ORDER OF THE COURT (Fourth Chamber)
9 December 1999 *

In Case C-299/98 P,

CPL Imperial 2 SpA, established at Pescara (Italy),

and

Unifrigo Gadus Srl, established at Naples (Italy),
represented by G. Celona, of the Milan Bar, with an address for service in Luxembourg at the Chambers of G. Margue, 20 Rue Philippe II,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 9 June 1998 in Joined Cases T-10/97 and T-11/97 *Unifrigo and CPL Imperial 2* v *Commission* [1998] ECR II-2231, seeking to have that judgment set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by P. Stancanelli, of its Legal Service, acting as Agent, with an address for service in Luxembourg

* Language of the case: Italian.

at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant in the proceedings at first instance,

THE COURT (Fourth Chamber),

composed of: D.A.O. Edward (Rapporteur), President of the Chamber, P.J.G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: N. Fennelly,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 31 July 1998, CPL Imperial 2 SpA ('CPL Imperial 2') and Unifrigo Gadus Srl ('Unifrigo Gadus') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 9 June 1998 in Joined Cases T-10/97 and T-11/97 *Unifrigo and CPL Imperial 2* v *Commission* [1998] ECR II-2231

('the contested judgment'), by which the Court of First Instance dismissed their application for, in particular, annulment of Commission Decision C(96) 2780 def of 8 October 1996 ('the contested decision').

Facts and procedure

2 The contested judgment shows that, in 1990 and 1991, the appellants, which are companies trading in fishery products, imported consignments of cod from Norway pursuant to EUR.1 certificates confirming that the products were of Norwegian origin, and therefore benefited from the preferential tariff arrangements applicable to such products.

3 Having in 1993 been informed by the Norwegian customs authorities that the exporter was unable to prove that the products were of Norwegian origin, the Verona Customs Office notified the appellants of its decision to effect a post-clearance recovery of the customs duties. The appellants, maintaining that they had acted in good faith, requested the Italian authorities not to effect that recovery and to refer the matter to the Commission.

4 On 30 January 1996 the appellants confirmed to the Italian authorities that they had taken cognisance of the file which those authorities were preparing to send to the Commission and that they had no comments to make in that regard.

5 By letter of 6 February 1996 the Italian authorities sent to the Commission the file relating to the request made by the appellants and requested the Commission to determine whether, in the present case, there was any justification for the non-recovery of the import duties, totalling ITL 148 890 000, in accordance with Article 5(2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 on the

post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1).

6 On 8 October 1996 the Commission adopted the contested decision, Article 1 of which is in the following terms:

'The import duties, amounting to [ITL] 148 890 000, in respect of which Italy submitted its request dated 2 February 1996 must be recovered'.

7 Following the adoption of the contested decision, the Italian authorities demanded payment of the customs duties from the appellants.

8 It was in those circumstances that, by applications lodged at the Registry of the Court of First Instance on 17 January 1997, the appellants each brought an action against the contested decision, pleading infringement of Article 871 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1) and violation of the general principle of the protection of legitimate expectations.

9 By the contested judgment, the Court of First Instance dismissed the appellants' actions as unfounded.

The contested judgment

10 The relevant particulars of the contested judgment are as follows:

— in paragraphs 37 to 41, the Court of First Instance rejected the appellants' argument that the file submitted to the Commission was incomplete and that the Commission should therefore have requested additional information pursuant to the first paragraph of Article 871 of Regulation No 2454/93, in particular the judgment of the Høyesterett of 2 April 1993, which called in question the validity of the certificates of origin. The Court of First Instance observed in paragraph 39 of the contested judgment that the appellants had not challenged the Norwegian authorities' conclusion that the exporter was unable to prove the Norwegian origin of the products in question, and that they had not disputed that information in their exchange of correspondence with the Italian authorities. In paragraph 40 of the contested judgment, the Court of First Instance noted that the appellants' representative had confirmed by letter of 30 January 1996 that he had nothing to add to the file sent to the Commission. The Court of First Instance inferred from this, in paragraph 41, that, in those circumstances, the Commission had been entitled to conclude that the file submitted to it was complete and that there was consequently no need for it to seek additional information;

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— in paragraphs 53 to 66 of the contested judgment, the Court of First Instance found that only errors attributable to acts of the competent authorities confer entitlement to the waiver of post-clearance recovery of customs duties under Article 5(2) of Regulation No 1697/79. That is not, however, the position where the competent authorities have been misled by incorrect declarations on the part of the exporter the validity of which they do not have to check or assess. In those circumstances, it is the responsibility of the importer himself to make the necessary arrangements in order to guard against the risks of an

action for post-clearance recovery, and the appellants could not rely on the principle of the protection of legitimate expectations; and,

— as regards CPL Imperial 2's alternative application for annulment of the contested decision in so far as it concerned the amount of the duties demanded, the Court of First Instance held, in paragraphs 81 to 84 of the contested judgment, that the Commission's powers are limited to establishing whether the conditions for applying Article 5(2) of Regulation No 1697/79 are fulfilled and that it does not determine the amount of the debt payment of which is to be demanded, being required merely to refer to the amount indicated by the competent authorities in their demand.

