, Carboni's customs agent, SPA-MAT Srl, presented the declaration relating to importation of the consignment to the customs at Molfetta (Italy) on behalf of Carboni, its value being declared on the basis of ECU 151 per tonne. The consignment was cleared through customs in that port after payment of customs duties on 14 June 1994.

12 By notice of assessment of 16 July 1994, the customs office informed Carboni through SPA-MAT Srl that the amount payable had to be increased, pursuant to Decision No 67/94, by an anti-dumping duty equivalent to the difference between the price of ECU 149 per tonne and the customs value, on the ground that the customs office considered the declared value to be inaccurate.

13 Carboni provided security for payment of the amount demanded by way of anti-dumping duty through the intermediary of the guarantor, namely RAS, but brought an action before the Tribunale de Bari (Bari District Court) (Italy) against the Ministry and RAS in which it claimed that the demand for payment of an anti-dumping duty and, consequently, the need to lodge a guarantee were unfounded.

14 Carboni claimed, inter alia, that the price of ECU 151 per tonne stated on the invoice issued by CMP was higher than the minimum import price (ECU 149 per tonne) and, consequently, that there were no grounds for levying an anti-dumping duty.

15 For its part, the Ministry contended that the import declaration was accompanied by an invalid certificate of origin and that the price indicated on the pro forma invoice from CMP was unreliable. It pointed out in this connection that the invoice in respect of the earlier sale, issued by OME-DTECH, showed that the sale price to CMP was ECU 130.983 per tonne and was therefore lower than the minimum import price fixed by Decision No 67/94.

16 Carboni's action was dismissed by decision of the Tribunale di Bari of 30 September 2000 on the ground, inter alia, that the protection of the European market through the imposition of an anti-dumping duty had to take place at the time of entry into the Community, that is to say, at the time of first acquisition by a Community operator.

17 Carboni appealed against that decision to the Corte d'appello di Bari (Bari Court of Appeal), which dismissed the appeal as unfounded. According to that court, the expression 'release for free circulation' within the terms of Article 201 of the Community Customs Code means release onto the Community market, which must refer to the commercial stage of acquisition of the goods by the first Community operator. Were it otherwise, the anti-dumping legislation could easily be circumvented.

18 Carboni lodged an appeal on a point of law against that judgment before the Corte suprema di cassazione (Supreme Court of Cassation) (Italy). In that appeal, Carboni argued, inter alia, that release for free circulation occurs only at the time when the goods enter the customs territory of the Community, and not when they are simply acquired by a Community subject in a State outside the Community. The purpose of the anti-dumping duty, it contended, is not to penalise the producing State in order to prevent it from exporting at a certain price, but to ensure that goods sold at below cost price do not enter the Community market, with adverse effects on competition.

19 Carboni also referred to Article 1(2) of Decision No 1751/94 and the introductory part of the first subparagraph of Article 29(1) of the Community Customs Code, which provides that '[t]he customs value of imported goods shall be the transaction value, that is, the price actually paid'. Carboni argued that, as there were no doubts as to the correctness of the invoice relating to the purchase issued by CMP, the amount paid by the latter was irrelevant since the difference in price between the two sales was justified by various factors such as payment for intermediary activities, transport costs and assumption of risks.

20 According to the Ministry, the *ratio legis* of the anti-dumping rules leads to the conclusion that the prejudice to the Community market arises not only with the actual entry into the Community customs territory of goods being sold at below cost price, but also in the case where a Community operator acquires those goods at a lower price than that which other Community operators have to pay.

21 The Corte suprema di cassazione has doubts as to whether the customs authorities may use, as the basis for applying an anti-dumping duty, a value corresponding to the price indicated for the goods in a sale prior to the sale on the basis of which the customs declaration was made or, in other words, whether the relevant time is that of the sale concluded for purposes of export to the customs territory of the Community, independently of the submission to customs.

