JUDGMENT OF THE COURT OF FIRST INSTANCE

7 February 2001 *

In Case T-186/98,

Compañía Internacional de Pesca y Derivados, SA (Inpesca), established in Bermeo (Spain), represented by M.I. Angulo Fuertes and M.B. Angulo Fuertes, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by L. Visaggio and J. Guerra Fernández, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for, first, annulment of the decision allegedly contained in a letter from the Commission dated 16 September 1998 and, second, an order that the Commission make good the harm allegedly sustained by the applicant,

* Language of the case: Spanish.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES,

composed of: J. Pirrung, President, A. Potocki and A.W.H. Meij, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 13 September 2000,

gives the following

Judgment

1 Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7) provides in Article 6(1) that the Commission may grant Community financial aid for material investments relating to the purchase or construction of new fishing vessels.

2 Article 34(1) of Regulation No 4028/86 provides that applications for Community aid are to be submitted to the Commission through the Member State concerned.

3 Article 37(1) of Regulation No 4028/86 provides:

'Aid applications in response to which no grant has been awarded for lack of funds shall be carried forward, once only, to the following budgetary year.'

4 Council Regulation (EC) No 1263/1999 of 21 June 1999 on the Financial Instrument for Fisheries Guidance (OJ 1999 L 161, p. 54) provides in Article 5:

'1. Council Regulations (EEC) No 4028/86(10) and (EEC) No 4042/89(11) shall continue to apply to applications for aid submitted before 1 January 1994.

2. Portions of sums committed as assistance for projects by the Commission between 1 January 1989 and 31 December 1993 under Regulation (EEC) No 4028/86 for which no final application for payment has been submitted to the Commission at the latest six years and three months after the date the aid is granted shall be released automatically by the Commission at the latest six years and nine months after the date the aid is granted, giving rise to the repayment of amounts unduly paid, without prejudice to projects which have been suspended on legal grounds.'

5 The Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1, hereinafter 'the Financial

Regulation') lays down in Article 7.7, as amended by Council Regulation (Euratom, ECSC, EEC) No 610/90 of 13 March 1990 amending the Financial Regulation (OJ 1990 L 70, p. 1), the following provisions:

'Revenue deriving from the repayment of advances by recipients of Community aid shall be entered in the suspense accounts.

At the start of each financial year, the Commission shall examine the volume of such revenue and assess the need for re-use in the budget heading from which the original expenditure was made, in the light of requirements.

The Commission shall take this decision before 15 February of each financial year and shall inform the budget authority by 15 March of the decision taken.

Revenue which has not been re-used shall be shown under miscellaneous revenue of the financial year in which it has been entered.'

Facts of the dispute

6 On 20 June 1989 the applicant submitted an application to the Commission, through the Spanish Government, for financial assistance for the construction of a vessel for the catching and freezing of tunney, named the *Txori-Berri*. The amount of aid sought, namely 216 886 200 Spanish pesetas (ESP), represented 10% of the vessel's construction cost.

7 By letter of 18 December 1990, the Commission informed the applicant that it was unable to grant Community financial assistance for its project because insufficient funds were available to finance the 1990 projects.

8 The applicant's request was therefore carried forward to the 1991 budgetary year, in accordance with Article 37(1) of Regulation No 4028/86.

9 By letter of 8 November 1991, the Commission informed the applicant that it was unable to grant the assistance requested for its project because insufficient funds were available to finance the 1991 projects.

10 By application lodged at the Registry of the Court of Justice on 30 July 1992, the applicant brought an action for annulment of the decisions of the Commission of 18 December 1990 and 8 November 1991 not to grant the Community financial assistance which it had sought for its project for the construction of a new fishing vessel.

11 By order of 27 September 1993, the Court of Justice referred the case to the Court of First Instance of the European Communities pursuant to Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21). The Registry of the Court of First Instance allocated the case number T-453/93.

12 By order of 29 March 1994, the President of the Second Chamber of the Court of First Instance joined that case to the similar case brought by Pesquería Vasco-Montañesa, SA (Pevasa) and registered as Case T-452/93.