The appeal

11 In their appeal, the appellants claim that the Court of Justice should:

— declare the appeal admissible;

— reverse the contested judgment and, in consequence, annul the contested decision;

and, in the alternative, that it should:

— declare that the contested decision does not have the effect of establishing whether or not the conditions for waiver of the right to recover post-

clearance customs duties are fulfilled, which is a matter to be decided by the national court in any event;

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

12 The Commission contends that the Court should:

— primarily, declare the appeal brought by the appellants against the contested judgment inadmissible;

— alternatively, dismiss the appeal in its entirety as wholly unfounded;

— order the appellants to pay the costs in any event.

13 Under Article 119 of its Rules of Procedure, where an appeal is clearly inadmissible or clearly unfounded, the Court of Justice may dismiss it at any time by reasoned order.

The first plea

The first part of the first plea

14 By the first part of their first plea, the appellants claim that the Court of First Instance infringed the rights of the defence and Community law by not acknowledging the Commission's obligation under the first paragraph of Article 871 of Regulation No 2454/93 to check whether the file sent to the Commission by the Italian authorities contained all the information needed for an examination of the matter, inasmuch as the appellants did not take part in the procedure. They were neither informed of the existence of the procedure nor heard by the Commission. The appellants further maintain that the Commission should have taken into consideration the judgment delivered by the Høyesterett as regards the origin of the goods.

15 It should be recalled that, as is apparent from Article 168a of the EC Treaty (now Article 225 EC) and the first paragraph of Article 51 of the EC Statute of the Court of Justice, an appeal is to be limited to points of law and must be based on the grounds of lack of competence of the Court of First Instance, a breach of procedure before it which adversely affects the interests of the appellant or an infringement of Community law by the Court of First Instance (see, in particular, the order made in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 36).

16 It also follows from the abovementioned provisions that an appeal may be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The Court of First Instance has exclusive jurisdiction, first, to establish the facts except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. Where the Court of First Instance has established or assessed the facts, the Court of Justice has jurisdiction under Article 168a of the EC Treaty (now Article 225 EC) to review the legal characterisation of those facts by the Court of First

Instance and the legal conclusions it has drawn from them (see, in particular, paragraphs 48 and 49 of the judgment in Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981 and paragraph 21 of the judgment in Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111).

17 It is sufficient to recall that, as is apparent from the facts found by the Court of First Instance, the Commission did not need to seek additional information in order to make the contested decision, since the file submitted to it was complete. Inasmuch as the appellants had requested the Italian authorities to refer the matter to the Commission and had confirmed that they had nothing to add to the file sent to the Commission, the Court of First Instance was correct in finding that there was no need for the Commission to request any additional information. The only item which did not appear in the file sent to the Commission was the judgment of the Høyesterett of 2 April 1993. However, as the Court of First Instance stated in paragraph 42 of the contested judgment, the judgment of the Høyesterett did not establish that the products in question were of Norwegian origin, and could not therefore affect the contested decision.

18 In those circumstances, the first part of the first plea must be rejected as manifestly unfounded.

The second and third parts of the first plea

19 By the second and third parts of the first plea, which may appropriately be examined together, the appellants maintain that the Court of First Instance misinterpreted and misapplied Article 5(2) of Regulation No 1697/79. They claim, first, that the Court of First Instance added a further condition to the three conditions prescribed by Article 5(2) of Regulation No 1697/79, by imposing on

them the burden of proving the origin of the goods in issue and, second, that they are not able to provide the necessary proof.

20 Whilst it is true that, as the Commission has stated, an appeal must be dismissed as inadmissible if it confines itself to repeating or reproducing word for word the pleas in law and arguments previously submitted to the Court of First Instance (see, in particular, the order in *San Marco* v *Commission*, cited above, paragraph 38), the second and third parts of the first plea must be declared admissible. The appellants are contesting, albeit laconically, the interpretation of Article 5(2) of Regulation No 1697/79 arrived at by the Court of First Instance.

