JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
17 October 2002 *

In Case T-180/00,

Astipesca, SL, established in Huelva (Spain), represented by J.-R. García-Gallardo Gil-Fournier and M.D. Domínguez Pérez, lawyers,

applicant,

v

Commission of the European Communities, represented initially by L. Visaggio and, subsequently, by S. Pardo Quintillán, acting as Agents, assisted by J. Guerra Fernández, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION for, first, annulment of the Commission's fax of 5 May 2000 informing the applicant of the payment, on 4 May 2000, of part of the balance of the financial aid granted to project SM/ESP/20/92 and of the contents of the

* Language of the case: Spanish.

Commission's letter of 18 May 2000, reducing the abovementioned aid and, second, compensation on the grounds of the allegedly unlawful suspension of payment of the balance of that aid and of the abovementioned reduction,

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

composed of: M. Jaeger, President, K. Lenaerts and J.Azizi, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 8 May 2002

gives the following

Judgment

Legal background

1 On 18 December 1986 the Council adopted Regulation (EEC) No 4028/86 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7). That regulation, as amended in turn by

Council Regulation (EEC) No 3944/90 of 20 December 1990 (OJ 1990 L 380, p. 1), by Council Regulation (EEC) No 2794/92 of 21 September 1992 (OJ 1992 L 282, p. 3) and by Council Regulation (EEC) No 3946/92 of 19 December 1992 (OJ 1992 L 401, p. 1), provides in Articles 21a to 21d that the Commission may grant various kinds of financial aid to joint enterprise fisheries projects, of amounts differing according to the tonnage and age of the vessels in question, in so far as those projects satisfy the conditions set by the Regulation.

2 'Joint enterprise' is defined, in Article 21a of Regulation No 4028/86, as follows:

'For the purposes of this Title, "joint enterprise" means a company incorporated under private law comprising one or more Community shipowners and one or more partners from a third country with which the Community maintains relations, associated under a joint enterprise agreement set up for the purpose of exploiting and, where appropriate, using the fishery resources of waters falling within the sovereignty and/or jurisdiction of such third country, primary consideration being given to the supply of the Community market.'

3 Article 21b(2) of Regulation No 4028/86 reads as follows:

'To qualify for financial aid, the joint enterprise projects must relate to vessels of length measuring more than 12 metres between perpendiculars, which are technically suited to the fishing operations planned, have been in operation for more than five years, fly the flag of a Member State, are registered in a Community port and are to be transferred definitively to the third country concerned under the joint enterprise....'

4 Article 21d(1) and (2) of Regulation No 4028/86 lays down the detailed rules governing the submission of a request for financial aid and the procedure for granting it. Article 21d(3) states that, for projects qualifying for financial aid, the beneficiary is to forward to the Commission and to the Member State a periodic report on the activities of the joint enterprise.

5 Article 44 of Regulation No 4028/86 provides:

'1. Throughout the period for which aid is granted by the Community, the authority or agency appointed for the purpose by the Member State shall send to the Commission on request all supporting documents and all documents showing that the financial or other conditions imposed for each project are satisfied. The Commission may decide to suspend, reduce or discontinue aid, in accordance with the procedure laid down in Article 47:

— if the project is not carried out as specified, or

— if certain conditions imposed are not satisfied...

Decisions shall be notified to the Member State concerned and to the beneficiary.

The Commission shall take steps to recover any sums unduly paid.

2. Detailed rules for applying this article shall be adopted by the Commission in accordance with the procedure laid down in Article 47.'

6 Article 47 of Regulation No 4028/86 provides:

'1. Where the procedure laid down in this article is to be followed, matters shall be referred to the Standing Committee for the Fishing Industry, by its chairman, either on his own initiative or at the request of the representative of the Member State.

2. The representative of the Commission shall submit a draft of the measures to be taken. The Committee shall deliver its opinion within a time-limit to be set by the chairman according to the urgency of the matter....

3. The Commission shall adopt the measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the Committee, the Commission shall forthwith communicate them to the Council. In that event the Commission may defer their application for not more than one month from the date of such communication. The Council, acting by a qualified majority, may adopt different measures within one month.'

7 On 20 April 1988, the Commission adopted Regulation (EEC) No 1116/88 laying down detailed rules for the application of decisions granting aid for projects concerning Community measures to improve and adapt structures in the fisheries and aquaculture sector and in structural works in coastal waters (OJ 1988 L 112, p. 1).

8 Article 7 of Regulation No 1116/88 provides:

'Before initiating a procedure for suspending, reducing or terminating aid in accordance with Article 44(1) of Regulation... No 4028/86, the Commission shall:

— inform the Member State on whose territory the project was to be carried out, so that it may express its views on the matter,

— consult the competent authority responsible for forwarding supporting documents,

— ask the beneficiary to provide, through the authority or agency, an explanation for the failure to comply with the conditions laid down.'

9 On 21 June 1991 the Commission adopted Regulation (EEC) No 1956/91 laying down detailed rules for the application of Council Regulation (EEC) No 4028/86 as regards measures to encourage the creation of joint enterprises (OJ 1991 L 181, p. 1).

10 Article 5 of Regulation No 1956/91 provides that Community aid is not to be paid until the joint enterprise has been created in the third country concerned and the transferred vessels have been definitively removed from the Community register of fishing vessels and registered at a port in the third country in which the joint enterprise is based. It adds that, without prejudice to those conditions, where Community aid consists partly or fully of a capital subsidy, an initial payment of not more than 80% of the total amount of the subsidy may be made. The application for payment of the balance of the subsidy is to be accompanied by the first periodic progress report on the activity of the joint enterprise. The payment application is to be submitted not earlier than 12 months after the date of the first payment.

11 Article 6 of Regulation No 1956/91 provides that the periodic report referred to in Article 21d(3) of Regulation No 4028/86 must be sent to the Commission every 12 months for three consecutive years and must contain the particulars specified in Annex III to the Regulation and be presented in the form shown in that Annex.

12 Part B of Annex I to Regulation No 1956/91 includes a note, headed 'important', which reads as follows:

'The applicant/applicants is/are reminded that, for a joint enterprise to benefit from a premium within the meaning of Regulation... No 4028/86 as amended by Regulation... No 3944/90, the enterprise must, in particular:

— concern vessel(s) measuring more than 12 metres between perpendiculars, which are technically suited to the fishing operations planned, have been in operation for more than five years, fly the flag of a Member State, are

registered in a Community port and are to be transferred definitively to the third country concerned under the joint enterprise...;

— be intended to engage in the exploitation and, where applicable, value-added processing of fishery resources falling within the control or sovereignty of the third country concerned;

— envisage supplying the Community market by priority;

— be based on a contractual agreement to found a joint enterprise.'