13 By order of 28 April 1994 in Joined Cases T-452/93 and T-453/93 *Pevasa and Inpesca* v *Commission* [1994] ECR II-229, the Court (Second Chamber) gave its decision in those two cases.

14 First, the Court considered that the letters of 8 November 1991 to the applicant and to Pevasa were legal acts having definitive legal effects *vis-à-vis* those parties. By those letters, which were drafted in precise and unequivocal terms, the Commission had taken a definitive position with regard to the applicants' applications, since Article 37(1) of Regulation No 4028/86 provides for applications to be carried forward once only in the event of their being refused Community aid for lack of funds.

15 Next, the Court held that the actions, which had been registered on 30 July 1992, had been brought after expiry of the period prescribed for the purpose. Accordingly, it decided that, in so far as they sought annulment of the decisions of 8 November 1991, the actions must be dismissed as inadmissible.

16 By applications lodged at the Registry of the Court of Justice on 8 July 1994, the applicant and Pevasa brought an appeal against the order in *Pevasa and Inpesca* v *Commission*.

17 By order of 26 October 1995 in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, the Court of Justice dismissed those appeals as manifestly unfounded.

18 By application lodged at the Registry of the Court of Justice on 12 February 1996, the applicant applied, pursuant to Article 41 of the EC Statute of the Court of Justice, for revision of the aforesaid order of 26 October 1995.

19 By judgment in Joined Cases C-199/94 P and C-200/94 P REV [1998] ECR I-831, the Court of Justice dismissed that application as inadmissible, pursuant to Article 100(1) of its Rules of Procedure.

20 In the meantime, by its judgment in Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, the Court of First Instance had dismissed the actions brought in those cases by four companies active in the fishing industry against four decisions of 24 March 1994 whereby the Commission had, first, decided to withdraw the Community financial aid granted to them under Regulation No 4028/86 and, second, ordered three of the companies to repay the amount of aid received.

21 It was to those facts that, in a letter of 11 May 1998, which the Commission received on 15 May 1998, the applicant referred in asserting that a total amount of ESP 270 328 740 had been reimbursed to the Commission. Since that amount was greater than the amount of the financial assistance which the applicant had sought on 20 June 1989, the Commission could no longer argue that the funds available to finance its project were insufficient. Having regard to that change in the situation, the applicant requested the Commission to comply as soon as possible with its repeated request for financial assistance.

22 In a letter of 20 July 1998, which the Commission received on 28 July 1998, the applicant relied on certain new facts which, it alleged, established the merits and legality of its application for financial assistance of 20 June 1989. First, it referred to the publication in the *Official Journal of the European Communities* of 9 June 1998 of the proposal for a Council Regulation (EC) on structural measures in the

fisheries sector (OJ 1998 C 176, p. 44), in particular Article 6 thereof. Second, it referred to the new judgments delivered on the subject, in particular the judgment of the Court of First Instance in Case T-218/95 *Le Canne* v *Commission* [1997] ECR II-2055, in which it had been held that the refusal to grant financial assistance on the ground of alleged lack of available funding should not imply a final and irrevocable refusal of the assistance sought. Third, it pointed out that funds to finance its project were available. It referred, in that respect, to the content of its letter of 11 May 1998 and further stated that, pursuant to Article 6 of the proposal for a regulation, the Commission had the option of automatically releasing the amounts corresponding to financial assistance not paid or unduly paid, in order to finance projects which, like the applicant's, 'have been suspended and allocated on legal grounds'.

23 By letter of 16 September 1998 (hereinafter 'the contested letter'), the Commission replied to the applicant as follows:

'I have pleasure in acknowledging your abovementioned letter [of 20 July 1998], in which you request the Commission to reconsider your case and, accordingly, to grant you, should it be appropriate, the assistance to which you consider you are entitled following the annulment [read: confirmation] of Commission Decisions C(94) 670/1, C(94) 670/2, C(94) 670/3 and C(94) 670/4 of 24 March 1994 and the resulting recovery of the assistance granted, which allegedly provides the Commission with sufficient funds to finance the project in question.