22 The Corte suprema di cassazione thus considers it necessary to establish whether the freedom of the operator to choose, for the purpose of determining the customs value, the price paid for the goods in question in a transaction prior to that on the basis of which the customs declaration was made, has its counterpart in an identical power on the part of the customs authorities.

23 Having determined that the point of law raised in the main proceedings had not yet been decided by the Court, the Corte suprema di cassazione decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'According to the principles of Community customs law and for the purpose of application of an anti-dumping duty such as that laid down by Commission Decision No 67/94 …, may the customs authority refer to the price indicated in a sale of the same goods which took place prior to that on the basis of which the customs declaration was made, where the buyer is a Community subject or, in any case, the sale took place for import into the Community?'

The question referred to the Court

24 By its question, the referring court asks essentially whether, for the application of the anti-dumping duty established by Decision No 67/94, the rules laid down in the relevant Community customs legislation permit the customs authorities to determine the customs value on the basis of the price indicated in a sale of the same goods which took place prior to that in respect of which the customs declaration was made.

25 In order to answer that question, it is first of all necessary to determine whether the customs authorities may, as a general rule, refer, for the purpose of applying the anti-dumping duty established by the abovementioned decision, to the price indicated in a prior sale of the same goods, even if the declared price corresponds to the price actually paid or payable by the importer. If the answer to that question is in the negative,

it will then be necessary to determine whether the customs authorities may at least do so on a case-by-case basis in the case where they have doubts as to the accuracy of the price mentioned in the customs declaration.

Whether the customs authorities may refer to a prior sale for the purpose of applying the anti-dumping duty established by Decision No 67/94 in the case where the declared price corresponds to the price actually paid or payable by the importer

26 In order to answer the question whether the customs authorities may, for the purpose of applying the anti-dumping duty established by Decision No 67/94, refer to the price indicated in a prior sale of the same goods, even if the declared price corresponds to the price actually paid or payable by the importer, it is necessary to interpret the concept of 'declared customs value' for the purposes of Article 1(2) of Decision No 67/94.

27 It must be pointed out, first of all, that the expression 'customs value' corresponds to the customs value of the imported goods, as defined by the customs rules (see, by analogy, Case C-93/96 *ICT* [1997] ECR I-2881, paragraph 14). Bearing in mind the time at which the facts in the main proceedings took place, reference must be made to Article 29(1) of the Community Customs Code, which defines that expression as 'the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community', adjusted, where necessary, in accordance with the relevant provisions of the Community Customs Code.

28 Article 29(1) provides that the customs value concerns only goods 'sold for export to the customs territory of the Community'. It follows that it must be agreed, at

the time of sale, that the goods originating in a non-member country will be transported into the customs territory of the Community (see, by analogy, with regard to Article 3(1) of Council Regulation (EEC) No 1224/80 of 28 May 1980 on the valuation of goods for customs purposes (OJ 1980 L 134, p. 1), a provision essentially identical to Article 29(1) of the Community Customs Code, Case C-11/89 *Unifert* [1990] ECR I-2275, paragraph 11).

29 Under the first sentence of Article 147(1) of the implementing regulation, the fact that the goods which are the subject of a sale are declared for free circulation is to be regarded as adequate indication that the abovementioned condition has been fulfilled. The second sentence of Article 147(1), in the version in force at the time of the facts in the main proceedings, provided that that indication was also to apply in the case of successive sales before valuation.

30 Thus, in the case of successive sales, the prices relating to sales made after export, but before release into free circulation in the Community, may be taken into account for the purpose of determining the 'transaction value' within the meaning of Article 29(1) of the Community Customs Code (see, by analogy, *Unifert*, paragraph 13).

31 It follows that, in the case of successive sales of goods for importation into the customs territory of the Community, the importer is at liberty to select from the prices agreed for each of the sales the price which he will take as a basis for determining the customs value of the goods in question, provided that he can furnish to the customs authorities all the necessary particulars and documents relating to the price which he chooses (see, by analogy, *Unifert*, paragraphs 16 and 21).

