

ORDER OF THE COURT OF FIRST INSTANCE (Second Chamber)

15 September 1998 *

In Case T-136/95,

Industria del Frio Auxiliar Conservera SA, a company incorporated under Spanish law, with its registered office in Bermeo (Spain), represented by Ignacio Sáenz-Cortabarría Fernández and Marta Morales Isasi, of the Vizcaya Bar, with an address for service in Luxembourg at the Chambers of Guy Harles, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by José Luis Iglesias Buhigues, Legal Adviser, and Blanca Vila Costa, a national civil servant seconded to the Commission, both acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Spanish.

APPLICATION for annulment of Commission Decision 95/119/EC of 7 April 1995 concerning certain protective measures with regard to fishery products originating in Japan (OJ 1995 L 80, p. 56), to the extent that those measures relate to fishery products en route to the Community at the time of publication of the decision, and for damages in respect of the losses incurred as a result thereof,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A. Kalogeropoulos, President, C. W. Bellamy and J. Pirrung, Judges,

Registrar: H. Jung,

makes the following

Order

Legal background

- 1 Council Directive 91/493/EEC of 22 July 1991 laying down the health conditions for the production and the placing on the market of fishery products (OJ 1991 L 268, p. 15, hereinafter 'Directive 91/493') contains veterinary measures to be applied on the importation of fishery products from third countries, particularly in Articles 10 to 12.

2 The first paragraph of Article 10 provides:

‘Provisions applied to imports of fishery products from third countries shall be at least equivalent to those governing the production and placing on the market of Community products’.

3 Article 11(1) provides:

‘For each third country or group of third countries, fishery products must fulfil the specific import conditions fixed [...], depending on the health situation in the third country concerned’.

4 Article 11(7) provides:

‘Pending the fixing of the import conditions referred to in paragraph 1, the Member States shall ensure that the conditions applied to imports of fishery products from third countries shall be at least equivalent to those governing the production and placing on the market of Community products’.

5 By various successive decisions of the Council and the Commission, provisional measures were adopted in relation to the certification of fishery products from third countries in order to facilitate implementation of the rules laid down by Directive 91/493.

6 Under Article 12 of Directive 91/493, the rules and principles laid down by Council Directive 90/675/EEC of 10 December 1990 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries (OJ 1990 L 373, p. 1, hereinafter 'Directive 90/675') 'shall apply, notably as regards the organisation of and follow up to the inspections to be carried out by the Member States'.

7 Article 19(1) of Directive 90/675 provides for the adoption of protective measures:

'If, in the territory of a third country, a disease referred to in [Council] Directive 82/894/EEC [of 21 December 1982 on the notification of animal diseases within the Community (OJ 1982 L 378, p. 58)], a zoonosis or other disease or phenomenon liable to present a serious threat to animal or public health [occurs or spreads], or if any other serious animal health or public health reason so warrants, in particular in the light of the findings of its veterinary experts, the Commission may, acting on its own initiative or at the request of a Member State, adopt one of the following measures without delay and depending on the gravity of the situation:

— suspend imports coming from part or all of the third country concerned, and where appropriate from the transit third country,

— set special conditions in respect of imports coming from part or all of the third country concerned.'

8 On the basis of that provision, the Commission adopted on 7 April 1995 Decision 95/119/EC concerning certain protective measures with regard to fishery products originating in Japan (OJ 1995 L 80, p. 56, hereinafter 'the disputed decision').

9 Article 1 of that decision states:

'Member States shall prohibit the import of consignments of fishery products in whatever form originating in Japan'.

10 Article 3 provides that Member States are to amend the measures that they apply to imports to comply with the decision and inform the Commission thereof.

11 The first and third recitals to the disputed decision read as follows:

'... a mission of experts of the Commission went to Japan to check the conditions of production and processing of fishery products exported to the Community; ... according to the observations of these experts, the official guarantees given by the Japanese authorities are not adhered to and the conditions of production and storage of fishery products show serious defects as regards hygiene and control and constitute risks to public health;

... it is necessary to suspend the import of all fishery products originating in Japan pending improvement of the conditions of hygiene and control of production'.