Background to the dispute

13 On 30 April 1992, Martín Vázquez SA submitted to the Commission, through the Spanish authorities, a proposal for a joint enterprise in order to obtain financial aid on the basis of Regulation No 4028/86. The project, which had been approved by the Spanish authorities, provided for the transfer, with a view to fishing activities, of three vessels — the *Marvasa Once*, the *Marvasa Doce* and the *Nuevo Usisa* — to the Spanish-Moroccan joint enterprise set up by Martín Vázquez and the Moroccan company Spamofish.

14 By decision of 5 July 1993 (hereinafter 'the decision of July 1993'), the Commission granted the project referred to in the preceding paragraph (project

SM/ESP/20/92, hereinafter 'the project') Community aid for a maximum amount of ECU 3 047 190. That decision provided for the payment by the Kingdom of Spain of aid of ECU 609 438.

15 In response to a request by Martín Vázquez on 7 January 1994, the Commission adopted a decision amending that of July 1993 (hereinafter 'the decision of January 1994'), by which it authorised the replacement, for the purpose of carrying out the project, of the vessel *Marvasa Doce*, which had sunk before the project was begun, by the vessel *Verecuatro*. The maximum amount of Community aid was reduced to ECU 2 921 520 and that paid by Spain to ECU 584 304.

16 On 25 October 1996, in response to an application by Martín Vázquez, the Commission adopted a decision amending that of January 1994 (hereinafter 'the decision of October 1996'). The amendments took the form of replacing the Hispano-Moroccan joint enterprise by a Hispano-Senegalese joint enterprise, Astipêche Sénégal SA, and the Moroccan partner Spamofish by Ms Ouleymatou Ndoye. Those changes were occasioned by administrative difficulties relating to access to the Moroccan fishing zone and the granting of the necessary fishing licences. The maximum amount of the Community aid remained set at ECU 2 921 520.

17 On 27 November 1997 the Commission paid out 80% of the financial aid.

18 In September 1998, Martín Vázquez submitted an application through the Spanish authorities for payment of the balance of the aid. It appended to that application a first periodic report on the activities of the joint enterprise under the project from 1 April to 31 December 1997.

19 Upon request by the Commission, Martín Vázquez provided, through the Spanish authorities, additional information concerning the carrying out of the project, received by the Commission on 15 October 1998 and 17 November 1998, respectively.

20 In a fax of 3 June 1999 sent to the Commission, Mr Almécija Cantón, Director General in charge of fisheries structures and markets in the General Secretariat for marine fisheries of the Spanish Ministry of Agriculture, Fisheries and Food, stated that it had been sufficiently well established that the project's objectives had been attained and that he therefore could not understand why the Commission was delaying payment of the balance of the aid despite applications to that end.

Pre-litigation stage

21 By letter sent to Martín Vázquez on 4 June 1999 (hereinafter 'the letter of 4 June 1999'), Mr Cavaco, Director General of the Commission's Directorate-General (DG) for Fisheries, stated that the information in the Commission's possession indicated that the vessel *Aziz*, formerly the *Nuevo Usisa*, was carrying out fishing activities in Moroccan waters although, under Regulations Nos 4028/86 and 1956/91, the purpose of the joint enterprise was to be the exploitation of fishery resources of the non-member countries referred to in the decision granting the financial aid — in this case, Senegal. He stated that, in accordance with Article 44(1) of Regulation No 4028/86, the Commission had decided to reduce the financial aid initially granted to the project. He indicated that the reduction would amount to the difference between the grant intended for the joint enterprise relating to the vessel concerned (ECU 1 138 530) and the grant relating to the definitive transfer of that vessel to a third country (ECU 569 265), and that the balance to be paid to Martín Vázquez was ECU 15 039, corresponding to the difference between the amount relating to the final tranche (20%) of the aid

initially granted (ECU 584 304) and the amount of the envisaged reduction (ECU 569 265). He stated that, if he did not receive the formal agreement of the beneficiary enterprise to the proposed solution within 30 days, he would be required to order his staff to continue the reduction procedure.

22 A copy of the letter referred to in the preceding point was sent the same day to Mr Almécija Cantón.

23 In a document sent to the Commission on 20 July 1999, Martín Vázquez set out its comments on the letter of 4 June 1999. It explained that the vessel *Aziz* had fished in the Moroccan fishery zone rather than in the Senegalese fishery zone because Senegalese fishery stocks did not provide sufficient resources to guarantee that operation of the vessel would be profitable. It asked for the reduction in aid envisaged by the Commission to be symbolic, in the light of the fact that the purpose of the project had always been respected. It mentioned that the change of fishing zone by the vessel *Aziz* had not been communicated to the Commission because it had considered, on the basis of indications given by the Spanish authorities, that such a change was not substantive, since the vessel retained its Senegalese flag and had continued to supply the Community market.

24 By letter of 27 July 1999 Mr Almécija Cantón sent the Commission a copy of the comments made by Martín Vázquez referred to in the preceding paragraph.

25 On 22 October 1999 a meeting took place between the Commission services and Martín Vázquez's adviser.

26 On 14 December 1999 the adviser to Martín Vázquez sent the Commission a letter which added to the comments contained in the document of 20 July 1999, mentioned in paragraph 23 above, and repeated the proposal for a symbolic reduction set out in that document.

27 By letter of 23 February 2000 Mr Gascard, head of unit in DG Fisheries, informed Martín Vázquez's adviser that an examination of the information received by the Commission confirmed that the vessel *Aziz* was fishing in Moroccan rather than in Senegalese waters and that, in those circumstances, Community financial aid relating to that vessel was to be reduced in accordance with Article 44(1) of Regulation No 4028/86 and the conditions set out in the letter of 4 June 1999. He added that, if Martín Vázquez would accept a reduction *pro rata temporis* of the financial aid, the Commission was prepared to authorise the change of fishing zone for the vessel *Aziz* with retroactive effect from 12 November 1998, the date when it was notified of that change, and accordingly to lower the amount by which the aid was reduced from ECU 569 265 to ECU 300 445. If it agreed, Martín Vázquez would thus receive in full settlement the amount of ECU 283 859, corresponding to the difference between the balance (20%) of the initial aid (ECU 584 304) and the amount of the reduction referred to above.

