JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
17 December 1997 *

In Case T-121/95,

European Fertilizer Manufacturers Association (EFMA), an association registered under Swiss law, established in Zurich (Switzerland), represented initially by Dominique Voillemot and Hubert de Broca and subsequently by Dominique Voillemot and Olivier Prost, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

applicant,

v

Council of the European Union, represented by Yves Crétien and Antonio Tanca, of its Legal Service, acting as Agents, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg and Brussels, with an address for service in Luxembourg at the office of Alessandro Morbilli, Director General of the Legal Department of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Nicholas Khan, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

* Language of the case: English.

APPLICATION for annulment of Article 1 of Council Regulation (EC) No 477/95 of 16 January 1995 amending the definitive anti-dumping measures applying to imports into the Community of urea originating in the former USSR and terminating the anti-dumping measures applying to imports into the Community of urea originating in the former Czechoslovakia (OJ 1995 L 49, p. 1),

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

composed of: K. Lenaerts, President, P. Lindh, J. Azizi, J. D. Cooke and M. Jaeger, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 28 May 1997,

gives the following

Judgment

Facts of the case

1 The applicant, European Fertilizer Manufacturers Association (EFMA), which was formed by the merger of several associations including CMC-Engrais (Common Market Committee of the Nitrogen and Phosphate Fertilizer Industry), is a trade association governed by Swiss law which represents the common and general interests of its members, who are producers of fertilizers.

2 Following a complaint lodged by CMC-Engrais in July 1986, the Commission gave notice in the *Official Journal of the European Communities* of the initiation of anti-dumping proceedings concerning imports into the Community of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, Libya, Saudi Arabia, the USSR, Trinidad and Tobago and Yugoslavia (OJ 1986 C 254, p. 3) and opened an investigation pursuant to Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1).

3 Those proceedings led to the adoption of Council Regulation (EEC) No 3339/87 of 4 November 1987 imposing a definitive anti-dumping duty on imports of urea originating in Libya and Saudi Arabia and accepting undertakings given in connection with imports of urea originating in Czechoslovakia, the German Democratic Republic, Kuwait, the USSR, Trinidad and Tobago and Yugoslavia and terminating these investigations (OJ 1987 L 317, p. 1). The undertakings accepted by that regulation were confirmed by Commission Decision 89/143/EEC of 21 February 1989 (OJ 1989 L 52, p. 37).

4 By letter of 29 October 1992, the applicant requested a partial review of those undertakings, relating to the former Czechoslovakia and the former Soviet Union.

5 The Commission obtained information on imports into the Community of urea originating in the former Czechoslovakia and the former Soviet Union and, in the light of its conclusions, considered that it had sufficient evidence of changed circumstances to justify initiating a review of the undertakings. The Commission therefore opened an investigation pursuant to Article 14 of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized

imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'the basic regulation') concerning the Czech Republic, the Slovak Republic, the Republics of Belarus, Georgia, Tajikistan and Uzbekistan, the Russian Federation and Ukraine (OJ 1993 C 87, p. 7).

6 Since the review proceedings had not yet been completed when the measures were about to expire, the Commission decided, in accordance with Article 15(4) of the basic regulation, that the measures concerning urea originating in the former Czechoslovakia and the former Soviet Union should remain in force pending the outcome of the review (OJ 1994 C 47, p. 3).

7 The investigation into dumping covered the period from 1 January to 31 December 1992 (hereinafter 'the investigation period').

8 In order to establish the normal value of the urea produced in the former Soviet Union (Russia and Ukraine), Australia was suggested by the applicant as reference country, in accordance with Article 2(5)(a)(i) of the basic regulation. However, the European Fertilizer Importers Association (EFIA), an organization taking part in the investigation, objected to the use of a reference country and proposed that the actual costs in the countries affected by the proceedings should be used. EFIA also submitted, at a later stage of the procedure, that Canada was the most suitable reference country.

9 The Commission, after choosing Australia as provisional reference country, considered that it was not the most suitable choice, because *inter alia* of its isolation from world markets and of its domestic sale prices which were higher than those prevailing in Europe. The Slovak Republic (hereinafter 'Slovakia'), which had already been investigated, was considered and then adopted as reference country.

10 On 10 May 1994 the Commission sent the applicant and all the parties concerned a disclosure letter setting out its conclusions from the investigation together with the principal facts and considerations on the basis of which it intended to recommend the introduction of definitive measures. In the letter the Commission explained why it had chosen Slovakia rather than Australia or Canada as reference country, its calculation of the normal value (in Slovakia), its comparison between the normal value (ex-works for Slovakia) and export prices (national frontier level for Russia and Ukraine), and finally its estimate of injury. It explained in particular why it found it appropriate to set a profit rate of 5% for Community producers and make an adjustment of 10% of the price of urea from the former Soviet Union in calculating the level of the proposed duty. As to the 10% adjustment, it stated in particular that the circumstances, first, that Russian urea tended to deteriorate during transport and, second, that importers of Russian urea were not always able to offer security of supply equivalent to that offered by Community producers resulted in a price difference between urea of Russian origin and urea of Community origin.