32 Next, it is necessary, on the basis of those clarifications as to the meaning of the expression 'customs value', which refers to the customs rules and thus gives the importer the choice set out in the previous paragraph, to determine the meaning of the term 'declared' added to that expression for the purpose of answering the question asked by the Corte suprema di cassazione as to whether the customs administration also has a choice and may also refer to the price indicated in a prior sale as the basis for the application of an anti-dumping duty.

33 The addition of the term 'declared' in Article 1(2) of Decision No 67/94 emphasises that the basis for applying an anti-dumping duty is not the customs value as such but the customs value declared by the importer. It follows from that provision, therefore, that the prices indicated in sales which took place prior to that on the basis of which the customs declaration was made by the importer cannot be taken into account for the application of an anti-dumping duty. It thus appears that the very terms of Article 1(2) of Decision No 67/94 preclude the customs authorities from being entitled to choose the price of the first sale as a basis for calculating the customs value for the purpose of determining an anti-dumping duty.

34 However, the Italian Government argues that, in the main proceedings, the customs authorities could have determined the customs duty on the basis of the sale of hematite pig iron by OME-DTECH to CMP, since the latter undertaking was itself a Community operator. For its part, the Commission, although it acknowledges that the terms of Decision No 67/94 do not permit the calculation of the variable duty on any basis other than that of the price of the last transaction presented in the customs declaration, points out that the objective of an anti-dumping measure based on the fixing of a minimum import price may easily be circumvented and there is a 'certain tension' in the use of the price indicated in the last sale for the purposes of customs law, on the one hand, and of variable anti-dumping duties based on a minimum import price, on the other.

35 In this regard, the terms of Article 1(2) of Decision No 67/94 expressly and unambiguously provide that the point of reference in determining an anti-dumping duty is the declared customs value. It must first be established, therefore, whether the arguments put forward by the Italian Government and the Commission are well founded and, if necessary, whether they are of such a nature as to call into question the outcome that necessarily follows from the wording of Article 1(2) of Decision No 67/94.

36 With regard, first of all, to the Italian Government's argument concerning the terms of Article 1(2) of Decision No 1751/94 imposing a definitive anti-dumping duty, the expression 'accepted customs value' in that provision is intended to express the obvious point that the price indicated by the person making the declaration is not as such conclusive for the purpose of determining an anti-dumping duty.

37 Article 29(1) of the Community Customs Code provides that the customs value, that is to say, the transaction value, is subject to adjustment, where necessary, in accordance with Articles 32 and 33 of the Code. In addition, as can be seen from Article 29(1)(d) and Article 29(2) of the Code, the customs authorities are entitled to examine the price indicated by the person making the declaration and to reject it where necessary. Consequently, the terms of Article 1(2) of Decision No 1751/94 contain nothing which calls into question the outcome that necessarily follows from the wording of Article 1(2) of Decision No 67/94.

38 Secondly, the Italian Government contends that account should be taken of the objectives of the anti-dumping rules and, for that purpose, that all the steps in a successive sale should be considered, avoiding too formalist an approach. In the case

of successive sales giving rise to the release of goods into free circulation, the various sales which took place with a view to importation into the Community customs territory should be regarded as steps preliminary to that importation, with the result that the time to be taken into consideration for the purpose of determining the customs value for the application of an anti-dumping duty is necessarily the time at which the goods were first acquired by a Community operator, that being the time at which the goods entered the 'Community circuit'.

39 As the Advocate General correctly noted in points 56 to 58 of his Opinion, it follows from Articles 1 and 2(1) of the basic decision that the rules on anti-dumping are aimed at protecting against dumped or subsidised imports and an anti-dumping duty may be applied to any dumped product the release of which for free circulation in the Community causes injury.