28 By letter of 24 March 2000 the adviser to Martín Vázquez informed Mr Gascard that it had accepted the Commission's proposal concerning the payment of the amount of ECU 283 859 referred to in the preceding paragraph. He requested the Commission as quickly as possible to adopt a final decision on the reduction of the aid and payment of the amount referred to above and to authorise the change of fishing zone.

29 By letter of 27 April 2000, Mr Almécija Cantón asked the Commission for information as to how the file stood.

30 On 4 May 2000 the Commission paid Martín Vázquez the amount of ESP 47 141 883 (about ECU 283 859).

31 By fax of 5 May 2000 (hereinafter 'fax of 5 May 2000'), Mr Bruyninckx, of DG Fisheries, informed Martín Vázquez that, on 4 May 2000, the amount referred to in the preceding paragraph had been paid to a bank account opened in the name of the company.

32 By letter of 18 May 2000 (hereinafter 'the letter of 18 May 2000'), Mr Gascard informed Martín Vázquez's adviser that he had taken formal notice of the latter's agreement to the reduction proposal drawn up by the Commission. He set out the reasons for that reduction and its limitation *pro rata temporis*. He mentioned that the balance of the aid, taking account of that reduction, had already been paid.

Procedure

33 It is in that context that, by application lodged at the Registry of the Court of First Instance on 5 July 2000, Astipesca SL, formerly Martín Vázquez (hereinafter, without distinction, 'the applicant') brought the present action. The written procedure was closed on 14 March 2001.

34 On 23 May 2001, the applicant, following the adoption by the Commission on 19 March 2001 of Decision C(2001) 678 final concerning the reduction of the financial aid granted to the applicant (hereinafter 'the decision of 19 March

2001'), lodged at the Registry of the Court of First Instance, on the basis of Article 48 of the Court's Rules of Procedure, a further statement in which it requested that the abovementioned decision be added to the documents in the case as a new fact which had occurred after the end of the written procedure.

35 On 15 June 2001 the Commission lodged its observations on that further statement at the Registry of the Court of First Instance.

36 Upon hearing the report of the Judge Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. By way of measures of organisation of procedure, it requested the parties to produce certain documents and to reply to certain questions. The parties complied with those requests within the periods allowed.

37 The Court heard arguments by the parties, together with their replies to questions put to them orally by the Court, at the hearing on 8 May 2002.

Forms of order sought by the parties

38 The applicant claims that the Court should:

— declare the action admissible;

— annul the contents of the fax and the letter sent by the Commission to the applicant's adviser on, respectively, 5 May 2000 and 18 May 2000;

— order the Commission to pay damages to indemnify the losses caused by the delay in paying the balance of the aid and by the reduction of that aid;

— order the Commission to reconsider the matter;

— order the Commission to pay the costs.

39 In its further statement of 23 May 2001, the applicant also proposes that the Court should declare that statement admissible and allow it to extend the scope of its request for annulment to cover the decision of 19 March 2001.

40 The Commission claims that the Court should:

— declare the action clearly inadmissible and, in the alternative, clearly unfounded;

— order the applicant to pay the costs.

Admissibility

41 Without formally raising an objection of inadmissibility under Article 114(1) of the Rules of Procedure, the Commission contends that the application is inadmissible. It puts forward two pleas in law to support its contention. The first plea alleges failure to comply with the formal conditions relating to the application. The second plea is based on the unchallengeable nature of the fax of 5 May 2000 and the letter of 18 May 2000.

The first plea: failure to comply with the formal conditions relating to the application

42 In the first plea, the Commission states, essentially, that the power of attorney accompanying the application is not in compliance with Article 44(5) of the Rules of Procedure. That power of attorney was not conferred under a notarial act. Furthermore, the duties carried out by Mr Santos Alaminos, signatory to that power of attorney, were not specified and it was not possible to ascertain whether he had been given the power to issue an authority to represent the principal.

43 In that regard, the Court of First Instance recalls that Article 44(5)(b) of the Rules of Procedure provides that an application made by a legal person governed by private law is to be accompanied by 'proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorised for the purpose'. In contrast to what the Commission maintains, the validity of the authority to act does not therefore depend, under that provision, upon the authority's having been drawn up in the form of a notarial act. However, it must be established whether the authority in the present case was properly given by a representative authorised for the purpose.

44 Appended to the application were an authority to act issued to the applicant's advisers on 28 June 2000 by Mr Santos Alaminos and a notarial act which makes

clear that the board of directors of the applicant conferred upon that person the powers associated with the duties of assistant manager. Since the notarial act referred to above, of 7 September 1995, predates the restructuring of the applicant in May 1999, the Court of First Instance asked the applicant to provide proof that, at the time the authority dated 28 June 2000 was drawn up, Mr Santos Alaminos had the standing required for that purpose.

45 Following that request, the applicant produced a statement by the president of its board of directors, dated 11 March 2002, which made it clear that Mr Santos Alaminos retained the powers which had been granted him by the notarial act of 7 September 1995.

46 In those circumstances, and given the fact that the Commission has not questioned, in its pleadings, the fact that the powers granted to Mr Santos Alaminos, in his role as assistant general manager for the applicant, include the power to issue an authority *ad litem*, it must be concluded that the authority granted to the applicant's advisers was properly conferred by a representative authorised for the purpose, in accordance with the requirement laid down in Article 44(5)(b) of the Rules of Procedure.

47 The first plea of inadmissibility must therefore be dismissed.

The second plea: the unchallengeable nature of the fax of 5 May 2000 and the letter of 18 May 2000

48 In its second plea, the Commission maintains that the fax of 5 May 2000 and the letter of 18 May 2000 are not acts open to challenge within the meaning of

Article 230 EC. In essence, it contends that those two documents did not produce binding legal effects likely to affect the applicant's interests by clearly and definitively altering its legal situation. The only act capable of having legal effects in the circumstances of this case is the order for payment issued by the Commission on 4 May 2000. Nevertheless, the effects of that order for payment cannot be considered binding.

49 In the fax of 5 May 2000, the Commission merely informed the applicant that it had ordered payment the previous day. That fax was signed by an official below the level of Head of Unit, which explains why it does not include any information which could lead to its being considered a binding decision. In addition, the payment communicated to the applicant in that fax constituted an undeniable benefit for it and can therefore not be considered to have affected its legal situation.