21 However, that plea must be rejected as manifestly unfounded.

22 It is settled case-law that, under Article 5(2) of Regulation No 1697/79, three cumulative conditions must be satisfied for the purposes of waiver by the competent authorities of post-clearance recovery of import duties, namely that non-collection must have been due to an error by the authorities, that the person liable must have acted in good faith and that he must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned (see, in particular, paragraph 12 of the judgment in Case C-348/89 *Mecanarte* v *Chefe do Serviço da Conferência Final da Alfândega, Oporto* [1991] ECR I-3277 and paragraph 83 of the judgment in Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] ECR I-2465).

23 In the present case, the Court of First Instance ruled only on the first condition laid down by Article 5(2) of Regulation No 1697/79. It held, in paragraphs 62 to

65 of the contested judgment, that that condition was not fulfilled in the present case, so that there was no need to consider the other conditions.

24 In that connection, the Court of First Instance found, in paragraph 39 of the contested judgment, that the exporter was unable to prove the origin of the goods in question, and rightly concluded, in accordance with the settled case-law of the Court of Justice, that the goods were therefore of unknown origin (see Case C-12/92 *Huygen and Others* [1993] ECR I-6381, paragraph 17, and *Faroe Seafood and Others*, cited above, paragraph 16). The Court of First Instance also noted that the appellants had not contested the fact that the exporter was unable to prove the Norwegian origin of the products in question.

25 On that point, it follows from the Community provisions that it is for the exporter to prove the origin of the goods by producing all appropriate supporting documents (see *Faroe Seafood and Others*, paragraphs 60 to 64, and Article 10(4) of Council Regulation (EEC) No 2937/77 of 20 December 1977 on the application of Decision No 1/77 of the EEC-Norway Joint Committee supplementing and amending Protocol 3 concerning the definition of the concept of 'originating products' and methods of administrative cooperation and replacing certain decisions of the said Joint Committee (OJ 1977 L 344, p. 1)).

26 Thus, contrary to the argument advanced by the appellants, the Court of First Instance did not introduce an additional condition by requiring the importer to prove the origin of the goods.

27 In those circumstances, the second and third parts of the first plea must be rejected as manifestly unfounded.

The second plea

28 By the second plea, the appellants contest the construction placed by the Court of First Instance on the notion of 'error' on the part of the customs authorities, inasmuch as it held that no error can be attributed to the customs authorities themselves where the incorrect treatment applied by them to the goods is in conformity with the declaration presented by the exporter. According to the appellants, those authorities were misled, and the condition laid down in Article 5(2) is therefore fulfilled.

29 In the Commission's view, that complaint is manifestly inadmissible, since the arguments put forward in support of it merely reproduce word for word the arguments previously advanced before the Court of First Instance.

30 However, it must be held that, in putting forward that second plea, the appellants are challenging the interpretation placed by the Court of First Instance on the notion of 'error'. Since it concerns a point of law, that plea must therefore be declared admissible.

31 Be that as it may, the Court of First Instance rightly held, in paragraphs 58 to 61 of the contested judgment, that the competent authorities did not commit any error, since they had been misled, in particular as to the origin of the goods, by incorrect declarations on the part of the person liable, the validity of which they did not have to check or assess (*Mecanarte*, paragraph 24, and *Faroe Seafood and Others*, paragraph 92).

32 It is settled case-law that only errors attributable to acts of the competent authorities confer entitlement to the waiver of post-clearance recovery of

customs duties (*Mecanarte*, paragraph 23, and *Faroe Seafood and Others*, paragraph 91).

33 In those circumstances, the second plea must be rejected as manifestly unfounded.

The third plea

The first part of the third plea

34 By the first part of the third plea, the appellants claim that, by stating that a certain commercial risk is inherent in the market, the Court of First Instance violated the principle of the protection of legitimate expectations.

35 The Commission maintains that the appellants are merely reproducing word for word the arguments advanced by them before the Court of First Instance, and that that part of the plea is therefore inadmissible.

36 In that regard, the plea must be declared admissible inasmuch as the appellants are challenging, albeit laconically, the contested judgment.

37 However, the Court of First Instance rightly observed in paragraphs 62 and 63 of the contested judgment, first, that the European Community cannot be made to

bear the adverse consequences of the wrongful acts of suppliers of importers, second, that the importer may seek compensation from the perpetrator of the fraud, and, finally, that, in calculating the benefits from trade in goods likely to obtain tariff preferences, a prudent trader aware of the rules must assess the risks inherent in the market which he is considering and accept them as normal trade risks (Case 827/79 *Amministrazione delle Finanze* v *Acampora* [1980] ECR 3731, paragraph 8, and Case C-97/95 *Pascoal & Filhos* v *Fazenda Pública* [1997] ECR I-4209, paragraph 59).