I must point out that the relevant Community legislation does not authorise reconsideration of files which have not been granted Community financing for lack of sufficient funds. Article 37 of [Regulation No 4028/86] provides that projects which have not been financed for lack of funds may be carried forward once only to the following budgetary year for reconsideration at the same time as the new projects submitted by the Member States. If a project is not accepted at the end of the second financial year it is definitively rejected.

Furthermore, the multiannual guidance programme for the Spanish fishing fleet provided for a reduction in fishing capacity in certain sectors. Consequently, although important, cancellation [el aporte de bajas] is not sufficient reason for your project to be eligible for funding as a priority, having regard to the Community's limited financial resources. The Spanish authorities responsible for fisheries will be able to confirm all the points of the present answer and, in particular, everything relating to the successive multiannual guidance programme for the Spanish fleet.

Finally, Community assistance constitutes only a part of the total assistance requested. The Spanish authorities with competence for fishery matters will therefore be able to provide you with further details of the assistance which you may possibly be able to claim and the processing of your case by the national and Community administration.'

Procedure and forms of order sought by the parties

24 By application lodged at the Registry of the Court of First Instance on 25 November 1998, the applicant brought the present proceedings.

25 In its application, the applicant claims that the Court should:

— declare admissible the present application for annulment of the Commission's decision of 16 September 1998 refusing to grant the applicant the Community funding sought for a project for the construction of a tunney freezer ship pursuant to Regulation No 4028/86 and Article 6(1) of the draft regulation;

— declare the said Commission decision void;

— declare that the applicant is entitled to receive, by way of compensation for the harm it has sustained owing to the adoption of the contested decision, the Community funding it was refused, amounting to ESP 216 886 200, together with interest from 12 March 1992 until the date on which payment is made;

— take note of the applicant's offer to adduce evidence in order to establish the facts put forward;

— order the Commission to pay the costs.

26 By separate document lodged at the Registry of the Court of First Instance on 15 February 1999, the Commission raised a plea of inadmissibility based on Article 114(1) of the Rules of Procedure of the Court of First Instance.

27 On 30 March 1999 the applicant lodged its observations on that plea pursuant to Article 114(2) of the Rules of Procedure.

28 In a document dated 12 July 1999, received at the Court of First Instance on 21 July 1999, the applicant submitted 'further observations' on that plea.

29 By letter of 6 October 1999, received at the Court of First Instance on the same date, the Commission disputed the admissibility of those 'further observations'.

30 Following the report of the Judge-Rapporteur, the Court decided to open the oral procedure in respect of the plea of inadmissibility. It also decided to put two questions to the Commission in writing, to which the latter replied at the hearing on 13 September 2000. At the hearing the parties also presented oral argument and their answers to the oral questions put by the Court.

31 The Commission contends that the Court should:

— by reasoned order declare the action inadmissible;

— order the applicant to pay the costs.

32 The applicant contends that the Court should:

— dismiss the plea of inadmissibility raised by the Commission;

— order the defendant to pay the costs.

The admissibility of the 'further observations' lodged by the applicant

33 The Court observes that its Rules of Procedure make no provision for the parties to a dispute to lodge 'further observations' on admissibility such as those lodged by the applicant in the present case.

34 In those circumstances, the 'further observations' lodged by the applicant on 21 July 1999 must be declared inadmissible.

35 In any event, the applicant made submissions at the hearing on the arguments it had wished to present in its 'further observations'.

Admissibility of the pleas for annulment

Arguments of the parties

36 The Commission observes that the letter in issue merely sets out the situation as regards the case. It is a purely confirmatory letter, having no legal effect, and is

therefore not a challengeable act (Joined Cases 41/59 and 50/59 *Hamborner Bergbau* v *High Authority* [1960] ECR 493, at 503, and Joined Cases 8/66, 9/66, 10/66 and 11/66 *Cimenteries and Others* v *Commission* [1967] ECR 75, at 90).