Background to the dispute

- 12 The applicant is a private company incorporated in Bermeo (Spain). The objects of the company are the preserving and freezing of all types of food and food products as well as the purchase, sale, processing and handling of fishery products. The main focus of its activities is the import, purchase and delivery to the tinned food industry of white tuna.
- 13 In January 1995, it resolved to purchase 250 tonnes of frozen albacore tuna (*Thunnus alalunga*) from the Japanese company Itochu Corporation. That purchase formed the subject-matter of two contracts dated 14 February and 9 March 1995. A consignment of 50 tonnes of tuna which was loaded on 28 February 1995 arrived at the port of Bilbao on 5 April 1995. It underwent the requisite health checks and was duly cleared by customs.
- 14 At the time when the disputed decision became applicable, 9 April 1995, the rest of the frozen tuna (200 tonnes) was on its way to the Community, having been dispatched from Japanese ports in three separate consignments.
- 15 The first consignment thereof, of 50 tonnes, was loaded on 15 March 1995 and arrived in Bilbao on 20 April 1995. On 21 April 1995, the national authorities refused to clear the goods through customs, relying on the disputed decision.
- 16 The applicant contacted the Department of Food Inspection (Third Countries) of the General Subdirectorate of External and Veterinary Health at the Spanish Ministry of Health and Consumer Affairs. The Subdirectorate contacted the Commission. By two faxes dated 25 and 26 April 1995, the Commission informed the Subdirectorate that the disputed decision prohibited any imports of fishery products originating in Japan, including those which had been dispatched prior to notification of the decision. The Vizcaya External Health Inspectorate refused customs clearance on 26 April 1995.

- 17 An administrative appeal against that refusal was dismissed by a decision of the Office of the Undersecretary for Health and Consumer Affairs dated 22 June 1995.
- 18 Prior thereto, on 8 June 1995, the 50 tonnes of tuna in question had been dispatched to San Juan (Puerto Rico) in the hope that it might find a purchaser there.
- 19 The second consignment, of 75 tonnes, was shipped from a Japanese port on 24 March 1995 to Bilbao. It was retained on 19 April 1995 by the United Kingdom authorities in the port of Southampton. By an agreement made on 18 May 1995 with Itochu, the latter took possession of the goods.
- 20 The final consignment, also of 75 tonnes, was loaded in Japan on 31 March 1995 and reached the Spanish port of Algeciras on 7 May 1995. The national authorities refused to clear that consignment through customs on 15 May 1995. By an agreement made on 18 May with Itochu, the latter took possession of the goods.
- 21 By an application lodged at the Registry of the Court of First Instance on 3 July 1995, the applicant brought this action against the Commission.
- 22 The Commission raised a plea of inadmissibility by a document lodged on 31 July 1995. That plea was joined to the main proceedings by an order of 2 May 1996. The written procedure was closed on 17 December 1996.

- 23 Between 6 and 27 October 1997, in response to a request from the Court of First Instance, the parties submitted their observations on the possible effect on these proceedings of the judgment of the Court of Justice in *Affish* (Case C-183/95 [1997] ECR I-4315).
- 24 By decision of the Court of First Instance of 9 June 1998, adopted in accordance with Articles 14 and 51 of the Rules of Procedure, the case was referred to the Second Chamber, composed of three judges.

Forms of order sought

- 25 The applicant claims that the Court should:
- annul the disputed decision to the extent that it relates to products en route to the Community;
 - order the Community to compensate the applicant for the loss incurred by it as a result of the unlawful application of the decision and fix the amount to be paid at PTA 18 396 133 pending subsequent settlement — depending on the sale price for the 50 tonnes of frozen *Thunnus alalunga* in Puerto Rico — or at the very least at such an amount as the Court deems appropriate, together with interest at the legal rate of 9% and default interest from the date of the lodging of the application;
 - order the Commission to pay the costs.