11 By letter of 17 May 1994, the applicant asked the Commission to send it the evidence collected during the investigation relating to the 10% adjustment for the difference in quality between urea from the former Soviet Union and urea produced in the Community.

12 By fax of 18 May 1994, the Commission replied that the adjustment was an average estimation on the basis of information obtained from the various importers, traders and distributors involved in trade in urea originating in Russia and in the Community.

13 By letter of 30 May 1994, the applicant submitted comments to the Commission on the disclosure letter. It also asked for further details on the ground that the disclosure letter did not give full information as regards dumping.

14 The Commission provided the applicant with additional information by letter of 10 June 1994.

15 The representatives of the applicant and the Commission met on 18 July 1994 to discuss the various conclusions and observations, and the applicant submitted additional observations to the Commission by letters of 28 July, 9 August, 21 and 26 September and 3 October 1994.

16 Following a further meeting in October 1994, the applicant submitted its final comments by letter of 26 October 1994 *inter alia* on the comparison between normal value and export prices, the 10% adjustment, and the 5% profit margin.

17 On 16 January 1995, the Council adopted Regulation (EC) No 477/95 amending the definitive anti-dumping measures applying to imports into the Community of urea originating in the former USSR and terminating the anti-dumping measures applying to imports into the Community of urea originating in the former Czechoslovakia (OJ 1995 L 49, p. 1, hereinafter 'the contested regulation'). It was published in the *Official Journal* on 4 March 1995.

18 As the injury elimination threshold was lower than the dumping margin established for Russia, the definitive anti-dumping duty was set at the level of the injury elimination threshold, in accordance with Article 13(3) of the basic regulation.

19 Article 1 of the contested regulation provides:

'1. A definitive anti-dumping duty is hereby imposed on imports of urea falling within CN codes 3102 10 10 and 3102 10 90 originating in the Russian Federation.

2. The amount of the duty shall be the difference between ECU 115 per tonne and the net, free-at-Community-frontier price, before customs clearance, if this price is lower.

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

Procedure

20 Those were the circumstances in which the applicant, by application lodged at the Registry of the Court of First Instance on 12 May 1995, brought the present action.

21 By application lodged at the Court Registry on 23 October 1995, the Commission sought leave to intervene in the proceedings in support of the form of order sought by the Council.

22 By order of 21 November 1995, the President of the Fourth Chamber, Extended Composition, of the Court granted leave to intervene.

23 By letter of 2 October 1996, the applicant requested the Court to be allowed to plead in French at the hearing.

24 That request was dismissed by order of the Court, Fourth Chamber, Extended Composition, of 24 January 1997 (Case T-121/95 *EFMA* v *Council* [1997] ECR II-87).

25 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance, Fourth Chamber, Extended Composition, decided to open the oral procedure without any preparatory inquiry. However, a number of questions and requests to produce documents were addressed to the parties.

26 The applicant, by letter lodged at the Court Registry on 17 April 1997, and the Council and the Commission, by letters lodged on 30 April 1997, replied to those questions and produced certain documents.

27 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 28 May 1997.

Forms of order sought

28 The applicant claims that the Court should:

— annul Article 1 of the contested regulation;

— order that the anti-dumping duty imposed by that regulation be maintained until the competent institutions adopt the more stringent measures needed to comply with the judgment requested; and

— order the Council to pay the costs.

29 The Council, defendant, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

30 The Commission, intervener, contends that the Court should:

— dismiss the application.

The claim for annulment

31 The applicant puts forward three pleas in law in support of its claim for annulment of Article 1 of the contested regulation. The first plea alleges, in effect, an infringement of the basic regulation in the choice of Slovakia as reference country. The second plea alleges, first, an infringement of the basic regulation in that the normal value and the export prices were compared at two different stages, namely at ex-works level and frontier level, and, second, a breach of the duty to give reasons in that the contested regulation does not explain why the comparison was made at different stages. In the alternative, it claims that the comparison was vitiated by a

manifest error of assessment. The third plea relates to the determination of injury: the applicant argues, first, that by making an adjustment to the price of urea produced in Russia in order to compensate for alleged differences in quality, the Council both made a manifest error of assessment and failed to respect the right to a fair hearing. Second, in setting too low a profit margin for Community producers, the Council made a manifest error of assessment and again infringed the applicant's right to a fair hearing.

32 Since the anti-dumping duty was set in the present case at the level of the injury elimination threshold, the third plea, concerning the determination of injury, must be considered first.

