OPINION OF ADVOCATE GENERAL GEELHOED
delivered on 14 October 2004 [1]

I — Introduction

1. This case concerns the appeal brought by Peter Biegi Nahrungsmittel GmbH ('Biegi') and Commonfood Handelsgesellschaft für Agrar-Produkte mbH ('Commonfood') against the judgment of the Court of First Instance of 17 September 2003 in Joined Cases T-309/01 and T-239/02. In that judgment the Court of First Instance dismissed the applications for the (partial) annulment of the two Commission decisions.

2. Case T-309/01 related to Commission Decision C(2001) 2533 of 14 August 2001 (REC 4/00), finding it appropriate to effect post-clearance recovery of import duties not charged to Biegi in respect of the importation of poultry meat from Thailand during the period from 13 to 18 July 1995 and from 4 to 22 September 1995. In this respect I should note that post-clearance recovery in relation to September 1995 was not disputed in that case. Case T-239/02 concerned Commission Decision C(2002) 857 of 5 March 2002 (REC 4/01) to the same effect but in relation to Commonfood in respect of goods imported on 24 July 1995.

3. The appeal is — in the same way as the earlier applications to the Court of First Instance — limited to the post-recovery of import duties in relation to July 1995 which correspond to an amount of DEM 218 605.65 in Case T-309/01 and an amount of DEM 222 116.06 in Case T-239/02.

4. The background to the case, which was brought by two of the principal importers of chicken meat in Germany, is as follows. On 1 July 1995 an import tariff of 0% on imports of chicken meat was incorporated into German law, but that national legislation did not make it clear whether an import licence was required to benefit from this zero tariff. This omission in the national legislation was based on an incorrect interpretation of Community customs provisions. Biegi and Commonfood subsequently declared the importation, in various consignments, of

1 — Original language: Dutch.

chicken meat from Thailand and the competent customs office allowed them the benefit of exemption from customs duties. On 22 August 1995 the national legislation concerned was amended with retrospective effect, making it necessary to present an import licence when making use of the tariff in question. Post-clearance recovery was subsequently effected.

II — Background

5. Central to this case is Article 220(2)(b) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code. [2] That article provides, in so far as is relevant:

'2. ... subsequent entry in the accounts shall not occur where:

...

(b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration;

...'

For a more detailed description of the legal background I refer to paragraphs 1 to 7 of the judgment of the Court of First Instance.

6. The facts and procedure are set out at paragraphs 8 to 18 of the judgment of the Court of First Instance. In brief, the importers of chicken meat concerned referred the matter of the post-clearance recovery to the Finanzgericht (Finance Court) Bremen (Germany). On a proposal from that court the German authorities asked the Commission to decide whether it would be justifiable under Article 220(2)(b) of the CCC to waive retrospective accounting for the import duties in the customs administration's dis-

2 — OJ 1992 L 302, p. 1; 'the CCC'.

putes with Biegi and Commonfood.[3] The appeal brought before the Court of First Instance is directed at the subsequent unfavourable decisions of the Commission.

III — Judgment of the Court of First Instance

7. At paragraphs 55 to 84 the Court of First Instance considers the applicants' first plea in law, claiming infringement of Article 220 (2)(b) of the CCC. This plea is dismissed because a condition arising from case-law for the competent authorities to be able to waive subsequent accounting for import duties was not met, namely that their error must be of such a kind that it could not reasonably have been detected by a taxable person acting in good faith (paragraph 55 of the judgment).

8. At paragraph 61 the Court of First Instance holds: 'The Court of Justice has consistently held that whether an error by the competent customs authorities was detectable must be determined having regard to the nature of the error, the professional experience of the traders concerned and the degree of care which they exercised.'

9. The nature of the error is to be determined in the light of the complexity of the rules concerned (paragraph 62 of the judgment). At paragraphs 63 and 67 of its judgment the Court of First Instance states that the legislation concerned is not that complex. In any event, the applicants are experienced professional economic traders who can be deemed to be aware of the importance of the import licence in order to obtain the benefit of the tariff quota. They also actually established a link between the licence and the quota and the German authorities took steps in order to remove their doubts (paragraphs 69 to 72 of the judgment). At paragraph 73 the Court of First Instance states: 'As regards the degree of care shown by the trader concerned, it is clear from the case-law that, as soon as he has doubts as to the need for an import licence in order to benefit from a preferential tariff quota, it is for the trader himself to make inquiries and seek the greatest clarification possible in order to ascertain whether or not those doubts are well founded.'