40 Having regard to those provisions, the application of an anti-dumping measure thus presupposes that introduction of the goods into the Community market will harm the Community industry. The anti-dumping legislation does not concern a sale of goods as such, such as the first sale of hematite pig iron by OME-DTECH to CMP in the main proceedings, as long as the goods are not actually exported to the Community customs territory or placed in free circulation within the Community. Anti-dumping duties are designed to neutralise the dumping margin arising from the difference between the price on export to the Community and the normal value of the product and thereby to nullify the injurious effects of the importation of the goods concerned into the Community. As can be seen from recitals (64) and (67) in the preamble to Decision No 67/94, in the case of hematite pig iron, the minimum price of ECU 149 per tonne represented the price level at which the imports concerned ceased to cause material injury to the Community industry.

41 Thus, the objective of the anti-dumping rules does not involve, in principle, the levying of an anti-dumping duty established on the basis of the price indicated in a prior sale of the goods concerned if the price actually paid or payable by the person making the declaration is equivalent to or greater than the minimum price laid down in the anti-dumping measure.

42 The Italian Government, however, contends, more specifically, that it follows from the objective of Decision No 67/94 that, in the case of successive sales with a view to importation into the territory of the Community, precipitating the release of the goods into free circulation, the first acquisition of the goods by a Community operator is conclusive for the purpose of application of the anti-dumping duty. The harm to the Community market results not only from the actual release into the Community customs territory of goods being sold at below cost price, but also when an advantage is conferred on one Community trader who acquires goods at a lower price than do other Community traders.

43 That argument presupposes that the objective which Decision No 67/94 seeks to attain could be circumvented in the case of successive sales even if, as in the main proceedings, the price for the last sale, at which point the goods were placed in free circulation, is higher than the minimum import price.

44 In this regard, the mere fact that one Community trader could be given an advantage over other Community traders by acquiring goods at a price below that paid by the latter does not endanger the objective of Decision No 67/94. That objective is not to take away the profits which importers may make but, as can be seen from recital (64) in the preamble to that decision, to avoid material injury to the Community industry, namely, the producers.

45 Thirdly and finally, the Italian Government, supported by the Commission, argues that the variable anti-dumping duty established by Decision No 67/94 may be easily circumvented, in particular, by a transversal offsetting of prices applied to other products or through the declaration of artificially inflated prices.

46 In that regard, under Article 13(2) of the basic decision, measures imposing an anti-dumping duty are required to indicate in particular the amount and type of duty imposed, together with certain other matters. Accordingly, the institutions are free to choose, within the limits of their margin of discretion, between the different types of duty (see Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945, paragraph 58). Thus, in the case of the hematite pig iron originating in the States referred to in Decision No 67/94, the Commission could have imposed a specific duty, possibly together with a variable duty, less likely to be circumvented (see, with regard to Council Regulation (EEC) No 3068/92 of 23 October 1992 imposing a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine (OJ 1992 L 308, p. 41), as amended by Council Regulation (EC) No 643/94 of 21 March 1994 (OJ 1994 L 80, p. 1), Case T-87/98 *International Potash Company* v *Council* [2000] ECR II-3179, paragraphs 43 to 48). However, as recital (66) in the preamble to Decision No 67/94 states, the Commission considered, in the exercise of its discretion, 'the introduction of a minimum price more appropriate in this particular case than any other type of measure in order to achieve' the objectives of that decision.

47 Since a variable duty may be easily circumvented and such circumvention can be avoided by imposing a specific duty or a combination of a variable and a specific duty, the fact that the Commission decided none the less to impose a variable duty in Decision No 67/94 cannot, of itself, justify a general abandonment, to the detriment of importers, of determination of the anti-dumping duty on the basis of the declared customs value, as provided for in that decision.

48 In the light of all the foregoing, the arguments put forward by the Italian Government and the Commission do not allow the result imposed expressly and without ambiguity by the wording of Article 1(2) of Decision No 67/94 to be called into question (see, by analogy, Case C-220/03 *ECB* v *Germany* [2005] ECR I-10595, paragraph 31).

49 In those circumstances, it must be held that, in accordance with Article 1(2) of Decision No 67/94, the customs authorities may not determine the customs value for the purpose of applying the anti-dumping duty established by that decision on the basis of the price indicated for the goods concerned in a sale prior to that on the basis of which the customs declaration was made in the case where the declared price corresponds to the price actually paid or payable by the importer.

