# JUDGMENT OF THE COURT (Sixth Chamber)

21 September 2000 *

In Case C-46/98 P,

**European Fertilizer Manufacturers Association (EFMA)**, established in Zürich (Switzerland), represented by D. Voillemot and O. Prost, of the Paris Bar, with an address for service in Luxembourg at the Chambers of M. Loesch, 11 Rue Goethe,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber, Extended Composition) of 17 December 1997 in Case T-121/95 *EFMA* v *Council* [1997] ECR II-2391, seeking to have that judgment set aside,

the other parties to the proceedings being:

**Council of the European Union**, represented by S. Marquardt, Legal Adviser, acting as Agent, assisted by H.-J. Rabe and G.M. Berrisch, of the Brussels Bar,

* Language of the case: English.

with an address for service in Luxembourg at the office of A. Morbilli, General Counsel of the Legal Affairs Directorate in the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant at first instance,

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

intervener at first instance,

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber, P.J.G. Kapteyn and H. Ragnemalm (Rapporteur), Judges,

Advocate General: A. La Pergola,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 23 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 11 November 1999,

gives the following

## Judgment

1 By application lodged at the Registry of the Court on 23 February 1998, 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), brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 17 December 1997 in Case T-121/95 *EFMA* v *Council* [1997] ECR II-2391 ('the judgment under appeal'), by which the Court of First Instance dismissed its application for the 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 contested regulation').

## Legal framework, facts and procedure

2 The legal framework and the facts of the dispute, as set out in the judgment under appeal, may be summarised as follows.

3 Following a complaint lodged by CMC-Engrais in July 1986, the Commission published a 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 subsidised imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1).

4 Those proceedings resulted in 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).

5 By letter of 29 October 1992, EFMA requested a partial review of those undertakings which related to the former Czechoslovakia and the former Soviet Union.

6 Since it considered that it had sufficient evidence of changed circumstances to justify initiating a review of the undertakings, the Commission opened an investigation pursuant to Article 14 of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1) ('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).

7 As 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).

8 The investigation into dumping covered the period from 1 January 1992 to 31 December 1992.

9 On 10 May 1994 the Commission sent to EFMA 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 that letter the Commission

explained why it had chosen Slovakia 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 to make an adjustment of 10% of the price of urea from Russia 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.

10 By letter of 17 May 1994, EFMA asked the Commission to send to 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.

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

12 By letter of 30 May 1994, EFMA submitted its 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.

13 The Commission provided EFMA with additional information by letter of 10 June 1994.

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

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

16 The Council adopted the contested regulation on 16 January 1995.

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

18 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.'

19 EFMA brought an action on 12 May 1995 seeking annulment of Article 1 of the contested regulation.

20 EFMA put forward three pleas in law in its action before the Court of First Instance. The first plea alleged, in substance, an infringement of the basic regulation in the choice of Slovakia as reference country. The second plea alleged, first, an infringement of the basic regulation in that the normal value and the export prices had been compared at two different stages, namely at the ex-works level and at the frontier level, and, second, a breach of the duty to give reasons in that the contested regulation failed to explain why the comparison had been made at different stages. In the alternative, it claimed that the comparison was vitiated by a manifest error of assessment. The third plea related to the determination of injury: EFMA argued, 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 had both made a manifest error of assessment and failed to respect its right to a fair hearing. Second, in setting too low a profit margin for Community producers, the Council had made a manifest error of assessment and again infringed EFMA's right to a fair hearing.

21 The Council and Commission submitted that the Court of First Instance should dismiss the action.

## The judgment under appeal

22 In the judgment under appeal, the Court of First Instance dismissed the action and ordered EFMA to pay its own costs and those of the Council.

23 Concerning the first limb of the third plea, the Court of First Instance took the view, in paragraphs 64 to 82, that, in fixing the price adjustment at 10% in order to take account of the difference in quality between urea originating in Russia and that manufactured in the Community, the institutions had not exceeded their margin of discretion in that regard. The Court of First Instance also considered, in paragraphs 87 to 89, that EFMA's right to a fair hearing had not been infringed since it had been informed, during the anti-dumping proceedings, of the principal facts and considerations on which the institutions had based their conclusions.

24 With regard to the second limb of the third plea, the Court of First Instance held, in paragraph 105 of the judgment under appeal, that, in establishing the profit margin of 5%, the Commission had taken 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. In paragraph 106 of the judgment under appeal, the Court of First Instance held that EFMA had failed to adduce any evidence to show that the Commission had made a manifest error of assessment. In paragraphs 108 and 109, the Court of First Instance refused in this connection

to take account of a report produced in November 1995 by Z/Yen Ltd entitled 'Profitability Requirement Review — European Urea Fertilizer Industry' as well as an analysis of 3 May 1995 compiled by Grande Paroisse, a company which is a member of the appellant association, on the ground that these had been submitted after the contested regulation had been adopted, with the result that the institutions had been unable to take them into account when adopting the contested regulation.