10. The Court of First Instance considers that care requires that an experienced trader should not, in any event, rely solely on the statement of rates contained in national tariff legislation. Community tariff provisions constitute the sole relevant positive law and everyone is deemed to know that law. A national customs tariff manual is merely a guide for customs operations, with purely indicative value (paragraph 75 of the judgment). It is not sufficient for a trader to rely on incorrect information given out over the telephone. The applicants' argument that they did not have the necessary time to ask the competent authorities to clarify the legal situation in writing is also baseless. The Court of First Instance demonstrates that in

3 — In accordance with the procedure laid down in 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).

this case the parties concerned had sufficient time. Moreover, acceptance of that argument would result in the duty of care of the traders concerned, as defined by the case-law, being devoid of all content (paragraphs 76 to 83 of the judgment).

IV — First plea in law

A — *Pleas and arguments*

11. The first plea put forward by the appellants in the appeal proceedings is that the Court of First Instance has infringed Community law by misapplying Article 220 (2)(b) CCC. In the view of the appellants, the Court of First Instance incorrectly based its ruling on a finding that the error made by the competent customs authority could have been detected by the appellants. They contend that in the contested judgment the Court of First Instance exaggerated the duty of care to be expected of the economic operators concerned. In addition, it failed to appreciate the complexity of the applicable rules.

12. The appellants point out that the purpose of the provision concerned is to protect the legitimate expectation of the person liable that all the information and criteria on which the decision whether or not to proceed with recovery of customs duties is based are correct. [4] They consider that the fact that authorities persisted in their error for a certain period is of relevance to the assessment. Not only was the national legislation concerned incorrect, the authorities persisted in their incorrect view in the course of several telephone conversations. It was the highest national customs authority which committed the error for almost two months. In this connection they also point out that Commission Regulation (EC) No 1359/95 of 13 June 1995 [5] does not state that other Community requirements, such as the obligation to present an import licence, have to be satisfied in order to benefit from the tariff quota in respect of frozen chicken pieces.

13. The error on the part of the authorities was not detectable by economic traders, not even experienced economic traders. The appellants contend that they exercised the care required by case-law by repeatedly requesting information on the import licence from the authorities, thereby giving the authorities an opportunity to remedy the error.

4 — See Case C-251/00 *Ilumitrónica* [2002] ECR I-10433, paragraph 39.

5 — Commission Regulation (EC) No 1359/95 of 13 June 1995 amending Annexes I and II to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, and repealing Regulation (EEC) No 802/80 (OJ 1995 L 142, p. 1).

14. The Commission takes the view that the appeal — and thus also the first plea in law — is inadmissible because the appellants reproduce the pleas in law and arguments previously submitted to the Court of First Instance. Furthermore, the appeal contains an assessment of the facts, for example as regards the complexity of the rules and the duration of the error.

15. In the alternative, the Commission considers that the application is unfounded. In its response it puts forward arguments similar to those on which the Court of First Instance based its judgment.

B — *Admissibility*

16. I consider that the first plea is admissible. Although in its case-law the Court requires that an appeal which confines itself to reproducing the pleas in law and arguments previously submitted to the Court of First Instance should be inadmissible, this requirement cannot be interpreted in such a way that the appeal procedure is devoid of all meaning. The legal appraisal by the Court of First Instance may be raised again in appeal proceedings. [6] Furthermore, I do not concur with the Commission that the appeal contains an assessment of the facts. The appeal essentially contains a clarification of the interpretation which case-law places on Article 220(2)(b) of the CCC.

C — *Substance*

17. In this case it is necessary to establish the extent to which a professional and experienced importer — in this case of chicken meat — may rely on the national customs authorities where they misinterpret the Community Customs Code.

18. Firstly, nothing really new is raised in this case. In similar cases the Court has often had to assess the extent to which an error by the authorities can subsequently be attributed to an undertaking. The general rule applied by the Court is that an error by the authorities can be attributed to an undertaking. Only where three quite stringent requirements are fulfilled can there be legal

6 — See in more detail my Opinion in Case C-234/02 P *European Ombudsman* v *Lamberts* [2004] ECR I-2803, paragraph 90 et seq.

certainty that the undertaking will not subsequently be subject to post-clearance recovery.