The plea of incorrect determination of the injury

33 The applicant submits that the Council made two errors in determining the injury: it wrongly applied a 10% adjustment for differences in quality between Russian urea and Community urea, and it wrongly determined a 5% profit margin for the Community producers.

The 10% adjustment for the difference in quality between urea originating in Russia and urea produced in the Community

— Arguments of the parties

34 This limb of the plea falls into two parts. First, by applying an adjustment of 10% for differences in quality when comparing the prices of urea imported from Russia

and urea produced in the Community, the Community institutions made a manifest error of assessment. Second, by so doing, they also infringed an essential procedural requirement, in that the applicant never had an opportunity to submit observations on the evidence used by the Commission to justify that adjustment.

35 The applicant submits to begin with that there is no difference in quality between urea produced in Russia and urea produced in the Community. There was therefore no reason to suppose exceptional deterioration of Russian urea during transport to the Community at the time. On this point, it refers to two items of evidence: a table of chemical and physical comparative analysis of Russian urea and Community urea, of 30 May 1994, which it drew up on the basis of samples analysed by various laboratories, and two faxes from Sinochem UK Ltd to the applicant, which were transmitted to the Commission on 9 August and 26 September 1994. According to the applicant, the table shows that there was no difference between Russian and Community urea, and the faxes confirm that prices of urea imported into China were similar, whether it came from Russia, the Middle East, Indonesia or the European Community.

36 As to the Council's assertion that the urea tends to deteriorate because of loading, unloading and storage, the applicant submits that the Council produces no evidence either that urea from Russia is subject to more loading and unloading movements than urea produced in the Community, or that the storage of Russian urea involves different operations from those required for storage of urea produced in the Community.

37 The applicant then states that Russia is the largest exporter of urea to China, which is the world's largest importer of urea. In its opinion, since exports of urea from Russia to China involve transport over long distances which are at least equivalent

to the distance between Russia and the European Union, it is clear that Russia is able to export urea over long distances without it deteriorating.

38 It challenges the Council's assertion that the determination of a price adjustment to compensate for differences in the quality of products is primarily based on an assessment of consumer perception. It points out that urea is a chemical product which always has the same composition, whether it comes from Russia or the European Community. Moreover, determination of quality differences on the basis of information on sales is unrealistic because of the highly subjective nature of consumer perception and because the information used relates only to one moment in time. Furthermore, as Russian-produced urea and Community-produced urea have the same physical and chemical properties, farmers — that is, consumers of urea — do not and could not distinguish between them.

39 Next, the applicant does not accept that importers of urea from Russia are not always able to guarantee security of supply equivalent to that offered by Community producers. It submits that the urea production capacity in Russia is so much higher than the total volume of sales that the question of security of supply should never arise. In support of its argument, it refers to a press release from Ferchimex published in the periodical *Agrochim-Business* (1/91) in July 1991.

40 In this connection, the applicant further submits that, contrary to the Council's allegations, there has not been any problem with gas supply in Russia. It refers on this point to a report produced in 1992 by British consultants (British Sulphur Consultants) entitled 'Fertilizer Supply from the Commonwealth of Independent States' (hereinafter 'the British Sulphur report') and an article published in *Fertilizer Week* (Volume 7 No 16) on 6 September 1993.

41 Moreover, the applicant rejects the method used by the Council to arrive at the 10% adjustment level, in particular the fact that that level represents 'the middle ground between the figure put forward by the Community producers and the amount requested by EFIA' (point 66 of the contested regulation).

42 It submits that EFIA's observations concerning the adjustment are of no relevance, as they are not based on any evidence. There is a general principle in anti-dumping law that a party seeking an adjustment must prove that its claim is justified. Consequently, EFIA should have been subject to a higher burden of proof, since it benefited from the adjustment.

43 The applicant adds that for its part it vigorously opposed that rate of adjustment in its correspondence following the disclosure letter, and that the two pieces of evidence it produced to the Commission (see paragraph 35 above) were never challenged by the Commission or the Community importers or the Russian producers and exporters.

44 The applicant argues, second, that the Community institutions infringed its fundamental right to a fair hearing.

45 It states that it was not in a position to make comments on the accuracy of the Commission's conclusions as to the 10% adjustment until after receipt of the disclosure letter, namely, at a time when the Commission had already fixed that rate. Similarly, the fax of 18 May 1994 (see paragraph 12 above) is irrelevant, because it was sent eight days after the disclosure letter. The applicant maintains that it never had access to the documents which the Commission used to fix the rate.

46 The applicant also submits that EFIA did not participate in the procedure before the disclosure documents were sent. It was therefore only after the Commission had already proposed the 10% adjustment that EFIA sent a request (on 31 May 1994) to the Commission to set an even higher adjustment rate to compensate for quality differences. The Commission thus could not have based its conclusion as to a rate of 10% on information from the importers.