50 As regards the letter of 18 May 2000, the Commission maintains that, contrary to what is required for the admissibility of an action for annulment under Article 230 EC, the applicant was not the person addressed by that letter, which was addressed to its advisers. Furthermore, the letter did not give rise to any binding definitive legal effect. In the letter, the Commission merely took formal note of the agreement which it had reached with the applicant regarding the reduction of the aid and confirmed the payment of the balance of that aid, as provided for in that agreement. The effect of the letter cited above was thus purely informative. There was nothing in the letter to support the inference that it contained a definitive decision to reduce the aid.

51 In that regard, the Court of First Instance observes, first, that in order to establish whether the fax of 5 May 2000 and the letter of 18 May 2000 constitute challengeable acts within the meaning of Article 230 EC, it is their content which must be the focus of concern, since the form in which an act or a decision is adopted is, in principle, immaterial as regards the question whether it may be the subject of an action for annulment (see, *inter alia*, Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9).

52 Secondly, it should be noted that the effect of the fax of 5 May 2000 and the letter of 18 May 2000, considered jointly and read in conjunction with the payment order sent out by the Commission on 4 May 2000, was to reduce the amount of Community aid initially granted to the applicant by the decision of July 1993, as amended by the decisions of January 1994 and October 1996. The fact that the fax of 5 May 2000 was signed by an official below the level of Head of Unit, even if proved correct, cannot in any event invalidate the preceding analysis.

53 In so far as they deprive the applicant of the whole of the aid initially granted, the Member State concerned not having any discretion of its own in that respect, the fax of 5 May 2000 and the letter of 18 May 2000 show the existence of an individual decision having binding legal effects capable of affecting the applicant's interests by bringing about a distinct change in its legal position (*IBM* v *Commission*, cited in paragraph 51 above, paragraph 9; Case C-291/89 *Interhotel* v *Commission* [1991] ECR I-2257, paragraphs 12 and 13; Case C-304/89 *Oliveira* v *Commission* [1991] ECR I-2283, paragraphs 12 and 13; and Case C-189/90 *Cipeke* v *Commission* [1992] ECR I-3573, paragraphs 11 and 12). The fact that the letter of 18 May 2000 was addressed to the applicant's adviser does not invalidate the finding that the applicant is the person to whom the abovementioned decision is addressed.

54 For that reason, the second plea of inadmissibility must be dismissed.

55 Following consideration of the two pleas of inadmissibility, it should once again be pointed out that the Court of First Instance may not, in the exercise of its jurisdiction, issue directions to the Community institutions (see, in particular, Case C-5/93 P *DSM* v *Commission* [1999] ECR I-4695, paragraph 36, and Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 83). The head of claim seeking that the Commission be ordered to reconsider the applicant's case must therefore be dismissed as inadmissible.

56 Subject to the preceding point, the action must be declared admissible.

Substance

1. The claim for annulment

Application for annulment of the fax of 5 May 2000 and the letter of 18 May 2000

57 The applicant bases its application for annulment of the fax of 5 May 2000 and the letter of 18 May 2000 on two pleas in law. The first plea alleges infringement of Articles 44 and 47 of Regulation No 4028/86 and Article 7 of Regulation No 1116/88. The second plea alleges infringement of the principle of proportionality.

First plea: infringement of Articles 44 and 47 of Regulation No 4028/86 and Article 7 of Regulation No 1116/88

58 The first plea consists of three parts. In the first part, the applicant claims that the decision to reduce the aid infringes Article 7 of Regulation No 1116/88. In the second part, the applicant maintains that the letter of 4 June 1999 involves a decision to suspend financial aid which is unlawful on the ground that it was not taken in accordance with the provisions of Articles 44 and 47 of Regulation

No 4028/86 and Article 7 of Regulation No 1116/88. In the third part, it claims that the Commission, in breach of Articles 44 and 47 of Regulation No 4028/86, reduced the aid without first consulting the Standing Committee for the Fishing Industry or adopting, within the college of Commissioners, a formal decision delegating authority to the member of the Commission in charge of fisheries.

59 However, as the Court of First Instance has formally noted, the applicant stated at the hearing that it was unconditionally withdrawing the third part of the plea under consideration. The first two parts of that plea must therefore be examined.

— The first part

60 In the first part, the applicant claims that the Commission infringed Article 7 of Regulation No 1116/88. The Commission did not notify the Spanish authorities and the beneficiary enterprise before initiating the procedure to reduce the aid.

61 In that regard, the Court of First Instance would point out, first of all, that while, as the Commission states in its defence, the first subparagraph of Article 9(1) of Council Regulation (EEC) No 2080/93 of 20 July 1993 laying down provisions for implementing Regulation (EEC) No 2052/88 as regards the financial instrument of fisheries guidance (OJ 1993 L 193, p. 1) provides for the repeal of Regulation No 4028/86 and the provisions establishing the detailed rules for its implementation, such as the provisions of Regulation No 1116/88, were repealed on 1 January 1994, it is nevertheless clear from the second subparagraph

of Article 9(1) of Regulation No 2083/93 that Regulation No 4028/86 and its implementation provisions remain valid for aid applications introduced before 1 January 1994. In the present case, the aid application was introduced on 30 April 1992 (see above, paragraph 13). Therefore, the argument of the Commission concerning the inadmissibility of Regulation No 1116/88 to the present case must be disregarded.

62 That said, it must be recalled that, under Article 7 of Regulation No 1116/88, before initiating a procedure for reducing aid 'in accordance with Article 44(1) of Regulation... No 4028/86', the Commission is to 'inform the Member State on whose territory the project was to be carried out, so that it may express its views on the matter', 'consult the competent authority responsible for forwarding supporting documents' and 'ask the beneficiary to provide, through the authority or agency, an explanation for the failure to comply with the conditions laid down' (see above, paragraph 8). Article 44(1) of Regulation No 4028/86 refers to 'the procedure laid down in Article 47' (see above, paragraph 5). Under Article 47(1) of that Regulation, '[w]here the procedure laid down in this article is to be followed, matters shall be referred to the Standing Committee for the Fishing Industry, by its chairman, either on his own initiative or at the request of the representative of a Member State' (see above, paragraph 6). Article 47(2) provides that '[t]he representative of the Commission shall submit a draft of the measures to be taken', on which 'the Committee shall deliver its opinion within a time-limit to be set by the chairman according to the urgency of the matter' (see above, paragraph 6).