19. Having regard to the context in which the import tariffs and quotas are laid down and implemented, it is also necessary that errors by authorities can in principle be attributed to the undertaking concerned or, in other words, that undertakings cannot too readily profit from errors which those authorities make in their favour. Firstly, it is important that implementation of the Community Customs Code be uniform. Differences in implementation between the Member States would simply result in distortions of competition. Furthermore, other undertakings are disadvantaged where one undertaking is able to derive benefit from the misapplication of preferential tariffs. The tariff quotas, which are normally laid down in the context of the WTO, are limited in scope. Secondly, there are the Community's financial interests. In this case it is Community own resources which suffer serious loss. If irredeemable errors were made on a large scale in the Member States, the Community budget could be seriously affected. Thirdly, the importers are generally professionals who can be expected to know and examine the Community law applicable to them.

20. There is a clear parallel with the Court's case-law concerning the recovery of unduly granted State aid. The Court holds that a diligent businessman should normally be able to determine whether the procedure laid down in Article 88 EC has been followed.[7] In this regard the undertaking has an active duty to investigate. That brings me to the criteria applied by the Court, namely nature of the error, professional experience and the degree of care (see paragraph 8 above).

21. As regards the nature of the error, in its case-law the Court attaches importance to the complexity or otherwise of the rules concerned. In the present case the appellants essentially plead that Community law is unclear. They are not entirely mistaken. Reading Regulation No 1359/95 in isolation, it is in fact possible to conclude that no import licence is required. The regulation does not refer to other Community provisions which provide for an import licence, thereby possibly creating the impression that no such licence need be presented. Furthermore, the regulation does not make clear what other Community rules are applicable to imports under the preferential tariff.

22. Therefore, the question also arises as to whether the legislation satisfies the require-

7 — See, for example, Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591.

ments laid down in the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation. [8] According to the first guideline, Community legislative acts are to be drafted clearly, simply and precisely. As the Commission emphasised again at the hearing before the Court, this is not altered by the fact that the customs duties were fixed by the Council pursuant to Article 26 EC or that the parties concerned could therefore not rely exclusively on Commission Regulation No 1359/95 which can, by nature, only contain rules implementing a decision of the Council.

23. None the less, neither of these facts means that the rules concerned cannot be relied upon as against the individual concerned. The abovementioned Community guidelines are not binding. What is more important, however, is that the rules are directed at well-informed professionals who, as I have said, have a duty to make investigations. They cannot simply rely on an isolated text.

24. In certain cases the Court has regarded the continuing nature of an error as evidence both of the complex nature of the problem to be resolved and of lack of negligence on the trader's part. *Belovo* [9] concerned a trader who had, in the course of several operations and over a long period of time, been issued with nine certificates each constituting confirmation that the view which subsequently proved to be erroneous was correct, and on which the contested payments were based. *Faroe Seafood* [10] also concerned traders who obtained the issue of certificates on several occasions and over a relatively long period of two and a half years. In *Ilumitrónica* the misapplication of the law covered a period of over 20 years. [11]

25. The Court of First Instance refers *a contrario* to these judgments to substantiate its argument that the problem was not that complex in this case. The problem raised by the appellants can be resolved relatively quickly. In addition, the Court of First Instance attaches importance to the fact that the undertakings concerned were evidently uncertain and asked the German authorities for clarification over the telephone. I agree with the result of that argument but not with the argument itself. Firstly, it seems to me unfair to rely, as against economic operators, on the fact that they consult the administration when they have doubts as to the proper interpretation of a Community rule. Furthermore, confirmation of a — subsequently apparent — incorrect practice by the autho-

8 — OJ 1999 C 73, p. 1.

9 — Case C-187/91 [1992] ECR I-4937, paragraph 18.

10 — Joined Cases C-153/94 and C-204/94 [1996] ECR I-2465, paragraphs 7 and 104.

11 — See paragraph 58 et seq. of the judgment, cited in footnote 4 above.

rities can precisely give rise to a justifiable assumption that that practice is compatible with Community law. To my mind, whether that confirmation is provided orally or in writing is not conclusive in this respect. Where an individual asks a public authority for an interpretation of the law he must, in principle, be able to assume that the answer given is correct.