47 In any event, if EFIA made evidence available to the Commission, the applicant was entitled to see it. It submits, citing the judgments in Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187 and Case C-69/89 *Nakajima All Precision* v *Council* [1991] ECR I-2069, that no limit on the institutions' duty of disclosure could be applicable in this case, in that the information supplied by the importers was relevant to the defence of its interests and the Commission never stated that the information was confidential under Article 8 of the basic regulation or provided any meaningful non-confidential summary (Article 7(4)(a) of the basic regulation).

48 The Council asserts, first, that it never claimed that there are chemical differences between Russian urea and urea produced in the Community; the difference in quality is the result of other factors. It states that, during the investigation, visits to the premises of Community importers of Russian-produced urea enabled the Commission's officials to find that the quality of the urea caused serious problems for the importers when it arrived in the Community. The quality of the product sometimes deteriorated so much because of the long journey and frequent handling that the importers were no longer able to sell it to farmers.

49 The Council observes that a price adjustment for quality differences is, at least in the present case, essentially a question of consumer perception. If consumers

believe (rightly or wrongly) that Russian urea is of inferior quality to that produced in the Community, and are thus not willing to offer a higher price, the question whether a quality difference actually exists is quite irrelevant.

50 It observes that it is irrelevant in the present case whether the true cause of the price differences is an objective difference in quality or a subjective perception by consumers. The price adjustment was intended to make it possible to calculate the target price, and the existing quality difference between Russian urea and urea produced in the Community meant that Community producers could obtain for their product a price at least 10% above the target price. That price level corresponds to the Community producers' production cost plus a reasonable profit margin, which the Council fixed at 5%, and is the price level which makes it possible to eliminate the injury caused by the dumped Russian imports. It further submits that if the Community institutions had not made the 10% adjustment for quality differences, they would have fixed the target price (and consequently the duty) at a higher level than that necessary to eliminate the injury caused by the dumped imports, which would have been contrary to Article 13(3) of the basic regulation.

51 Moreover, the Council rejects the table of comparative chemical and physical analyses of Russian-produced and Community-produced urea submitted by the applicant to show that there are no chemical differences between them. It considers that the analyses do not support the applicant's arguments. The way in which the samples were selected is not clear, and how representative they are is thus open to doubt. Moreover, the samples of Russian urea tested on the spot had not undergone the frequent handling and transshipment which led the institutions to conclude that an adjustment should be made.

52 As to the other evidence relied on by the applicant, namely the faxes from Sinochem to the applicant which are used in order to show that Russian urea and Community urea are sold at the same price in the People's Republic of China, the

Council observes that it was stated in the first fax that only a very small quantity of urea had been exported to China in recent years.

53 Moreover, in its letter of 30 April 1997 in reply to a written question of the Court, the Council explained that the tendency of Russian urea to deteriorate resulted from improper handling during transport, the length and conditions of transport, the fact that Russian urea, unlike urea of Community origin, is transported in bulk rather than in bags and requires more frequent handling, and the fact that Russian urea is not coated with an anti-caking agent, as urea produced in the Community generally is.

54 The Council rejects the applicant's assertion that urea produced in the Community is transported in the same way as Russian urea. It submits that urea produced in the Community in the majority of cases leaves the factory by lorry with a minimum amount of handling before it reaches the end user, whereas urea produced in Russia is loaded and unloaded several times between the factory and the end user in the Community, and that it therefore considers it inevitable that Russian urea tends to deteriorate during transport.

55 Second, with regard to the question of security of supply, the Council points out that the importers themselves informed the Commission of the supply difficulties and that that information was confirmed in the article in *Fertilizer Week* of 6 September 1993 (Volume 7 No 16). It adds that that information proves that there were also quality differences which affected prices.

56 The Council submits that the Ferchimex press release, referred to by the applicant in support of its argument on delivery guarantees (see paragraph 39 above), is of no probative value. It submits that it is merely an advertisement by a company, and

that the fact that the company stresses the delivery guarantee suggests that the supply of urea from Russia generally causes problems. The Council adds that it never stated that importers of Russian urea could never guarantee the same security of supply; it stated that they could not always guarantee that security of supply. It considers, finally, that the conclusion drawn from the article in *Fertilizer Week*, namely that there had not been any problems with gas supplies in Russia, is incorrect, and that the conclusion on the same subject drawn from the British Sulphur report is an attempt to mislead the Court.