37 The Commission states that the applicant merely requested a reconsideration of the application for financial assistance which it had submitted on 20 June 1989. That application was rejected by decisions of 18 December 1990 and 8 November 1991, which became immune to challenge because the applicant did not bring an action within the prescribed period. The orders of 28 April 1994 and 26 October 1995 in *Pevasa and Inpesca* v *Commission* and the judgment in *Inpesca* v *Commission* confirmed that those decisions became final and were no longer open to discussion. In those circumstances, to declare the present action admissible would seriously undermine the principle of legal certainty.

38 The applicant replies, first, that the letter in issue is comparable with the letters of 18 December 1990 and 8 November 1991, which formed the subject-matter of the actions leading to the order of 28 April 1994 in *Pevasa and Inpesca* v *Commission*, cited above. Since the Court of First Instance held in those cases that the letters constituted challengeable decisions, it must reach the same conclusion with regard to the contested letter.

39 Second, the applicant claims that the contested letter is a challengeable measure because it constitutes the response to a new request, namely the request set out in its letters of 11 May and 20 July 1998 and based on the existence of new facts. In that regard, it refers to the facts stated in the two letters and, in particular, to the judgment in Case C-48/96 P *Windpark Groothusen* v *Commission* [1998] ECR I-2873. The applicant contends that that judgment confirms that the Commission has reserved the possibility of granting financial assistance to projects which have been definitively refused.

Findings of the Court

40 It is settled case-law that a decision which has not been challenged by the addressee within the time-limit laid down by Article 173 of the EC Treaty (now, after amendment, Article 230 EC) becomes definitive as against him (Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 57, and the case-law cited there). Furthermore, time-limits for bringing proceedings, which are a matter of public policy, are not subject to the discretion either of the Court or of the parties (order of the Court of First Instance of 3 February 1998 in Case T-68/96 *Polyvios* v *Commission* [1998] ECR II-153, paragraph 43).

41 In the present case, the Court of First Instance held in its order of 28 April 1994 in *Pevasa and Inpesca* v *Commission*, cited above (paragraphs 28 to 37), that the letter of 8 November 1991 contained the definitive decision of the Commission on the request for financial assistance which the applicant had submitted on 20 June 1989. It then held that the applicant's action, which had been registered on 30 July 1992, had been brought out of time. It therefore dismissed the action, in so far as it was directed against the decision of 8 November 1991, as inadmissible.

42 In its order of 26 October 1995 in *Pevasa and Inpesca* v *Commission*, cited above, the Court of Justice upheld those findings of the Court of First Instance and dismissed the applicant's appeal as manifestly unfounded.

43 In those circumstances, the decision of 8 November 1991 has become definitive as against the applicant.

44 According to settled case-law, an action for the annulment of a decision which merely confirms a previous decision not contested within the time-limit for initiating proceedings is inadmissible. A measure is regarded as merely confirmatory of a previous decision if it contains no new factor as compared with the previous measure and was not preceded by a re-examination of the circumstances of the person to whom that measure was addressed (see, in that regard, judgment of the Court of Justice in Case 54/77 *Herpels* v *Commission* [1978] ECR 585, paragraph 14; and judgment of the Court of First Instance in Case T-82/92 *Cortes Jiminez and Others* v *Commission* [1994] ECR-SC I-A-69 and II-237, paragraph 14).

45 However, the confirmatory or other nature of a measure cannot be determined solely with reference to its content as compared with that of the previous decision which it confirms. The nature of the contested measure must also be appraised in the light of the nature of the request to which it constitutes a reply (judgment of the Court of Justice in Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 22; judgment of the Court of First Instance in Case T-330/94 *Salt Union* v *Commission* [1996] ECR II-1475, paragraph 32).

46 In particular, if the measure constitutes the reply to a request in which substantial new facts are relied on, and whereby the administration is requested to reconsider its previous decision, that measure cannot be regarded as merely confirmatory in nature, since it constitutes a decision taken on the basis of those facts and thus contains a new factor as compared with the previous decision.