26. In my view, the argument to be pursued is different. The wording of a Community rule is decisive, not the interpretation placed thereon by a particular public authority. Only in quite exceptional cases can an individual deduce from this interpretation contrary to the wording of the rule legitimate expectations worthy of protection by the court such that the wording can no longer be relied on as against him. There can be no such exceptional case where a particular interpretation of the law is perpetuated for several years with the result that the individual also guides his conduct permanently by that misinterpretation of the law. In brief, a Community rule does not only have to be complex but also systematically misinterpreted. That is not so in this case.

27. The second condition which the Court applies is the professional experience of those concerned. The longer a trader has been in the business and the larger his undertaking is, the less the likelihood that his reliance on Article 220(2)(b) of Regulation No 2913/92 will be successful. In its judgment the Court of First Instance explains that in this case the importers of poultry meat are experienced.

28. A high degree of care is expected from experienced importers. As the judgment of the Court of First Instance states correctly, an experienced importer cannot merely rely on national implementing provisions because Community regulations have direct effect. An experienced importer can be expected to base his conduct on Community legislation itself and also to study it carefully. In view of the importance of exporters being able to respond swiftly to changes in tariffs, this requirement, which an importer will also normally satisfy in his own interest, is not excessive. To him a national implementing provision will constitute nothing more than an indication.

29. Furthermore, the importer has the option of consulting the national authorities. As I have said, I am not convinced that he must do so in writing — as the Court of First Instance appears to conclude — but I do think it is important that a customs authority

has a certain amount of time to respond and that an experienced importer cannot rely on an initial telephone confirmation of his opinion. Contact between customs authority and importer is characterised by professionalism and equality of knowledge.

30. Where there is doubt as to the correctness of an action, the Member States can consult the Commission in accordance with the procedure set out in Article 871 of Commission Regulation No 2454/93. [12] The existence of this possibility also influences the conduct of importers. They can ask the Member State to do so and thereby to obtain clarification from the Commission.

31. In brief, I consider that the conditions laid down in Article 220(2)(b) of the CCC, under which the retrospective accounting was waived in relation to the applicants in question, are not satisfied. I therefore propose that the Court should dismiss the first plea in law.

V — Second plea in law

32. The second plea in law concerns an allegedly flawed procedure in so far as the Court of First Instance incorrectly declined to hear the witnesses named by the appellants. Instead, it based its judgment on assumptions detrimental to the appellants.

33. As regards this plea, I can be brief. To begin with, the Court of First Instance is not required to hear witnesses, as is evident from Article 68 of its Rules of Procedure — paragraph (2) of which refers [in the Dutch version] to witnesses whom it is deemed necessary to hear — and confirmed in the case-law of the Court of Justice. [13] In more general terms, the Court of First Instance is the sole judge of any need for the information available to it in cases before it to be supplemented. Whether or not the evidence before it is convincing is a matter to be appraised by it alone and is not subject to review on appeal, except where the clear sense of that evidence has been distorted or the substantive inaccuracy of the Court of First Instance's findings is apparent from the documents in the case-file. [14]

12 — Cited in footnote 3 above.

13 — Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 77. The German version of this provision is less explicit than the Dutch and French versions: they read respectively: 'Die Zeugen werden aufgrund eines Beschlusses des Gerichts geladen'; 'De getuigen wier verhoor noodzakelijk wordt geacht, worden opgeroepen krachtens een beschikking'; 'Les témoins dont l'audition est reconnue nécessaire sont cités en vertu d'une ordonnance'. In spite of these differences in the various language versions, the Court explicitly confirmed in the case-law cited that the Court of First Instance is not required to hear witnesses.

14 — See, inter alia, Case C-315/99 P *Ismeri Europa* v *Court of Auditors* [2001] ECR I-5281, paragraph 19.

34. The appellants have put forward no arguments which, having regard to the abovementioned case-law, must lead to a substantive examination by the Court of Justice and could possibly lead to the setting aside of the judgment of the Court of First Instance. In this respect I should note that the dismissal of the first plea in law is essentially based on the extent of the appellants' duty to make investigations and not on the assessment of the (telephone) conversations between the appellants and the German authorities.

35. In brief, the second plea in law is also unfounded.

VI — Conclusion

36. In the light of the foregoing, I propose that the Court should declare unfounded the appeal brought by Peter Biegi Nahrungsmittel GmbH and Commonfood Handelsgesellschaft für Agrar-Produkte mbH against the judgment of the Court of First Instance of 17 September 2003 in Joined Cases T-309/01 and T-239/02.