57 Third, with regard to the method used to arrive at the 10% adjustment, the Council begins by rejecting the applicant's argument that there is a general principle in the anti-dumping legislation that a party which claims an adjustment must prove that its claim is justified. Assuming that the applicant relies in this respect on Article 2(9)(b) of the basic regulation, the Council observes that that provision relates only to the comparison between the normal value and the export price for the purpose of calculating the dumping margin, and so does not prevent the Community institutions from making an adjustment if they consider that to be justified on the basis of the information they have gathered during the investigation.

58 The Council asserts that this also follows from the nature of an anti-dumping investigation, which is only an administrative procedure in which the Community institutions seek to determine whether anti-dumping measures should be imposed in a given case. Consequently, the provisions which put the burden of proof on one party (such as Article 2(9)(b) of the basic regulation) are relevant only with respect to relations between the Community institutions and that party.

59 It is therefore immaterial, according to the Council, which party bears the burden of proof.

60 The Council submits, moreover, that it is very difficult to quantify an adjustment made to take account of consumer perception of quality differences, and the Community institutions must necessarily have a comparatively wide margin of discretion when fixing the level of such an adjustment. It considers that the best information on which to base such an adjustment is not scientific evidence on the degree of differences in quality but information on sales.

61 The Council then addresses the applicant's argument that the Community institutions infringed its right to a fair hearing during the investigation. It begins by noting that during anti-dumping investigations the obligation of the Community institutions to disclose information to the undertakings concerned is limited if, *inter alia*, the information must be regarded as confidential (see the *Al-Jubail Fertilizer* judgment cited above).

62 It observes that the Commission informed the applicant in the disclosure letter of 10 May 1994 that it intended to make a 10% adjustment and gave the reasons why it considered that adjustment appropriate. The Commission also provided additional information in a fax dated 18 May 1994, and the question was discussed with the applicant at the meeting on 18 July 1994. The Council states that at that meeting the Commission's approach was explained and the applicant was informed that the Commission had learnt from an importer that in one transaction a rebate of 19% had been asked for, and given, for quality differences. The Council stresses that the Commission could not disclose the corresponding evidence to the applicant, since that information was clearly confidential (see Article 8 of the basic regulation).

63 Finally, the Council submits that the applicant's assertion that EFIA participated in the procedure only after receiving the disclosure letter is incorrect. It submits that the conclusion which the applicant draws from that assertion, namely that the Commission did not base its finding that a 10% price difference was justified on information from the importers, is consequently wrong.

— Findings of the Court

64 The question whether an adjustment should be made for quality differences involves the appraisal of complex economic situations. Judicial review by this Court must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts have been accurately stated and whether there has been a manifest error of assessment or a misuse of powers (see, *inter alia*, Case C-174/87 *Ricoh* v *Council* [1992] ECR I-1335, paragraph 68).

65 According to point 64 of the contested regulation,

'... a certain difference in price existed between Community-produced urea and that from the former USSR as a result of the imported product's inferior quality and finish. Its tendency to deteriorate during transport, combined with the fact that importers cannot always offer the same security of supply as the Community producers, leads naturally to lower prices. While these differences are difficult to evaluate in monetary terms, it has been concluded that such a difference exists and that a 10% adjustment in value is considered to be appropriate'.

66 It follows from that passage that the Council did not base the adjustment intended to compensate for the quality differences between urea from the Community and urea from Russia on the condition of the latter when it leaves the factory in Russia. The difference in quality is due to the fact that urea exported from Russia tends to deteriorate during transport and that security of supply is not always ensured. That does not relate to the original condition of the Russian urea. Consequently, the applicant's arguments are immaterial in so far as they concern the physical and chemical composition of the urea when it leaves the Russian factory.

67 Furthermore, the Council's explanation on this point must be accepted.

68 The question of a price adjustment for quality differences is essentially a question of consumer perception, since what matters for determining an adjustment in the context of determining the injury in an anti-dumping investigation is the price which the consumer is prepared to pay for the dumped products compared with products of Community manufacture, not the objective differences between them.

69 Moreover, the applicant has not produced evidence to disprove the fact that urea from Russia was improperly and more frequently handled during transport than urea produced in the Community, and that, unlike Community urea, it was transported in bulk rather than in bags and was not coated with an anti-caking agent.

70 As to the question of security of supply, it appears from the documents in the case that the Commission was informed during the investigation by the importers themselves that they were not always able to guarantee security of supply equivalent to that of Community producers, and that that information was confirmed by an article in *Fertilizer Week* of 6 September 1993 (Volume 7 No 16).

71 It follows that the applicant's arguments to the effect that the institutions made a manifest error of assessment by taking into consideration the fact that Russian urea tended to deteriorate during transport and that importers of Russian urea were not always able to guarantee security of supply equivalent to that of Community producers must be rejected.

72 As to the method used to arrive at the 10% adjustment, the applicant submits that the burden of proof is on the importers to show that there is a difference in quality.