47 In that regard, as the Commission acknowledged at the hearing, it is settled case-law that the existence of substantial new facts may justify the submission of a request for reconsideration of a previous decision which has become definitive (see, *inter alia*, judgments of the Court of Justice in Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 53; Case 127/84 *Esly* v *Commission* [1985] ECR 1437, paragraph 10; judgment of the Court of First Instance in Case T-58/89 *Williams* v *Court of Auditors* [1991] ECR II-77, paragraph 24, and order of the Court of First Instance of 11 July 1997 in Case T-16/97 *Chauvin* v *Commission* [1997] ECR-SC I-A-237 and II-681, paragraph 37).

48 If a request for reconsideration of a decision which has become definitive is based on substantial new facts, the institution concerned is required to comply with the request. After reconsidering the decision, the institution must take a new decision, the legality of which may where necessary be challenged before the Community judicature. If, on the other hand, the request for reconsideration is not based on substantial new facts, the institution is not required to comply with it.

49 An action brought against a decision refusing to reconsider a decision which has become definitive will be declared admissible if it appears that the request was actually based on substantial new facts. On the other hand, if it appears that the request was not based on such facts, an action against the decision refusing to reconsider it will be declared inadmissible (see, in that regard, judgment of the Court of Justice in Case 153/85 *Trenti* v *ESC* [1986] ECR 2427, paragraphs 11 to 16; order of the Court of First Instance of 9 February 2000 in Case T-165/97 *Gómez de la Cruz Talegón* v *Commission* [2000] ECR-SC II-79, paragraph 46 et seq.).

50 As regards the question of the criteria which determine whether facts are to be classified as 'substantial new' facts, it is clear from the case-law that, in order for a fact to be 'new', it is essential that neither the applicant nor the administration was aware of, or in a position to be aware of, the fact in question when the previous decision was adopted (see, in that regard, Case T-141/97 *Yasse* v *EIB* [1999] ECR-SC II-929, paragraphs 126 to 128). That condition is fulfilled, *a fortiori*, if the fact in question has emerged after the previous decision was adopted (see *Esly* v *Commission*, cited above).

51 In order to be 'substantial', the fact concerned must be capable of substantially altering the applicant's situation forming the basis of the initial request which

gave rise to the previous decision which has become definitive (see, in that regard, Case 232/85 *Becker* v *Commission* [1986] ECR 3401, paragraph 11).

52 In the present case, in its letter of 20 July 1998 the applicant relied on substantial new facts and requested the Commission to reconsider its decision of 8 November 1991. In its reply, in the contested letter, the Commission described the applicant's letter as a request for such a reconsideration. Without commenting on the facts relied on, however, the Commission rejected the applicant's request on the ground that Article 37(1) of Regulation No 4028/86 allows only a single 'reconsideration'.

53 The Commission's reply must be construed as meaning that it considers that the facts on which the applicant relies cannot be taken into consideration for the purpose of reconsidering its decision of 8 November 1991, since Article 37(1) of Regulation No 4028/86 allows only a single 'reconsideration' within the meaning of that provision, namely, in the present case, the reconsideration which the Commission carried out prior to its decision of 8 November 1991.

54 In that regard, a clear distinction must be drawn between a 'reconsideration' for the purposes of Article 37(1) of Regulation No 4028/86 and a reconsideration of a decision which has become definitive where substantial new facts are invoked. A 'reconsideration' for the purposes of Article 37(1) of Regulation No 4028/86 occurs where a request for financial assistance is carried forward to the next financial year for lack of funds in the first year of assessment. That does not constitute a reconsideration of a decision which has become definitive but a re-assessment by the institution of the request for financial assistance in question in the context of a new financial year. A reconsideration based on substantial new facts, on the other hand, is governed by the general principles of administrative law, as defined in the case-law of the Court of Justice and the Court of First Instance, and entails a reconsideration of a previous decision which has become final, such as, in the present case, a reconsideration of the Commission's decision of 8 November 1991, as requested by the applicant.

55 Since there are two types of 'reconsideration', each having a different legal basis and each serving its own individual purpose, the Commission cannot take Article 37(1) of Regulation No 4028/86 as the basis for its refusal to grant a request for reconsideration of the decision of 8 November 1991 based on what are alleged to be substantial new facts.

56 Consequently, for the purpose of considering the admissibility of the action, it is necessary to consider whether the facts on which the applicant relies in its letter of 20 July 1998 constitute substantial new facts within the meaning of the case-law cited above.