26 The Commission contends that the Court should:

- declare the application inadmissible;
- alternatively, dismiss the application as unfounded;
- order the applicant to pay the costs.

Substance

27 In this case it is appropriate to apply Article 111 of the Rules of Procedure, as amended with effect from 1 June 1997 (OJ 1997 L 103, p. 6), which states that where an action is manifestly lacking any foundation in law the Court of First Instance may, without taking further steps in the proceedings, give a decision by reasoned order. It is clear from the judgment in *Affish*, cited above, which confirmed the validity of the decision which is being challenged here, that this action is manifestly lacking any foundation in law.

28 Five of the six pleas in law submitted by the applicant, which are based on alleged breach of the general principles of the protection of legitimate expectations, proportionality and equal treatment, the obligation to provide reasons and misuse of powers, were raised in substance in the proceedings leading to the judgment in *Affish*.

29 In addition, the applicant raises a sixth plea in law based on breach of the principle of legal certainty (non-retroactive effect of rules of law).

- 30 Consequently, it is necessary in this case to make a more detailed assessment only in respect of that additional plea and the arguments specifically raised in support of the five other pleas in law.

Breach of the principle of legal certainty

- 31 The applicant considers that, by prohibiting the import of goods which were en route to the Community at the time of publication of the decision and which were bound to reach a Community port after publication, the decision had retroactive effect, since it applied to acts the execution of which had started in the past. Applying a protective measure in such circumstances would lead to inequitable situations not covered by Article 19 of Directive 90/675, Article 3b of the EC Treaty and Articles 2 and 5(6) of the Agreement on the application of sanitary and phytosanitary measures in Annex IA to the Agreement establishing the World Trade Organisation.
- 32 The Commission contends that the decision was a general measure of immediate, albeit temporary, and universal application, adopted in full knowledge of the facts in order to achieve maximum effectiveness in terms of both protecting health and improving and restoring health conditions in Japanese factories.
- 33 It should be noted that the disputed decision was expressly applicable immediately from the date of publication to all imports of fishery products originating in Japan.
- 34 It did not relate to imports made into the Community before it came into force. The activity which determines the scope of the decision is importation into the

Community and not, as the applicant wrongly alleges, exportation from third countries. The fact that the decision actually affected goods en route to the Community does not alter the fact that it took immediate effect, that is to say it applied to all goods imported from the day on which it was published.

35 It follows that, since it was not retroactive, the decision did not breach the principle of legal certainty.

36 The plea in that respect is therefore manifestly lacking any foundation.

37 The question whether the Commission should have taken goods in the course of transportation into account concerns only the pleas of breach of the principle of legitimate expectations and of the principle of proportionality. That argument will be considered in the context of those pleas.

Breach of the principle of legitimate expectations

38 The applicant claims that the principle of the protection of legitimate expectations required that temporary measures be adopted to take into account the particular situation of goods already en route to the Community. Exempting such goods from the prohibition would not have made the disputed decision ineffective since the goods would have been subject to a health inspection to certify that they were harmless.