73 That argument cannot be accepted.

74 It is for the Commission as investigating authority to determine whether the product being dumped causes injury when put into free circulation in the Community. The Commission must ascertain whether there has been significant price undercutting compared with the price of a like product in the Community (see Article 4(2)(b) of the basic regulation), and in so doing it must use the information available at the time without imposing the burden of proof on one of the parties (see Article 7(7)(b) of the basic regulation).

75 Moreover, the applicant provided, *inter alia*, information intended to show that the physical and chemical composition of Russian urea is the same as that of urea produced in the Community. Since that information is of altogether secondary importance in determining a specific level of adjustment, it must be concluded that the applicant did not in fact provide any evidence on which a precise level of adjustment could be determined.

76 As regards the calculation of the adjustment, the contested regulation states:

'(65) Whilst admitting that the Community producers' product commanded a higher price, EFMA considered that the level of the adjustment was too high.

Moreover, they argued that the conclusions drawn were without basis given the lack of factual supporting evidence.

EFIA also contested the level of the adjustment, but on the grounds that it was insufficient given the significantly inferior state of the Russian product on arrival at the end user in the Community. They argued that this poorer quality had to be compensated for by lower prices.

(66) In view of the inconclusive and conflicting information received by the Commission, it was concluded, based on the information available, that a 10% adjustment level was both reasonable and appropriate. It also constituted the middle ground between the figure put forward by the Community producers and the amount requested by EFIA.

(67) Allowing for these differences, the level of undercutting of the Community producers' prices was found to be approximately 10% for urea of Russian origin.'

77 To support its conclusion that a 10% adjustment was reasonable and appropriate, the Council, particularly in its letter of 30 April 1997 in reply to a written question of the Court, summarized the relevant issues in the case as follows:

— the Community producers agreed that an adjustment of the order of 5% might be acceptable in respect of the difference in quality between Russian urea and urea produced in the Community;

— the Community importers asked for an adjustment of the order of 15% in that respect;

— an importer stated that it had made a claim for 19% of the purchase price of a consignment because of its poor quality;

— an Australian producer which cooperated in the investigation declared during the verification visit of the Commission's officials to its premises that a price difference of 10% to 15% between its prilled urea and that from the former Soviet Union would be perfectly justified.

78 The Council confirmed at the hearing that it had no other information available for assessing the level of the adjustment. It further stated that it was difficult to reach a conclusion in view of the hypothetical nature of the operation in monetary terms.

79 The Court observes that the question of the appropriate level of adjustment depends essentially on an assessment of consumer perception. If importers buy Russian urea only if it costs 10% less than urea produced in the Community, the Community industry is in danger of losing its market share or having to reduce its prices if the price of the Russian product falls to such an extent that the price difference exceeds 10%, whatever the similarity or difference between the two products.

80 Moreover, assessment of that difference between Russian and Community urea in monetary terms is, as the Council submits, altogether hypothetical, given that Russian urea is being dumped on the Community market. That also means that it was not possible to produce evidence on the point, apart from the opinions of the Community producers and importers which were available to the institutions.

81 It follows that the institutions made their decision on the basis of an evaluation of all the information gathered during the investigation.

82 Accordingly, the Court considers that the institutions did not exceed their margin of discretion in that regard.

83 Finally, the Court must consider the applicant's argument that its right to a fair hearing was infringed, in that it did not have access to information on the method used by the Commission to arrive at the 10% adjustment.

84 It is settled case-law that the right to a fair hearing is respected if the undertaking concerned has been afforded the opportunity during the administrative procedure to make known its views on the correctness and relevance of the facts and circumstances alleged (see *Al-Jubail Fertilizer*, paragraphs 15 and 17, and *Nakajima All Precision*, paragraph 108).

85 In the present case the applicant, by letter of 17 May 1994 in response to the disclosure letter, asked for additional information on the 10% adjustment. The Commission replied in its letter of 18 May 1994: 'The 10% adjustment ... is an average estimation of information obtained from different importers-traders-distributors involved in the trade of Russian as well as Community-produced urea.'

86 Moreover, at the meeting on 18 July 1994 (see paragraph 15 above) the Commission informed the applicant that it had been told by an importer that in one transaction a rebate of 19% had been asked for and given on the ground of differences in quality.

87 It is therefore clear that the applicant was informed during the anti-dumping proceedings of the principal facts and considerations on which the institutions based their conclusions. The only additional factor provided in this respect by the Council, during the written procedure before the Court, is the statement by the Australian producer mentioned in paragraph 77 above. However, as that information is

merely confirmatory and did not form part of the statement of reasons in the contested regulation, its non-disclosure cannot have deprived the applicant of its right to a fair hearing.

88 In those circumstances, and having regard to the fact that the Commission was obliged to assess the level of the adjustment by reference to all the information collected during the investigation, the applicant also cannot claim that the information it received concerning the adjustment was supplied at too late a stage in the administrative procedure.