63 The passages cited in the preceding paragraph make clear that the procedure referred to in Article 7 of Regulation No 1116/88 corresponds to that which takes place when the chairman of the Standing Committee for the Fishing Industry refers a matter to the Committee for its opinion on the measures proposed by the Commission. Compliance with that article therefore implies that the Commission is to satisfy the obligations imposed by the article before referral is made to that committee.

64 The applicant's pleadings make clear that its criticisms relate to the fact that, in the present case, the Commission, contrary to the requirements laid down in the

first and third indents of Article 7 of Regulation No 1116/88, failed to notify the Member State concerned — in the present case, the Kingdom of Spain — of its intention to initiate the reduction procedure and to request the applicant, prior to the commencement of that procedure, to explain, through the Spanish authorities, its failure to comply with the conditions laid down in the decision to grant assistance. The applicant does not deny, on the other hand, that, before initiating the reduction procedure referred to in Article 7 of Regulation No 1116/88, the Commission consulted the competent authority responsible for sending the supporting documents, in accordance with the requirement imposed by the second indent of that article.

65 It is appropriate to rule on the merits of the applicant's complaints alleging that the Commission failed to comply with the requirements laid down in the first and third indents of Article 7 of Regulation No 1116/88.

66 In that respect, the Court finds as a fact, on reading the letter of 4 June 1999 (see above, paragraph 21) that the Commission, in light of the information indicating that the vessel *Aziz* was fishing in Moroccan waters and not, as envisaged, in Senegalese waters, informed the applicant that it had decided to reduce the aid initially granted to the project, in accordance with Article 44(1) of Regulation No 4028/86, and that the amount of that reduction would be ECU 569 265. The applicant was notified that, failing its formal agreement within 30 days to the proposed solution, the Commission would take further steps in the reduction procedure. Mr Almécija Cantón was sent a copy of that letter (see above, paragraph 22) by virtue of his position within the general secretariat for marine fisheries of the Spanish Ministry of Agriculture, Fisheries and Food.

67 On 20 July 1999, the applicant sent the Commission a document containing its comments on the letter of 4 June 1999, in which it set out, in particular, the reasons why the vessel *Aziz* was fishing in Moroccan waters rather than Senegalese waters, as well as the reasons for which it had not considered it necessary to notify the change of fishing zone to the Commission (see above,

paragraph 23). In a letter of 27 July 1999, Mr Almécija Cantón also sent a copy of the abovementioned comments to the Commission (see above, paragraph 24).

68 Given the information set out in the two preceding paragraphs, it should be pointed out that while, as the applicant notes in its correspondence, the Commission did in fact refer in its letter of 4 June 1999 to the 'reduction procedure in progress', the applicant does not deny that the letter to Mr Almécija Cantón and itself, as well as the communication to the Commission on 20 July 1999 and 27 July 1999 of its comments to that letter, were sent before the matter was referred to the Standing Committee for the Fishing Industry.

69 Nor does the applicant deny that Mr Almécija Cantón, a senior official in the Ministry of Agriculture, Fisheries and Food, in charge of fisheries structures and markets, represents in the present case the authority of 'the Member State on whose territory the project was to be carried out', within the meaning of the first indent of Article 7 of Regulation No 1116/88. Moreover, since Mr Almécija Cantón did not send the Commission his own observations in response to the letter of 4 June 1999, it must be considered that he expressed his views, within the meaning of the first indent of Article 7 of Regulation No 1116/88, by adopting the comments made by the applicant in the document of 20 July 1999 which he sent to the Commission with his letter of 27 July 1999.

70 From the above considerations (paragraphs 66 to 69), it appears that, before the matter was referred to the Standing Committee for the Fishing Industry by its chairman, the Spanish authorities had been notified by the Commission of its decision to reduce the aid pursuant to Article 44(1) of Regulation No 4028/86 and the applicant had been asked by the Commission to give the reasons for its failure to comply with the conditions laid down in the decision granting the aid, which it did in its document of 20 July 1999 containing its comments on the letter of 4 June 1999, which was sent to the Commission on 20 July and 27 July 1999.

In those circumstances, and since the Commission's compliance with the obligation laid down in the second indent of Article 7 of Regulation No 1116/88 has not been called in question (see above, paragraph 64), it must be concluded that the Commission satisfied the various obligations imposed upon it under that article before initiating the reduction procedure referred to therein.

71 The first part of the first plea must therefore be dismissed.

— The second part

72 In its second part, the applicant claims that the letter of 4 June 1999 contains an implied decision to suspend aid, within the meaning of Article 44(1) of Regulation No 4028/86. However, the decision to suspend aid ought, according to the applicant, to have been taken in accordance with Articles 44 and 47 of Regulation No 4028/86 and Article 7 of Regulation No 1116/88 (Case C-359/98 P *Ca'Pasta* [2000] ECR I-3977, paragraphs 26 to 36).

73 In that regard, the Court of First Instance recalls that, by letter of 4 June 1999, the Commission informed the applicant that, in light of the information in its possession concerning the activities of the vessel *Aziz*, it intended to reduce the initial aid on the basis of Article 44(1) of Regulation No 4028/86. In addition, it is clear from that letter that, after it announced that intention, the Commission decided to freeze the payment of the balance of the aid claimed by the applicant in September 1998, pending acceptance by the applicant of the proposal contained in that letter to reduce the aid. It follows that, in addition to notifying the planned reduction, the letter of 4 June 1999 led to the suspension of payment of the balance of the aid. It must therefore be seen as containing a decision to suspend aid (*Ca'Pasta*, cited in the preceding paragraph, paragraphs 29 to 32).

74 However, even assuming that the decision suspending payment contained in the letter of 4 June 1999 was taken in breach of Articles 44 and 47 of Regulation No 4028/86 and Article 7 of Regulation No 1116/88, the Court of First Instance must observe that the alleged unlawfulness of the decision to suspend aid is not, in any event, such as to affect the lawfulness of the decision reducing the aid contained in the fax and the letter referred to in the present application for annulment, which constitutes an autonomous decision in relation to the abovementioned decision suspending payment.

75 In that regard, it should be borne in mind, first, that examination of the first part of the present plea led to dismissal of the applicant's claim that the abovementioned decision reducing the aid was taken in breach of Article 7 of Regulation No 1116/88 and, second, that at the hearing the applicant withdrew the third part of that plea, alleging that the decision had been adopted in breach of Articles 44 and 47 of Regulation No 4028/86.