- 39 The Commission contends that the decision did not breach the principle of the protection of legitimate expectations. The conditions necessary to create legitimate expectations were not present in this case. In respect of goods deemed to represent a serious risk to human health any exception — creating discrimination between goods — would undermine the aims of the measure and prevent the re-establishment of satisfactory production and storage conditions in the Japanese factories in as short a time as possible.
- 40 In this case, the Court of First Instance takes the view that the Community did not create a situation giving rise to legitimate expectations.
- 41 Any protective measures adopted by the Commission must necessarily be adapted to the circumstances. Traders cannot rely on their economic interests being taken into account in all circumstances even if in the past certain protective measures have taken account of comparable interests.
- 42 The examples raised by the applicant in its letter of 27 October 1997, namely, Commission Decisions 97/513/EC of 30 July 1997 and 97/515/EC and 97/516/EC of 1 August 1997, relating to certain protective measures in relation to certain fishery products originating in Bangladesh, India and Madagascar respectively (OJ 1997 L 214, pp. 46, 52 and 53), do not alter that view: those three decisions were adopted *after* the disputed decision, so that in no circumstances could they have given rise to a legitimate expectation since such an expectation can only be based on situations existing *prior* to the adoption of a measure.
- 43 Moreover, the Court of Justice has held that even where the Community has initially created a situation capable of giving rise to legitimate expectations, an overriding public interest may preclude the adoption of transitional measures in respect of situations which arose before the new rules came into force but which are still

subject to change (*Affish*, cited above, paragraph 57). The objective of the disputed decision, namely the protection of public health, constitutes an overriding public interest of that kind (*Affish*). The question whether certain consignments of fish left Japan before or after 8 April 1995 is irrelevant.

- 44 As for the possibility of recourse to a protective measure in the form of inspection upon importation of consignments of fishery products already dispatched, the Court of Justice has found that the applicant could not entertain a legitimate expectation that that course would be taken (*Affish*, paragraph 58). Such inspections cannot in all cases constitute a satisfactory point of reference for determining whether a product is suitable for importation since health inspections carried out at the production stage are significantly more effective and more practical than inspections carried out at importation. Furthermore, the procedure adopted constituted the basis for the veterinary and health directives, in particular Directive 91/493 (*Affish*, paragraphs 39 and 40, referred to in paragraph 58). Finally, the Commission could not adapt the protective measure to the specific circumstances of a single importer or a single importing Member State, but had to take into account imports of fishery products from Japan to the territory of the Community as a whole (paragraph 58).
- 45 It follows that the plea of breach of the principle of the protection of legitimate expectations is manifestly unfounded.

Breach of the principle of proportionality

- 46 The applicant considers that an absolute ban on imports of goods in the course of transportation was not necessary to attain the objectives of the decision. Other equally effective but less restrictive measures would have been possible for importers whose goods were en route to the Community at the time of publication of the decision.

- 47 The applicant relies on the binding nature for the Community of Article 5(6) of the Agreement on the application of sanitary and phytosanitary measures and the end of Article 2(3) thereof, which provides that sanitary and phytosanitary measures are not to be applied in a manner which would constitute a disguised restriction on international trade.
- 48 The Commission contends that it could not have achieved its aims by a less restrictive measure, such as routine or even special inspections. The measure had to be radical (a total ban) and generally applicable (all species from the entire country). The applicant cannot therefore claim that it had complied with Community veterinary requirements and that the presumption of compliance with those requirements should apply.
- 49 To apply in the applicant's case a measure less disadvantageous to it, such as simply carrying out veterinary inspections upon entry into the Community, would have been equivalent to adopting no measures at all, since there is already provision for such checks on goods which have reached their destination where health and hygiene requirements under Community rules are satisfied from the outset and there is thus in principle no risk to human health. The applicant is therefore claiming in this case that the Commission should have refrained from adopting measures altogether in order to satisfy the purely commercial interests of the relevant undertaking and without having any regard to sanitation and public health considerations.
- 50 Due consideration of what measures might be adopted to protect public health led to the conclusion that a total ban, with no exceptions, on imports of fish from Japan would be considerably more effective than routine inspection of imports at the port of destination, particularly since fishery products were involved and the catastrophic production and storage conditions constituted a definite risk to health. Indeed that was exactly why Directive 91/493 contained protective provisions imposing measures which went far beyond the routine veterinary inspections.