89 Accordingly, the applicant's right to a fair hearing was not infringed.

90 It follows from all the foregoing that the first limb of the plea must be rejected.

The profit margin of 5% for assessment of loss of profit

— Arguments of the parties

91 In relation to the profit margin for Community producers the applicant advances, in effect, two arguments. First, it considers that the profit margin of 5% before tax used to evaluate the loss of profit is too low. Second, it submits that the Community institutions were in breach of an essential procedural requirement in that they never stated the methodology used to arrive at that figure.

92 The applicant first challenges the figure of 5% for the profit margin calculated by the Community institutions, on the basis that that figure is insufficient to produce the necessary capital for the fertilizer industry to operate and to ensure the new investment needed to maintain plant and equipment and bring them into compliance with new environmental standards. It states that during the investigation and in all its correspondence with the Commission it always claimed that a figure of 10% was more reasonable. It relies on an analysis of 3 May 1995 by Grande Paroisse (one of its members) to show that the figure of 5% is inadequate.

93 With the reply the applicant submitted a report produced in November 1995 by Z/Yen Ltd entitled 'Profitability Requirement Review — European Urea Fertilizer Industry' (hereinafter 'the Z/Yen report'), giving an analysis of the fertilizer industry in Europe, which it refers to in support of its argument that the profit margin is too small.

94 The applicant also submitted in the reply the results of a survey on profitability which it had carried out among the Community producers in order to ascertain the reliability of the information disclosed by the Commission. The applicant explains that it asked them individually on a strictly confidential basis for a copy of their responses to the Commission's questionnaire on profitability. In the applicant's opinion, the results of the survey are difficult to reconcile with the Commission's assertions regarding the profit margin of the Community producers.

95 Second, the applicant submits that if there was a method of calculation, the Community institutions never disclosed or explained it to the applicant. It was therefore unable to make comments either on the level of profit margins generally or on the basis of its assessment, so that its right to a fair hearing was infringed (see the *Al-Jubail Fertilizer* judgment, paragraph 17).

96 The Council states first that to determine the profit margin the Community institutions took into account the factors they generally use, and that in the present case the factors taken into account were clearly explained in point 73 of the contested regulation.

97 It observes that in order to determine the profit margin the Commission must take into account various factors relating to the overall financial situation of the industry, such as normal and fair competition in the market, the efficiency or inefficiency of individual undertakings, comparative advantages, and the increase or decrease in demand. They must be taken into account in order to determine the profit which could reasonably be achieved in the absence of dumped imports. The Council states that that is what the Commission did in the present case.

98 With respect to the results of the questionnaire on profitability sent to the Community producers, the Council submits that a substantial number of Community producers (representing about 40% of total sales by Community producers) considered that the level of profitability was less than 10%, and that they stated this either in their replies to the Commission's questionnaire or during the verification visits to their premises by Commission officials. The Council states that for reasons of confidentiality it is unable to disclose the names of those companies or provide the corresponding evidence.

99 As to the survey submitted by the applicant concerning the Community producers' replies, the Council for its part submits a table drawn up on the basis of all the information received by the Commission during the investigation, which contradicts the results of the applicant's survey. That is due in particular, it explains, to the fact that the results of the applicant's survey do not take into account the information obtained during the visits carried out as part of the administrative procedure.

100 The Council then submits that no evidence was ever produced by the applicant during the investigation to support its assertion that Community producers had to make a profit of 10% before tax to remain competitive. In the Council's opinion, the applicant's submissions contain only vague references to investment said to be necessary to ensure compliance with new environmental standards.

101 The Council considers that it was for the applicant to provide during the investigation the necessary information to support its claim that a profit margin of 10% should be used.

102 As to the Z/Yen report, the Council submits that the applicant may not rely on it, for two reasons. First, the Council claims that the Z/Yen report constitutes a new plea in law within the meaning of Article 48(2) of the Rules of Procedure of the Court of First Instance. The Z/Yen report is related neither to an argument put forward in the application nor to a specific argument raised by the Council in its defence or in the contested regulation. The Z/Yen report cannot therefore be regarded as a mere complement to arguments and submissions made in the application.

103 The Council submits, second, that the applicant may not rely on the report, since it could and should have submitted it during the administrative investigation. On this point, the Council states that in the disclosure letter the Commission sent the applicant, it informed it of its intention to use a profit margin of 5% to calculate the anti-dumping duty and the loss of profit. In the letter the applicant sent the Commission on 17 May 1994, it sought clarification on some points, but not on the determination of the profit margin, so that the Commission's explanations must have been clear.