76 Consequently, the second part of the plea must be dismissed. It follows that the first plea must be rejected in its entirety.

Second plea: infringement of the principle of proportionality

77 In the second plea, the applicant maintains that the reduction decided by the Commission constitutes a disproportionate penalty.

78 In that regard, the Court recalls that it is settled case-law that the principle of proportionality, enshrined in the third paragraph of Article 5 EC, requires that

the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued (see, in particular, the judgment of the Court of Justice in Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, and the judgment of the Court of First Instance in Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraph 144).

79 It should be added that, where the evaluation of a complex economic situation is involved, which is the case with respect to fisheries policy, the Community institutions enjoy a wide measure of discretion (Case C-179/95 *Spain* v *Council* [1999] ECR I-6475, paragraph 29, and Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 44). In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether that exercise discloses manifest error or constitutes misuse of powers or a clear disregard of the limits of its discretion on the part of that institution (see, to this effect, Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraph 31).

80 In the present case, it should be pointed out that, under the first indent of Article 44(1) of Regulation No 4028/86, the Commission may decide to the reduce aid 'if the project is not carried out as specified'.

81 The parties agree that, faced with administrative problems relating to access to the Moroccan fishing zone and to obtaining the necessary licences, the applicant at its own request secured permission, under the decision of October 1996, for the Hispano-Moroccan joint enterprise initially involved in the funded project, in accordance with the decision of July 1993, to be replaced by a Hispano-Senegalese joint enterprise. Consequently, by virtue of the amendment made by the decision of October 1996 and the relevant legislation (see above, paragraphs 2 and 12), in order for the project to be properly carried out it was necessary that the vessels assigned to the project should engage in the exploitation and, where applicable, value-added processing of fishery resources in Senegalese waters.

82 The applicant does not deny, however, that following the decision of October 1996, the vessel *Aziz*, one of the three vessels assigned to the project, engaged in fishing activities in Moroccan waters, without that fact's having been notified beforehand to the Commission. The inevitable inference is that the project was not carried out as specified, which, under the first indent of Article 44(1) of Regulation No 4028/86, authorised the Commission to reduce the aid.

83 It is now necessary to consider the arguments developed by the applicant to establish the disproportionate nature of the reduction decided on in the present case.

84 First, the applicant complains that the Commission failed to take account of the limited duration of the infringement.

85 The Court of First Instance observes, however, that the letter of 18 May 2000 shows that the Commission, with a view to reducing the aid, took into consideration the fact that it had been notified of the change of fishing zone by the vessel *Aziz* in November 1998 and therefore considered only the period between April 1997, when the activities of the joint enterprise referred to in the decision of October 1996 began, and October 1998, without taking into account the period following the abovementioned notification. Contraty to the applicant's submissions, the reduction decided on by the Commission is therefore proportional to the duration of the infringement.

86 The applicant complains that the Commission, when limiting the duration of the reduction, failed to take into account the five months between April and September 1997 during which the vessel *Aziz* was 'blocked in Senegal' and could not have fished in Morocco (point 62 of the application).

87 Nevertheless, it should be observed that the applicant does not claim that, during the five-month period referred to in the preceding paragraph, the vessel *Aziz* carried out activities in the Senegalese fishing zone. On the contrary, it states in its application (point 82) that that vessel 'was not suitable for fishing in Senegalese waters, because the species in which it specialised was not found in the waters of that country'. The Commission could therefore legitimately consider that the vessel *Aziz* had not, during the abovementioned period, exploited the fishery resources in Senegalese waters, contrary to what was required in the present case in order to comply with the decision of October 1996 in conjunction with the relevant legislation (see above, paragraphs 2 and 12). It follows that the Commission was fully entitled not to recognise the five months from April to September 1997 as a period during which the vessel *Aziz* was engaging in activity in the Senegalese fishing zone.

88 Secondly, the applicant maintains that the Commission did not take account of the lack of seriousness of the infringement. The requirement to fish in the waters of the third country referred to in the decision granting aid is secondary, so that a failure to fulfil that obligation cannot be considered to be a serious infringement.

89 In that regard, the Court points out that, as is clear from the letter of 18 May 2000, read in conjunction with the letter of 4 June 1999, the reduction decided on by the Commission applied solely to the part of the aid relating to the vessel *Aziz* which was affected by the change of fishing zone at issue.

90 That having been stated, it should first be recalled that, under Article 21a of Regulation No 4028/86, which defines a joint enterprise within the meaning of that regulation, the purpose of creating such an enterprise is to exploit and, where applicable, to use with the primary consideration being given to the supply of the Community market, the fishery resources of waters falling within the sovereignty and/or jurisdiction of the third country concerned in the creation of the enterprise (see above, paragraph 2).

91 In light of the information set out in the preceding paragraph, it is undeniable that the exploitation, by vessels involved in the creation of a joint enterprise, of the fishing zone of the third country which is the country of origin of the partner of the Community shipowner involved in the project constitutes, contrary to what the applicant claims, an essential element in carrying out that project. As the Commission has rightly pointed out in its pleadings, compliance with the requirement to fish in the waters of the third country concerned in the project is an indispensable condition for the proper management and stability of the international relations between the Community and non-member countries in the framework of the fisheries policy, a purpose made clear in both the 13th recital in the preamble to Regulation No 3944/90, amending Regulation No 4028/86, and the third recital in the preamble to Regulation No 1956/91.

92 For that reason, Regulation No 1956/91 requires precise information to be submitted to the Commission when an aid application is made, when payment of the first instalment and the balance of the aid granted are applied for and in the periodic activities reports on the joint enterprise concerning the fishing zones of the vessels involved in the project (Annexes I to IV to the Regulation). For the same reason, in Part B of Annex I to Regulation No 1956/91, the Commission specifically reminds applicants for Community financial aid that the granting of such aid is subject to the condition, *inter alia*, that the joint enterprise should relate to the exploitation and, where applicable, value-added processing of the fishery resources of waters of the third country concerned (see above, paragraph 12).