- 51 The Court of Justice has held that in order to establish whether a provision of Community law complies with the principle of proportionality it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (Case C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraph 54, and *Affish*, paragraph 30).
- 52 As the Court of Justice stated, that principle finds specific expression in Article 19(1) of Directive 90/675, which provides that the protective measure decided upon by the Commission must depend on the gravity of the situation. The measure may take the form of either suspending imports or fixing special conditions for imported products. In either case, the measure may be extended to the whole of the third country concerned or limited to products from part of it (*Affish*, paragraph 31).
- 53 As regards the territorial effect of the import ban, the Court of Justice has recognised that the Commission cannot be criticised for restricting its inspections to a limited number of establishments exporting fishery products since, firstly, those inspections were reliable, and, secondly, their results could be extrapolated in an appropriate manner to describe the situation in the third country concerned as a whole. To visit a large number of establishments, or all of them, is impossible in practice, even if for no other reason than to comply with the requirement of speed that applies to the adoption of protective measures in public health matters. Moreover, in organising inspections, the Commission is dependent upon the authorities of the third country concerned (*ibid.*, paragraph 33).
- 54 With regard to the possibility of extrapolating the results of the inspections carried out in the selected establishments, the first point to make is that, since the selection was made by the Japanese authorities, the Commission was entitled to regard those establishments as representative of Japanese establishments as a whole, and not just of those with the worst hygienic conditions (*ibid.*, paragraph 35).

55 Moreover, as the Court of Justice observed (*ibid.*, paragraph 36), the report of the Commission's mission of experts showed, first, that the Japanese official authority did not exercise proper supervision over the establishments concerned and declared establishments which constituted severe public health risks to be in compliance with Directive 91/493, and, secondly, that the imprecise labelling of consignments of the products made it impossible to identify with certainty what establishments the products came from and what manufacturing process had been used. In those circumstances, and in the absence of effective central supervision for the country as a whole, a prohibition limited to products from certain regions of Japan would have given no guarantee that products from an establishment situated in another region, where all the health rules were complied with, would not be mixed up with products not from that region.

56 The applicant alluded to the possibility of recourse to veterinary inspections of products from Japan on importation. On that point, the Commission rightly emphasised that inspections carried out at the place of destination are already provided for where the conditions of health and hygiene are satisfied from the start and there is therefore in principle no danger to human health. In fact, such checks are less effective because they are necessarily carried out on samples and at a time when the frozen fish are packaged. It would be financially prohibitive to examine all the packages and there would be a risk that the amount of time it would take would result in the products deteriorating. Such inspections at the port of destination could therefore not guarantee that all products were free of pathogenic micro-organisms even though the consignments as a whole might be considered to comply with the requirements of the Community legislation. Inspections on importation would thus be incomplete and so less representative and less reliable than inspections at the production and processing stage. A complete ban, without any exception, on imports from Japan is thus a considerably more effective measure than routine inspection on importation. It would thus appear to be justified in the light of its objective, namely the protection of consumers and public health in the Community. In this regard, the Commission rightly points out that it is precisely in order to avoid what would be a certain risk for human health that Directive 91/493 provides for protective provisions comprising measures which go well beyond mere routine veterinary inspections.

- 57 In any event, the freedom to carry on a trade or business is not absolute, but must be viewed in relation to its social function. It may, therefore, be restricted, especially in the context of a common organisation of the market, provided that the restrictions imposed in fact correspond to objectives of general interest pursued by the Community and do not, in relation to the aim pursued, constitute disproportionate and intolerable interference, impairing the very substance of the right guaranteed. The importance of the objectives pursued may justify restrictions which have adverse consequences for certain traders (*Affish*, paragraph 42 and the cases cited therein).
- 58 Therefore, even if assessed in relation to the economic consequences which it may entail for importers in a situation such as that in which the applicant finds itself, the disputed decision cannot be regarded as constituting disproportionate interference since it fulfils the requirements of proportionality laid down by Article 19(1) of Directive 90/675. Those requirements are in fact intended to ensure that due attention is paid to the interests of traders. That is all the more so in this case, as the protection of public health which the disputed decision is intended to guarantee must take precedence over economic considerations (*ibid.*, paragraph 43 and the cases cited therein).
- 59 Finally, the provisions of the Agreement on the application of sanitary and phytosanitary measures referred to by the applicant likewise do not impose any obligation on the Commission to take the applicant's economic interests into account. In the light of the foregoing observations, since the measure taken was intended to protect public health, it was not 'more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility' under Article 5(6) of the Agreement on the application of sanitary and phytosanitary measures. Furthermore, since the Commission based its decision on reliable conclusions reached by experts, the applicant's claim, made in the absence of any supporting evidence, that the decision constituted a 'disguised restriction on international trade' under Article 2(3) of the Agreement cannot be entertained.