104 Should the Court consider that the applicant may rely on the Z/Yen report, the Council submits that in any event it has not the slightest probative value. It submits in particular that the Z/Yen report does not deal with the question of the

profit margin necessary for the Community industry to eliminate the injury caused by the dumped imports.

— Findings of the Court

105 It appears from the contested regulation that in establishing the profit margin of 5% the Commission took account of the decline in demand for urea, the need to finance additional investments in manufacturing facilities and the profit which was considered reasonable in the original anti-dumping investigation concerning that product (see point 73 of the contested regulation).

106 The Court therefore holds that the applicant has not adduced any evidence to show that in so doing the Commission made a manifest error of assessment.

107 It appears from the documents in the case and the applicant's reply to a written question of the Court (letter of 17 April 1997) that the applicant has done no more than assert during these proceedings that a profit margin before tax of 5% was manifestly not sufficient to provide the capital necessary for the fertilizer industry to operate and to ensure the new investment necessary for maintaining plant and equipment and bringing it into compliance with new environmental standards, without producing any evidence in support of those assertions.

108 As regards the Z/Yen report, the Court finds that it was submitted after the contested regulation had been adopted. The Court must ascertain whether the institutions based their decisions on correct material facts and whether the assessment of those facts was not manifestly erroneous, in the situation as it appeared at the time

of adoption of the contested measure. In the present case, it has been shown that the applicant did not during the administrative procedure produce any evidence in support of its assertion that a higher profit margin was required. The institutions were therefore unable to take that factor into account when they adopted the contested regulation. For that reason the Court considers that the Z/Yen report should not be taken into account in the present proceedings.

109 The same applies to the analysis by Grande Paroisse of 3 May 1995, submitted by the applicant with its application.

110 Nor may the applicant rely on the results of the survey on profitability it conducted among Community producers. There is nothing to contradict the Council's explanation that the different results are due to the fact that the applicant's survey does not take account of the information obtained during the visits made in the course of the investigation. In addition, the applicant itself maintained in its letter of 17 April 1997 that the Community producers had provided the Commission with a variety of methods for calculating profitability which did not have the same meaning, and which could be clarified by the Commission during the on-site verifications at the premises of the Community producers.

111 As to the applicant's allegation that its right to a fair hearing was infringed, it suffices to note that it was in a position to make known its views on the appropriateness of the 5% figure and to show why a pre-tax profit of 10% was necessary. It did no more, however, than assert in general terms that a profit of the order of 10% would be more appropriate, and did not even seek further details regarding any particular method for calculating the profit margin.

112 The disclosure letter of 10 May 1994 stated: 'The majority of Community producers claimed that a minimum pre-tax profit of 15% was required for them to remain

competitive. However, this was not substantiated and, being an established product, this figure is considered to be high.' The applicant thus knew during the administrative procedure that, in the Commission's opinion, it was for the applicant to show why a higher profit margin was necessary.

113 Consequently, the applicant's right to a fair hearing was not infringed in the administrative proceedings.

114 It follows from the foregoing that the plea must be rejected in its entirety.

The first and second pleas

115 The applicant claims that the Court should annul Article 1 of the contested regulation and order that the anti-dumping duty imposed by that regulation be maintained until the competent institutions adopt more stringent measures.

116 According to point 106 of the contested regulation, the injury elimination threshold was lower than the dumping margin established for Russia. Consequently, in accordance with Article 13(3) of the basic regulation, the definitive anti-dumping duty was set at the level of the injury elimination threshold.

117 That conclusion, which was moreover stated in the disclosure letter of 10 May 1994, was never contested by the applicant.

118 Nor has the applicant challenged the method by which the amount of duty was fixed, that is to say, an amount equal to the difference between ECU 115 per tonne and the free-at-Community-frontier price before customs clearance, if the latter is lower.

119 It follows from the foregoing that the institutions quite rightly set the duty at the level necessary to eliminate the injury caused by dumped imports from Russia.

120 Consequently, even if the applicant were correct in complaining that the institutions fixed a dumping margin which was too low, it would not be possible in any event for it to obtain annulment of Article 1 of the contested regulation.

121 The first and second pleas are thus ineffective, and the claim for annulment of Article 1 of the contested regulation must therefore be rejected in its entirety.

122 Accordingly, the application must likewise be dismissed in its entirety.

Costs

123 U-nder Article 87(2) of the Rules of Procedure, 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, and since the Council has applied for costs, the applicant must be ordered to pay, in addition to its own costs, the costs of the Council. In accordance with Article 87(4) of the Rules of Procedure, the Commission as intervener must be ordered to bear its own costs.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and to pay the costs of the Council;**

3. **Orders the Commission to bear its own costs.**

Lenaerts Lindh Azizi

Cooke Jaeger

Delivered in open court in Luxembourg on 17 December 1997.

H. Jung P. Lindh

Registrar President