57 In that regard, in its letter of 20 July 1998, in which reference is made to the letter of 11 May 1998, the applicant relied on three factors, set out in paragraph 22 above, which, it maintains, constitute substantial new facts: first, the publication of the proposal for a regulation, second, the 'new judgments' delivered on the subject, in particular *Le Canne* v *Commission*, cited above, and, third, the fact that budget resources were available to finance its project.

58 As regards the first of these factors, a 'proposal' for a regulation, as a preparatory measure which has not yet become definitive, cannot alter the applicant's situation. Furthermore, even if, for the sake of argument, the regulation in its final form, Regulation No 1263/1999, were to be regarded as the relevant factor, it would not constitute a substantial new fact.

59 That regulation does not in any way alter the applicant's situation. In particular, Article 5 of Regulation No 1263/1999, as Article 6 of the proposal for a

regulation to which the applicant refers more particularly, became, merely provides in paragraph 1 that Regulation No 4028/86 (and another regulation of no relevance to the present case) are to continue to apply to applications submitted before 1 January 1994. The applicant's request for financial assistance has already been assessed and definitively rejected by the Commission on the basis of the provisions of Regulation No 4028/86. Therefore the fact that that regulation remains applicable cannot affect the applicant's situation.

60 Nor can Article 5(2) of Regulation No 1263/1999 affect the applicant's situation, since that provision concerns only sums which the Commission has already committed as assistance pursuant to Regulation No 4028/86. No sum was committed by the Commission in favour of the applicant by way of the assistance which it requested.

61 As regards, second, the fact that 'new judgments' on the subject have been delivered, in particular *Le Canne*, cited above, the applicant contends that it follows from those judgments that a refusal on the ground of alleged lack of available funding must not imply a final and irrevocable refusal of the assistance sought. In support of that assertion, it claims that if the Commission is able to reduce assistance after it has been granted, the contrary inference is that the Commission may also grant assistance when it has initially refused to do so.

62 Without its being necessary to comment on the relevance of the conclusion which the applicant draws from that case-law, it is sufficient to observe that a judgment given by the Court of First Instance and containing a legal determination in relation to facts which might be categorised as new could never, by itself,

constitute a new fact (Case C-403/85 REV *Ferrandi* v *Commission* [1991] ECR I-1215, paragraph 13; order in *Chauvin*, cited above, paragraph 45).

63 As regards, third, the availability of resources to finance the project in question, the applicant maintains that it follows from *Industrias Pesqueras Campos* that the Commission recovered sums granted as aid during the same period as that during which the application for aid in issue was submitted and that by virtue of the sums thus recovered budgetary resources to finance the applicant's project are again available.

64 In that regard, the Commission observed at the hearing that it attempted to recover the sums referred to in *Industrias Pesqueras Campos* but that the amount actually recovered was very small, owing, in particular, to the financial circumstances of the undertakings concerned.

65 It must be held that even if the Commission had been able to recover all the sums in question, that would not constitute a substantial new fact requiring the Commission to reconsider its decision of 8 December 1991.

66 As the Commission explained in reply to a written question put by the Court, it follows from Article 7.7 of the Financial Regulation that revenue deriving from the repayment of advances by recipients of Community aid cannot be re-used in the budget heading under which the initial expenditure was incurred unless the Commission takes an express decision to that effect; and it states that no such decision was taken in respect of the sums recovered in that instance.

67 Furthermore, as the Commission correctly stated at the hearing, even if such a decision had been taken, so that the sums recovered would again have been available in the original budget heading, they could not have been used to finance projects such as the applicant's in respect of which a definitive decision of rejection had been taken during the previous financial year.

68 In accordance with the principle of yearly budgeting, laid down in the EC Treaty (Articles 199, 202 and 203 of the EC Treaty, now Articles 268 EC, 271 EC and 272 EC) and in the Financial Regulation (Article 6), sums recovered in one financial year can no longer be used in the context of a previous financial year which has already been closed. Therefore the sums referred to in *Industrias Pesqueras Campos*, which would have been recovered in the course of 1994 — during which the Commission adopted the decisions forming the subject-matter of that judgment — or a subsequent year, as the case might be, could no longer be used, in the context of the 1991 financial year, to finance the investment to which the applicant's request for aid related.