- 60 The Commission was therefore not bound to provide for a special regime for traders with goods en route to the Community.
- 61 The plea of breach of the principle of proportionality is therefore manifestly unfounded.

Breach of the principle of equal treatment

- 62 The applicant considers that by failing to take account of goods en route in the disputed decision, the Commission treated identical situations differently and thus ignored the general principle of equal treatment. The disputed decision can only be explained by a desire to favour certain means of transport over others (air transport over sea transport).
- 63 Furthermore, the fact that the decision applies to goods dispatched prior to its publication infringes the principle of non-discrimination on grounds of nationality set out in Article 6 of the Treaty. Application of the decision will inevitably lead to discrimination on grounds of nationality against undertakings which import fishery products since they are only based where the majority of their customers, in this case, undertakings in the food-preserving industry, are also based. Importing companies cannot therefore be established in other Member States.
- 64 According to the applicant, for the purposes of compliance with the aim of the decision there is a difference in quality between products shipped from Japan prior to adoption of the decision and those shipped after its adoption. There is therefore no justification whatsoever for treating all the products from that country in the same way and it is not possible to impose an irrebuttable presumption in the case

of products shipped prior to adoption of the decision that they are hazardous, as the Commission alleges, by treating them in the same way as products shipped after the decision was adopted, and which therefore constituted a public health risk from then on.

- 65 The Commission contends that it treated all products of Japanese origin from factories which did not meet the conditions of health and hygiene laid down by Community inspectors the same, not differently. The fact that the decision did not take into account products which were en route shows precisely that all products from Japan were treated in the same way.
- 66 To distinguish between goods dispatched and reaching the port of destination prior to the date of publication of the decision on the one hand and goods dispatched prior to, but due to arrive after, that date on the other hand is futile because it ignores the rule of non-retroactivity of administrative acts. As regards the distinction based on the method of transport, it is wholly artificial. The disputed decision covers all goods from the date of publication and thus its effects do not go beyond those of any administrative act comprising a general health measure.
- 67 The Commission considers that the allegation of discrimination on grounds of nationality is wholly without foundation because it seeks to attribute to the disputed decision effects on traditional trade routes which it does not have, inasmuch as, being temporary, it could not result in any extraordinary changes.
- 68 The Court of First Instance considers that the disputed decision treats identical situations in the same way. It applies to all goods imported after its publication, whatever the method of transport used. Whether or not the decision applies depends solely on the date of importation into the Community. All imports,

regardless of the method of transport, are banned from the date of its entry into force. The fact that goods may have already started their journey and be en route to the Community has no bearing on the application of the decision, which applies uniformly to all fish coming from Japan.

- 69 The fact that other traders may have diverted products to other markets is a secondary effect of publication of the decision which does not justify the conclusion that the principle of equality has been breached.
- 70 Furthermore, the disputed decision did not discriminate on grounds of nationality since it affects all traders importing fish from Japan into the Community.
- 71 The plea of breach of the principle of equality is therefore manifestly unfounded.