Whether the customs authorities may refer to a prior sale for the purpose of applying the anti-dumping duty established by Decision No 67/94 in the case where they question the accuracy of the price indicated in the customs declaration

50 In order to determine whether the customs authorities may, for the purpose of applying an anti-dumping duty pursuant to Decision No 67/94, refer to the price indicated in a sale prior to that on the basis of which the customs declaration was made in the case where they question the accuracy of the price indicated in the declaration, the relevant provisions of the implementing regulation and Articles 29 to 31 of the Community Customs Code must be considered, regard being had to the specific characteristics of a variable anti-dumping duty.

51 It should be noted in this connection that, according to Article 1(3) of Decision No 67/94, the provisions in force concerning customs duties are to apply.

52 In this context, Article 181a of the implementing regulation, introduced by Regulation No 3254/94, provides that the customs authorities need not necessarily determine the customs valuation of imported goods on the basis of the transaction value method if they are not satisfied, on the basis of reasonable doubts, that the declared value represents the total amount paid or payable, and they may refuse to accept the declared price if those doubts continue after they have asked for additional information or documents and have provided the person concerned with a reasonable opportunity to respond to the grounds for those doubts.

53 Although that provision of the implementing regulation was not yet in force when the goods at issue in the main proceedings were declared, it codifies, according to the information supplied by Commission, a customs practice common at both international and Community level, as applied at the time at which the facts in the main proceedings took place. In addition, Article 29(2)(a) of the Community Customs Code lays down the same procedural requirements when the customs authorities have grounds for taking the view that the relationship between the buyer and the seller influenced the price. The conclusion must therefore be drawn that those procedural requirements are inherent in the valuation system.

54 On the basis of Article 181a of the implementing regulation and the abovementioned customs practice, the Commission takes the view that the Italian customs authorities were entitled to use the price indicated in a sale prior to that on the basis of which the customs value was declared.

55 Article 181a of the implementing regulation merely states that the customs authorities 'need not determine the customs valuation … on the basis of the transaction value method' but does not specify what other value is to be substituted for the transaction value in such a case.

56 Pursuant to Articles 30 and 31 of the Community Customs Code, which apply to the anti-dumping duty established by Decision No 67/94 by virtue of Article 1(3) of that decision, where the customs value of the imported goods cannot be determined under Article 29 of the Code, it is to be determined by application, first, of Article 30 and, second, of Article 31.

57 The question thus arises whether, where it is impossible, during the examination referred to in paragraph 52 of this judgment, to determine the real transaction value, that is to say, the price actually paid or payable in the transaction in respect of which the customs declaration has been made, the customs authorities may, in accordance with Articles 30 and 31 of the Community Customs Code, refer to the price indicated for a prior sale.

58 It should be pointed out, on the one hand, with regard to Article 30 of the Community Customs Code, that that article seeks essentially to establish the customs value on the basis of the price usually charged for the goods in question. However, the specific characteristic of dumping cases lies in the introduction of goods onto the Community market at a price below that charged on that market. In addition, the particular characteristic of a variable anti-dumping duty lies in the fact that it is calculated on the basis of the difference between the minimum import price and the price actually agreed for the goods in question. Consequently, the customs value determined in accordance with Article 30 by reference to the price generally paid or payable cannot be used for the purpose of applying a variable anti-dumping duty.

59 On the other hand, Article 31(1) of the Community Customs Code provides that, under the conditions which it sets out, the customs value is to be determined on the basis of data available in the Community, using reasonable means consistent with the principles and general provisions of the international agreements and the provisions which it sets out.