93 The Court also recalls that it is settled case-law that applicants for, and beneficiaries of, aid are required to satisfy themselves that they are submitting to the Commission reliable information which is not liable to mislead it, without which the system of controls and evidence set up to determine whether the conditions for granting aid are fulfilled cannot function properly (Case T-216/96 *Conserve Italia* v *Commission* [1999] ECR II-3139, paragraph 71.) Recently, the Court of Justice noted the importance of compliance with that obligation 'for the

proper functioning of the system of controls set up to ensure proper use of Community funds' (Case C-500/99 P *Conserve Italia* v *Commission* [2002] ECR I-867, paragraph 100). In the absence of reliable information, aid could be granted to projects which do not fulfil the necessary conditions (Case T-216/96 *Conserve Italia* v *Commission*, cited above, paragraph 71).

94 In the present case, the applicant does not deny that, without first notifying the Commission, it shifted the activities of the vessel *Aziz* from the Senegalese fishing zone, where it was meant to operate under the decision of October 1996 read in conjunction with the applicable legislation, to the Moroccan fishing zone. By so doing, the applicant failed to fulfil an essential condition for carrying out the project in question (see above, paragraphs 91 and 92).

95 In addition, as the Commission points out in its pleadings, the documents in the file make it clear that, in September 1998, the applicant sent the Commission, through the Spanish authorities, an application for payment of the balance of the aid in which it made a sworn statement that the three vessels were carrying out their activities in Senegalese waters, as well as a first activity report covering the period between 1 April and 31 December 1997 which indicated that the activities of the three vessels were taking place in the Senegalese fishing zone and were completely satisfactory.

96 However, in the case of the vessel *Aziz*, that information was untrue. In a memorandum of October 1998 sent on 12 November 1998 by the Spanish authorities to the Commission, following a request by the latter for additional information motivated by the imprecise nature of the information relating to the activities of the *Aziz*, the applicant stated that, after vain attempts to operate in Senegalese waters, the *Aziz* had, on the basis of a fishing licence obtained from the Moroccan authorities in June 1997, transferred its activities to Moroccan waters. During the written procedure, it indicated that the unsuitability of the vessel *Aziz* for fishing in Senegalese waters had led it to transfer, during the period covered by the report referred to in the preceding paragraph, the activities of that vessel to Moroccan waters.

97 It must therefore be stated that, in its first activity report, the applicant, under the cloak of a sworn statement, concealed from the Commission the real situation regarding the activities of the vessel *Aziz*. By so doing, it failed to fulfil its obligation to provide information to and to act in good faith vis-à-vis the Commission (see above, paragraph 93).

98 The circumstance, alleged by the applicant, that the Commission had previously authorised, by its decision of October 1996, a change of fishing zone on the ground that such a modification did not alter the structural objective of the joint enterprise project, as well as the fact, also invoked by the applicant, that the change of fishing zone by the vessel *Aziz* was subsequently accepted by the Commission without the latter's considering it necessary to amend the original grant decision, do not invalidate the analysis set out in paragraphs 90 to 97 above.

99 In its reply, the applicant claims that the failure to give prior notification to the Commission of a change of fishing zone by the vessel *Aziz* occurred because the Spanish authorities, through which the applicant was required by the legislation to communicate with the Commission, did not consider it necessary to make that notification and informed the applicant that it could transfer the *Aziz*'s activities to the Moroccan fishing zone without fear of complaint by the Commission.

100 None the less, without its being necessary to rule on the admissibility of those allegations, made at the stage of the reply, in the light of Article 48(2) of the Rules of Procedure, it must first be stated that they are in no way substantiated.

101 Next, even if those allegations were to be accepted as correct, it must be pointed out that it falls to the beneficiary of Community financial aid, as the party

responsible for the proper performance of the subsidised project, to take the necessary measures to provide timely information to the Commission of proposed alterations to the implementation of the project. In that regard, no provision of the applicable rules makes it possible to maintain that the beneficiary is prohibited from directly informing the Commission, in particular where the national authorities concerned fail to act, of a change which affects an essential condition for carrying out the project. It follows that the applicant may not take refuge behind the alleged passivity of the Spanish authorities in order to justify the failure to notify the Commission prior to the change of fishing zone for the vessel *Aziz*.

102 Finally, the applicant's claims set out in paragraph 99 above do not obviate the finding that, both in its application for payment of the balance of the aid and in the first activity report appended to that application, the applicant made a sworn statement to the Commission that the vessel *Aziz* was fishing in Senegalese waters, although that was untrue.

103 The preceding analysis (paragraphs 90 to 102) makes clear that the applicant, without giving prior notification to the Commission, transferred the activities of the vessel *Aziz* from the Senegalese fishing zone referred to in the decision of October 1996 to the Moroccan fishing zone and that it concealed that change of fishing zone from the Commission in its application for payment of the balance of the aid and in the first activity report appended to that application. In so doing, it has incurred liability for serious breaches of essential obligations for the functioning of the system of Community financial aid in the area of fisheries. The applicant's argument that the infringement is not a serious one in the present case must therefore be dismissed.

104 Thirdly, the applicant claims that the Commission did not take account of the absence of serious misconduct or of negligence on its part. Drawing attention to the problems encountered by the vessel *Aziz* in Senegalese waters, it states that the change of fishing zone which occurred was crucial to the activity and

profitability of that vessel. The fact that the two other vessels of the joint enterprise continued to fish in Senegalese waters clearly indicates that that change constituted a case of *force majeure*. In its reply, the applicant provides a technical report which concludes that the activities of the vessel *Aziz* would not be profitable in the Senegalese fishing zone.

105 The Court finds, however, that the applicant's explanations as regards the technical problems encountered by the vessel *Aziz* in the Senegalese fishing zone, even if correct, do not in any event justify dismissing the finding which emerges from the analysis carried out in paragraphs 90 to 102 above, that the applicant carried out the change of fishing zone at issue without prior notification to the Commission, thereby altering, without the latter's knowledge, an essential condition for the granting of aid, and that, despite a sworn statement, it concealed that change in the application and information which it sent to the Commission in September 1998 for payment of the balance of the aid.

106 Fourthly, the applicant states that it did not fraudulently profit from the infringements complained of by the Commission.

107 None the less, even it were to accept that that statement is correct, the Court finds that, under Article 44(1) of Regulation No 4028/86, the power conferred upon the Commission to reduce aid responds to strictly objective conditions, such as the fact that a project is not carried out as provided for, as in the present case. The exercise of that power is not conditional on the finding of unlawful enrichment of the beneficiary of the aid. In addition, the applicant's assertion does not diminish the seriousness of the infringements noted, so that the reduction made in the present case by the Commission cannot be regarded as excessive.