25 The Court of First Instance, in paragraphs 111 to 113 of the judgment under appeal, also rejected EFMA's allegation that its right to a fair hearing had been infringed in the case, pointing out that, having been given the opportunity to make its views known, it had done no more than assert in general terms that a profit of the order of 10% would be more appropriate and had not even sought further details regarding any particular method for calculating the profit margin.

26 Finally, the Court of First Instance ruled, in paragraphs 119 to 121 of the judgment under appeal, that the first and second pleas were ineffective in view of the fact that, even had EFMA been correct in complaining that the institutions had fixed a dumping margin which was too low, it would not have been possible in any event for it to obtain annulment of Article 1 of the contested regulation, since the institutions had quite rightly set the duty at the level necessary to eliminate the injury caused by dumped imports from Russia.

## The appeal

27 The appellant asks that the judgment under appeal be set aside on the points of law set out in its appeal and, if necessary, that the case be referred back to the Court of First Instance. It also requests that the Council be ordered to pay the costs of both sets of proceedings.

28 In support of its appeal, the appellant invokes six pleas in law alleging, *inter alia*, breach of the obligation to state reasons, infringement of the right to a fair hearing, and distortion of the evidence.

29 The Council submits that the Court should dismiss the appeal and order the appellant to pay the costs.

30 The Commission submits that the Court should dismiss the appeal.

## The first plea in law

31 The appellant criticises the Court of First Instance for having failed to indicate the reasons why it did not examine the first and second pleas in law put forward in its application, thereby infringing a general principle of law which obliges every court to state the reasons on which its decisions are based by indicating, in particular, the reasons which led it to decide not to uphold a complaint expressly raised before it.

32 It must first be noted that the Court of First Instance found, in paragraph 116 of the judgment under appeal, that, according to point 106 of the contested

regulation, the injury elimination level 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 had been set at the same level as the injury elimination level.

33 After pointing out, in paragraphs 117 and 118 of the judgment under appeal, that neither that conclusion nor the method by which the amount of duty had been fixed had ever been contested by the appellant, the Court of First Instance held, in paragraph 119, that the institutions had quite rightly set the duty at the level necessary to eliminate the injury caused by dumped imports from Russia. It accordingly concluded, in paragraphs 120 and 121, that the first and second pleas were ineffective, since, even if EFMA were correct in complaining that the institutions had fixed a dumping margin which was too low, it would not have been possible for it in any event to obtain annulment of Article 1 of the contested regulation.

34 That being so, it must be held that the obligation to state the reasons on which the judgment is based following from Articles 33 and 46 of the EC Statute of the Court of Justice was not infringed, since the Court of First Instance set out clearly the reasons why it was unnecessary to examine further EFMA's first and second pleas.

35 The first plea in law is accordingly unfounded.

**The second plea in law**

36 In its second plea, the appellant complains that the Court of First Instance implicitly considered that it had not proved an interest in relation to the first and second pleas in its application.

37 It should be noted in this regard that, contrary to the appellant's assertions, the Court of First Instance did not take the view that the appellant had not proved an interest in relation to the first and second pleas in its application, but rather that those pleas were ineffective, as is expressly stated in paragraphs 120 and 121 of the judgment under appeal.

38 In an action for annulment, the ineffective nature of a plea which has been raised refers to its capacity, in the event that it is well founded, to lead to the annulment sought by an applicant; it does not refer to the interest which that applicant may have in bringing such an action or even in raising a specific plea, since those are issues relating to the admissibility of the action and the admissibility of the plea respectively.

39 The second plea is consequently unfounded and must be rejected.

**The third plea**

40 The appellant submits that, contrary to what was stated in paragraph 77 of the judgment under appeal, Community producers never agreed during the administrative procedure that an adjustment of the order of 5% might be acceptable. Moreover, such an adjustment does not feature in any document on file.

41 The appellant accordingly takes the view that there has been a distortion of the evidence or at least a substantive inaccuracy in the findings of fact made by the Court of First Instance.

42 First, it should be pointed out that, under Article 168a of the EC Treaty (now Article 225 EC) and Article 51, first paragraph, of the EC Statute of the Court of Justice, 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 (order in Case C-19/95 P *San Marco* v *Commission* [1996] ECR I-4435, paragraph 39).

43 It also follows from settled case-law that the appraisal by the Court of First Instance of the evidence put before it does not constitute (save where the clear sense of that evidence has been distorted) a point of law which is subject, as such, to review by the Court of Justice (Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42).

44 Without it being necessary to rule on the question whether paragraph 77 of the judgment under appeal contains a finding or an assessment of the facts by the Court of First Instance, suffice it to hold that that Court confined itself to noting that point among others submitted by the Council and did not draw any specific legal consequences from it in its subsequent reasoning.