69 Consequently, the possibility of sums being recovered in 1994, or in a subsequent year, and re-used in the budget heading relating to the financing of investment projects for new fishing vessels does not have the effect that the Commission, in the course of a reconsideration, would alter the assessment of the applicant's request for aid which it made in 1991.

70 It follows that the applicant has not established the existence of substantial new facts which should have led the Commission to reconsider the decision of 8 December 1991 definitively rejecting the request for aid which it had submitted in 1989.

71 In those circumstances, the claim that the decision should be annulled must be dismissed as inadmissible.

Admissibility of the claim for damages

Arguments of the parties

72 The Commission observes that the applicant seeks, by its claim for damages, to obtain amounts identical to those which would have been granted if the Commission had granted its request for aid, plus interest for delay. It further states that the claim for damages is based on the same pleas of illegality as those put forward in support of the claim for annulment. The Commission therefore contends that the claim for damages is not an independent claim. It follows that, as the claim for annulment is inadmissible, the claim for damages is also inadmissible.

73 As regards the admissibility of the claim for damages, the applicant replies that the action for damages based on Articles 178 and Article 215 of the EC Treaty (now Articles 235 EC and 288 EC) is an independent form of action which has a particular purpose to fulfil within the system of actions, which is subject to conditions for its use conceived with a view to its specific purpose (Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 6) and which differs from an application for annulment in that it normally seeks not the abolition of a particular measure but compensation for damage caused by an institution in the performance of its duties (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 3).

74 As regards the substance of the claim, the applicant observes that the only ground on which the Commission refused to grant the aid requested was that 'insufficient budgetary funds were available'. Since the Commission subsequently obtained sufficient funds by recovering aid granted in 1990 and 1991, the applicant was clearly entitled to Community aid. By failing within a reasonable time to correct the error in respect of the applicant's request for aid, the Commission acted unlawfully and thus rendered the Community liable.

75 The applicant claims that the damages it claims come under two heads. First, it claims the amount of aid refused, namely ESP 216 886 200. Second, it claims the corresponding default interest, which, having regard to the criteria established in similar cases, should be counted from 12 March 1992, the date on which the *Txori-Berri* was launched, until payment is actually made, at the rate of 8% per annum (see Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 32, and Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 35).

Findings of the Court

76 Although a party may take action by means of a claim for compensation without being obliged by any provision of law to seek the annulment of the unlawful measure which causes him damage, he may not by those means circumvent the inadmissibility of an application which concerns the same instance of illegality and which has the same financial end in view ((judgments in Case 543/79 *Birke* v *Commission and Council* [1981] ECR 2669, paragraph 28, Case 799/79 *Bruckner* v *Commission and Council* [1981] ECR 2697, paragraph 19; and order of 26 October 1995 in *Pevasa and Inpesca* v *Commission*, cited above, paragraph 27).

77 In the present case, what is alleged to be a claim for damages is submitted for the specific purpose of obtaining an amount identical to the amount of Community aid which would have been paid if the Commission had granted the request for aid submitted by the applicant, plus default interest, and is based on the same pleas of illegality as those raised in support of the claim for annulment. Clearly, therefore, the claim for damages is intended to circumvent the limitation period laid down in Article 173 of the EC Treaty and therefore constitutes an abuse of the procedure laid down in Article 178 of the EC Treaty.

78 Consequently, the claim for damages is inadmissible.

79 It follows from the foregoing that the application must be dismissed in its entirety.

Costs

80 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

81 In the light of the form of order sought by the defendant, the applicant must therefore be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE

hereby:

1. **Declares the 'further observations' filed by the applicant on 21 July 1999 inadmissible;**

2. **Dismisses the application;**

3. **Orders the applicant to pay the costs.**

Pirrung Potocki Meij

Delivered in open court in Luxembourg on 7 February 2001.

H. Jung A.W.H. Meij

Registrar President