38 It is the responsibility of traders to make the necessary arrangements in their contractual relations in order to guard against the risks of an action for post-clearance recovery (*Faroe Seafood and Others*, paragraph 114, and *Pascoal & Filhos*, cited above, paragraph 60).

39 In those circumstances, the first part of the third plea must be rejected as manifestly unfounded.

The second part of the third plea

40 By the second part of the third plea, the appellants maintain that, by holding that there existed a 'customs' risk, and thus confirming the need for a covert restriction on intra-Community trade, the Court of First Instance infringed

Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC).

41 It must be recalled in that regard that, under Article 113(2) of the Rules of Procedure of the Court of Justice, the subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal (*San Marco* v *Commission*, paragraph 47).

42 Were a party to be allowed to put forward for the first time before the Court of Justice a plea in law — in the present case, infringement of Articles 30 and 36 of the Treaty — which it had not raised before the Court of First Instance, that would enable it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the Court of First Instance. In an appeal, the jurisdiction of the Court of Justice is confined to review of the assessment made by the Court of First Instance of the pleas argued before it (*San Marco* v *Commission*, paragraph 49, and *Commission* v *Brazzelli Lualdi*, cited above, paragraph 59).

43 Even if the plea advanced were founded on an alleged error of law on the part of the Court of First Instance, it follows from the combined effects of Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside, and also the legal arguments specifically advanced in support of the appeal (*San Marco* v *Commission*, paragraph 37).

44 The appellants have not in any way specified the nature of the alleged infringement of Articles 30 and 36 of the Treaty; they merely state that '[t]he entire system of Community trade would be affected by the aforesaid "risk" and would consequently be subject to the contingency of having to pay, several years

after the exportation took place, a duty which no longer exists', and that 'this is an absurd idea'.

45 In those circumstances, the second part of the third plea must be rejected as manifestly inadmissible.

The fourth plea

46 By the fourth plea, CPL Imperial 2 asserts that the Court of First Instance infringed the principle of *non bis in idem* and Articles 5 of Regulation No 1697/79 and 220 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), inasmuch as it did not annul that part of the contested decision in which the Commission authorised recovery of customs duties indicated on a customs slip in respect of which payment had already been effected by CPL Imperial 2. According to the latter, the Commission should authorise the recovery of the sums relating to that slip only if they are due. It is for the national courts to fix the precise amount of such sums.

47 The Commission regards that plea as inadmissible, since it has not been explained with sufficient clarity.

48 The plea in question is manifestly unfounded.

49 The Court of First Instance held that it is not for the Commission to determine the amount to be recovered, since the national court has sole jurisdiction to review the legality of the Italian administrative act ordering post-clearance recovery of the duties.

50 The Court of First Instance found that the Commission had merely responded to the Italian authorities' request regarding the interpretation of Article 5(2) of Regulation No 1697/79. It did not express a view in the contested decision as to the amount of the import duties payable, as referred to by the Italian authorities. The Commission merely took the sum indicated by the Italian authorities at its face value and did not therefore carry out any calculation or verify the amount arrived at by the Italian authorities.

51 In those circumstances, the fourth plea must be rejected as manifestly unfounded.

The fifth plea

52 By the fifth plea, the appellants maintain that, in accordance with Commission Regulation (EC) No 1677/98 of 29 July 1998 amending Regulation No 2454/93 (OJ 1998 L 212, p. 18), Member States may waive post-clearance recovery of customs duties without authorisation from the Commission where, as in the present case, those duties amount to less than ECU 50 000. Moreover, that regulation provides that persons such as the appellants are to be informed and heard before a negative decision is adopted.

53 Suffice it to note that Article 42(2) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 118 of those Rules, provides that no

new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

54 Since the arguments expounded in the context of the fifth plea were not raised by the appellants prior to the submission of their reply in the proceedings before the Court of Justice, and since Regulation No 1677/98 was adopted and published before the date on which their appeal was lodged, the fifth plea must be rejected as manifestly inadmissible.

55 It follows from all the foregoing considerations that the pleas in law advanced by the appellants in support of their appeal are either manifestly inadmissible or manifestly unfounded. The appeal must therefore be dismissed in accordance with Article 119 of the Rules of Procedure.

Costs

56 Under Article 69(2) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 118, 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 Commission has applied for costs, and since the appellants have been unsuccessful, they must be ordered to pay the costs.

On those grounds,

THE COURT (Fourth Chamber)

hereby orders:

1. **The appeal is dismissed.**

2. **CPL Imperial 2 SpA and Unifrigo Gadus Srl shall pay the costs.**

Luxembourg, 9 December 1999.

R. Grass — Registrar

D.A.O. Edward — President of the Fourth Chamber