45 It follows that the third plea in law is ineffective and must be rejected as unfounded.

**The fourth plea in law**

46 Referring to paragraphs 66 and 67 of the judgment under appeal, the appellant argues that the Court of First Instance distorted the evidence submitted to it.

47 According to the appellant, the Court of First Instance rejected the analyses submitted to it, after wrongly forming the view that those analyses compared ex-works Russian urea with Community urea, whereas in fact the analyses had been carried out on the Community market, as had, moreover, been indicated both during the administrative procedure and in the proceedings before the Court of First Instance.

48 It should be noted in this regard that, contrary to the appellant's assertions, the Court of First Instance did not, in paragraphs 66 and 67 of the judgment under appeal, rule on the relevance of the technical and chemical analyses submitted to it, since this matter was addressed in paragraph 75 of that judgment.

49 The Court of First Instance found, in paragraph 75 of the judgment under appeal, that the information provided by EFMA which was intended to show that the physical and chemical composition of Russian urea was the same as that of urea produced in the Community was of altogether secondary importance in determining a specific level of adjustment; the Court of First Instance did not, however, indicate that the analyses submitted to it compared ex-works Russian urea and Community urea.

50 It follows that it has not been demonstrated that the Court of First Instance distorted the evidence submitted to it. That being so, the fourth plea in law must be dismissed as unfounded.

**The fifth plea in law**

51 The appellant submits that the Court of First Instance made an incorrect legal characterisation of the facts in affirming that the appellant's right to a fair hearing had not been infringed.

52 The appellant considers that it was not able effectively to make its views known on the information which had induced the Commission to make a 10% adjustment in respect of the quality differences between Russian urea and Community urea.

53 According to the appellant, it ought to have received all of the information supplied to the Commission during the administrative procedure to enable it to demonstrate that it had no probative value. In this regard, the appellant argues in particular that the importers who cooperated in the procedure could not be considered to be sufficiently representative in so far as they accounted for only 1.5% of urea imports and that their oral declarations before the Commission were wholly inconsistent.

54 It must be noted in this regard that the appellant was informed by the Commission that the adjustment was an average of the information obtained from various importers, traders and distributers engaged in the trade in urea originating in both Russia and the Community. The Commission also informed the appellant that it had learned from one importer that, during one transaction, a 19% discount had been requested and granted in respect of quality differences. As is clear from paragraphs 12 to 15 of the present judgment, the appellant was in a position to submit observations on that information.

55 In those circumstances, the Court of First Instance was correct in law to hold, in paragraph 87 of the judgment under appeal, that EFMA had been informed during the anti-dumping proceedings of the principal facts and considerations on which the institutions had based their conclusions.

56 It must therefore be held that the appellant's right to a fair hearing was not infringed.

57 It follows that the fifth plea in law must be rejected as being unfounded.

## The sixth plea in law

58 Finally, the appellant criticises the Court of First Instance for having failed to take account of the report produced by Z/Yen Ltd on the ground that that report had been submitted to it only after the contested regulation had been adopted and that the institutions had therefore been unable to take it into account when they adopted that regulation.

59 According to the appellant, the right of a person directly and individually concerned to present arguments before the Court of First Instance cannot be restricted simply because he refrained from doing so when he had the opportunity to submit those arguments during the administrative procedure.

60 It must be noted in this regard that, in an action for annulment under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), it is not for the Court of First Instance to carry out a re-examination of the substance of the contested regulation but to determine whether there was any manifest error of assessment on the part of its author.

61 The Council's assessment at the close of the administrative anti-dumping procedure relates, according to Article 12(1) of the basic regulation, to the facts as finally established. It follows that the Court of First Instance could, within the

framework of its judicial review, confine itself to determining whether the Council had committed a manifest error in its assessment of the facts of which it was aware when the contested regulation was adopted. The Court of First Instance was therefore correct in law to take the view that it was unnecessary to take account of the report subsequently produced by Z/Yen Ltd.

62 The sixth plea in law must consequently be rejected.

63 It follows from all of the foregoing considerations that the pleas in law submitted by the appellant in support of its appeal are unfounded.

64 In those circumstances, the appeal must be dismissed.

## Costs

65 Under Article 69(2) of the Rules of Procedure, which apply to the procedure on appeal 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 Council had applied for the appellant to be ordered to pay the costs and the appellant has been unsuccessful, it must be ordered to pay the costs. The Commission shall bear its own costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Dismisses the appeal;**

2. **Orders European Fertilizer Manufacturers Association (EFMA) to pay the costs;**

3. **Orders the Commission of the European Communities to bear its own costs.**

Schintgen Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 21 September 2000.

R. Grass
Registrar

J.C. Moitinho de Almeida
President of the Sixth Chamber