60 It should be pointed out in this regard that, according to the case-law, the Community legislation on customs valuation seeks to introduce a fair, uniform and neutral system excluding the use of arbitrary or fictitious customs values (*Unifert*, paragraph 35, Case C-15/99 *Sommer* [2000] ECR I-8989, paragraph 25, and Case C-306/04 *Compaq Computer International Corporation* [2006] ECR I-10991, paragraph 30) and that that objective meets the requirements of commercial practice (Case C-299/90 *Hepp* [1991] ECR I-4301, paragraph 13). In accordance with Point 2 of the Interpretative Notes on Customs Value in Annex 23 to the implementing regulation, concerning Article 31(1) of the Community Customs Code, the methods of valuation to be used under Article 31(1) should be those laid down in Articles 29 and 30(2) of the Code but a 'reasonable flexibility' in the application of those methods would be in conformity with the objectives and provisions of Article 31(1) of the Code.

61 Having regard to the need to establish a customs value for the purpose of applying a variable anti-dumping duty and to the 'reasonable flexibility' mentioned in Point 2 of the Interpretative Notes, it must be accepted that the price indicated in a sale which took place prior to that on the basis of which the customs declaration was made may constitute data available in the Community which Article 31(1) of the Community Customs Code allows to be used as a basis for determining customs value. Having regard to the particular characteristic of a variable anti-dumping duty, as indicated in paragraph 58 of this judgment, reference to that price constitutes a means

of determining a customs value which is both 'reasonable' within the meaning of Article 31(1) and consistent with the principles and general provisions of the international agreements and the provisions referred to in Article 31(1).

62 However, under Article 31(2)(b) of the Community Customs Code, the customs value determined under Article 31(1) may not be based on a system which provides for the acceptance for customs purposes of the higher of two alternative values. Adapted to a context concerning a variable anti-dumping duty, that provision excludes a system which provides for the acceptance of the lower value. Moreover, Article 31(2)(g) of the Code excludes the determination of customs value on the basis of arbitrary or fictitious values.

63 Consequently, it is appropriate to point out that the relevant customs value for the purpose of determining a variable anti-dumping duty corresponds to the price agreed in the most recent sale prior to that for which the customs declaration was made and in regard to which the customs authorities have no objective reason to doubt its accuracy.

64 In the light of all of the foregoing, the answer to the question referred to the Court must be that, in accordance with Article 1(2) of Decision No 67/94, the customs authorities may not determine the customs value for the purpose of applying the anti-dumping duty established by that decision on the basis of the price indicated for the goods concerned in a sale prior to that on the basis of which the customs declaration was made when the declared price corresponds to the price actually paid or payable by the importer. If the customs authorities have reasonable doubts as to the accuracy of the declared value and their doubts are confirmed after they have asked for additional information or documents and have provided the person concerned with a reasonable opportunity to respond to the grounds for those doubts, without it being possible to determine the price actually paid or payable, they may, in accordance

with Article 31 of the Community Customs Code, calculate the customs value for the purpose of applying the anti-dumping duty established by Decision No 67/94 by reference to the price agreed for the goods in question in the most recent sale prior to that on the basis of which the customs declaration was made and in regard to which the customs authorities have no objective reason to doubt its accuracy.

Costs

65 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

In accordance with Article 1(2) of Commission Decision No 67/94/ECSC of 12 January 1994 imposing a provisional anti-dumping duty on imports into the Community of hematite pig iron, originating in Brazil, Poland, Russia and Ukraine, the customs authorities may not determine the customs value for the purpose of applying the anti-dumping duty established by that decision on the basis of the price indicated for the goods concerned in a sale prior to that on the basis of which the customs declaration was made when the declared price corresponds to the price actually paid or payable by the importer.

If the customs authorities have reasonable doubts as to the accuracy of the declared value and their doubts are confirmed after they have asked for additional information or documents and have provided the person concerned with a reasonable opportunity to respond to the grounds for those doubts, without it being possible to determine the price actually paid or payable, they may, in accordance with Article 31 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, calculate the customs value for the purpose of applying the anti-dumping duty established by Decision No 67/94 by reference to the price agreed for the goods in question in the most recent sale prior to that on the basis of which the customs declaration was made and in regard to which the customs authorities have no objective reason to doubt its accuracy.

[Signatures]