Breach of the obligation to state reasons

- 72 The applicant considers that the Commission failed to fulfil its obligation to give reasons for its measures as it did not justify certain essential aspects of the decision. The defendant should have specifically set out the reason for the retroactive effect which the applicant claims it gave to the decision.
- 73 Community traders whose products are en route are in a special situation which is entitled to protection by virtue of the general principle of legal certainty. In this case, both Article 19(1), second indent, of Directive 90/675 and Article 3b of the

Treaty and Articles 2(3) and Article 5(6) of the Agreement on the application of sanitary and phytosanitary measures require that regard be had to the situation of products en route at the time when a protective measure is adopted.

74 The Commission points out that the statement of reasons need not cover more than what is contained in the operative part of the measure which it precedes. In this case, where a protective measure provided for in Article 19 of Directive 90/675 was being implemented, the statement of reasons was limited to the material circumstances and the timing of the measure. Since no special rules are applicable to goods en route to the Community, it is not necessary to set out the reasons for not including such goods as traders cannot rely on any legitimate expectation.

75 It must be noted that, as the Court of Justice stated in *Affish* (paragraph 64), the recitals in the preamble to the disputed decision show clearly that the Commission adopted the protective measure after sending a mission of experts on the spot and that those experts found serious defects in matters of hygiene and supervision of the conditions of production and storage of fishery products which could constitute risks to public health (first recital in the preamble to the disputed decision).

76 It is also clear (*ibid.*, paragraph 65) that, given the nature of the disputed decision and in particular the time within which it had to be adopted, the Commission was entitled to confine itself to indicating in general terms the procedure followed and the essential factors which constituted the basis of its assessment, without repeating the details of the report of the mission of experts or providing a specific statement of why other possibilities had been discarded.

77 Accordingly, the plea of breach of the obligation to state reasons is manifestly unfounded.

Abuse of powers

78 The applicant claims that, in the light of the preliminary report provided by the Commission's experts, which only states that products shipped from two Japanese establishments represent a risk to public health, the fact that the disputed decision was applied to products of other origin and products en route confirms that it is a commercial rather than a health-related measure. The Commission is thus arrogating to itself, in breach of Article 4(1) and Article 155 of the Treaty, powers attributed to the Council by Article 113 of the Treaty, and thus committing an abuse of power.

79 The Commission confirms that the adopted measure is strictly limited to the parameters set out in Article 19(1) of Directive 90/675. It emphasises that since the serious defects found related to the production and storage facilities for all types of fish, the immediate measure to be adopted had to be general and provide adequate protection. It adds that the measure was not accompanied by any special provision regarding goods presenting a risk, including those which were en route at the time; nor did it provide for retroactive application.

80 The Commission observes that Article 43 of the Treaty, which is the legal basis for the whole of the common agricultural policy, confers on the Community institutions, and in particular the Commission, a very wide power of decision. According to the Commission, the re-establishment of sanitary conditions in this case was no

more than the general objective, of a structural nature, of any protective measure. The institution has therefore not infringed either Article 43 of the Treaty or Directive 90/675 and has not exercised its powers for commercial purposes.

81 It should be noted that, as regards the aims pursued by the Commission, the deficiencies found in the supervision exercised by the Japanese authorities in fact contributed to the assessment that the standard of hygiene of products from Japan as a whole could not be guaranteed (*Affish*, paragraph 49). In this case, the applicant has not, any more than the applicant in *Affish*, produced any evidence to show that in adopting the contested decision the Commission was pursuing an objective other than that for which power in that area was conferred on it by Article 19 of Directive 90/675 (*Affish*, paragraph 49).

82 In those circumstances, the plea of misuse of powers is manifestly unfounded.

83 It follows from the foregoing that the application for annulment must be dismissed.

84 The claim for compensation is unfounded because the disputed decision is not tainted with illegality such as to cause the Community to incur liability.

Costs

85 Under 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 by the successful party. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby orders:

1. **The application is dismissed.**
2. **The applicant is ordered to pay the costs.**

Luxembourg, 15 September 1998.

H. Jung

Registrar

A. Kalogeropoulos

President