108 Fifthly, the applicant maintains that the Commission did not take its good faith into account. It regularly provided the necessary information to the Commission and notified it of fundamental changes likely to affect the project, namely, the replacement of the vessel *Marvasa Doce* by the vessel *Aziz* and the replacement of Morocco by Senegal as the third country covered by the project. During negotiations with the Commission, it accepted the principle of a reduction and proposed that it be proportional to the infringement found to have been committed.

109 Sixthly, it draws attention to the position set out by the Spanish authorities in their letter to the Commission of 3 June 1999 (see above, paragraph 20). In addition, those authorities paid the applicant the amount of aid which it was their responsibility to grant under the award decision.

110 The Court none the less points out that such arguments cannot confute the reality and seriousness of the infringements for which the applicant is answerable in connection with the activities of the vessel *Aziz* (see above, paragraphs 90 to 102).

111 Consideration of the second plea shows that the applicant has not demonstrated that the reduction decided on by the Commission in the present case is disproportionate in the light of the alleged infringements and of the objective of the legislation applicable to the present case.

112 Confronted with the applicant's failure to fulfil several obligations, it was reasonable for the Commission to consider that a less severe sanction than the one decided on in the present case was likely to compromise the sound management of the structural policy for fisheries and to invite fraud, since beneficiaries of aid would be tempted to change fishing zones without informing the Commission, at the risk only of having that aid reduced in a symbolic manner or, in any event, to an extent less than that which corresponds to the seriousness and duration of the infringement (see, to that effect, Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and*

Others v *Commission* [1996] ECR II-247, paragraph 163). On any view, in the light of the exceptional seriousness of the infringements attributable to the applicant (see above, paragraphs 90 to 103), a symbolic reduction of the aid, as proposed by the applicant in the document of 20 July 1999 and in the letter of 14 December 1999 (see above, paragraphs 23 and 26) would have constituted a particularly lenient penalty and thus run counter to the principle of proportionality.

113 It is important to add that the Court has even held that, as regards Community financial aid, the penalty imposed by the Commission in the case of an irregularity may, without infringing the principle of proportionality, be greater than the amount which corresponds to that irregularity, in order to produce the deterrent effect required to ensure the proper management of the resources of the structural funds in question (Case C-500/99 P *Conserve Italia* v *Commission*, cited in paragraph 93 above, paragraph 101).

114 It follows that the alleged infringement of the principle of proportionality has not been proved and that the second plea must be rejected.

115 In the light of the preceding considerations (paragraphs 57 to 114), the application for annulment of the fax of 5 May 2000 and the letter of 18 May 2000 is dismissed.

Application to extend the subject of the application for annulment to the decision of 19 March 2001

116 In its further submission of 23 May 2001, the applicant asks for the subject of the application for annulment to be extended to the decision of 19 March 2001, adopted after the end of the written procedure.

117 Having defended the admissibility of its application for annulment of the decision of 19 March 2001, the applicant maintains, as to the substance, that the adoption of that decision does not make it possible to discount its criticisms relating to the absence of procedure and a formal decision to suspend the aid, the irregular nature of the opening of the reduction procedure and the disproportionate character of the reduction made in the present case.

118 None the less, without its being necessary to take a position on the admissibility of the application for annulment made by the applicant in its further statement of 23 May 2001, the Court observes, on reading that document, that the applicant is taking steps to annul the decision of 19 March 2001 on the basis of the same arguments as those developed under the first two parts of the first plea and under the second plea put forward to support the application for annulment of the fax of 5 May 2000 and the letter of 18 May 2000.

119 As regards the first part of the first plea, it was found, at the end of the analysis carried out in paragraphs 61 to 70 above, that the Commission had in the present case complied with the obligations laid down in Article 7 of Regulation No 1116/88 before commencing the reduction procedure in accordance with that article. As regards the second part of that plea, as explained in paragraph 75 above, the grounds on which the applicant submits that the decision to suspend the aid set out in the letter of 4 June 1999 is unlawful, even on the assumption that they are valid, cannot in any event affect the lawfulness of the reduction decided by the Commission in the present case.

120 As to the second plea, it should be pointed out that the decision of 19 March 2001, like the decision in the fax of 5 May 2000 and in the letter of 18 May 2000, reduces the financial aid by ECU 300 445. In addition, a comparative reading of the letter of 18 May 2000 and of the preamble to the decision of 19 March 2001 makes clear that the grounds for the reduction put forward in the decision of 19 March 2001, like those put forward in the letter of 18 May 2000, arise from the finding of an infringement by the applicant of the applicable rules

and the conditions set for granting financial aid, linked to the fact that the vessel *Aziz*, without the knowledge of the Commission, carried out its activities in the Moroccan fishing zone until November 1998 and not, as required, in the Senegalese fishing zone. That comparative reading also makes clear that, in the decision of 19 March 2001, the Commission took account, as in its letter of 18 May 2000, of the fact that it was notified of the change to the fishing zone at issue in November 1998 and took into account only the period of activity by the joint enterprise prior to that notification when calculating the reduction.

121 In the light of the similarity of the subject-matter and the grounds of the letter of 18 May 2000 and the decision of 19 March 2001, and taking into account the analysis set out in paragraphs 77 to 114 above, the plea based on a breach of the principle of proportionality must also be dismissed in so far as it relates to the decision of 19 March 2001.

122 At the hearing, the applicant also claimed a breach of the principle of legal certainty, based on the allegedly unreasonable period of time elapsing between May 2000 and the adoption of the decision of 19 March 2001.

123 Nevertheless, without its being necessary to rule on the admissibility under Article 48(2) of the Rules of Procedure of that argument, set out for the first time at the hearing although there was nothing to prevent the applicant from setting it out when it lodged its further statement following the adoption of the decision of 19 March 2001, it is sufficient to observe that, on reading the fax of 5 May 2000 and the letter of 18 May 2000, the applicant knew that the Commission had reduced the financial aid by ECU 300 445. In those circumstances, the applicant, which had, moreover, continually raised during the action the definitive nature of the legal effects of the abovementioned fax and letter and the purely confirmatory nature of the decision of 19 March 2001, cannot reasonably maintain that the allegedly excessive lapse of time between May 2000 and the adoption of the decision of 19 March 2001 led it to believe that it could be certain it would receive the entire balance of the financial aid.

124 Finally, at the hearing, the applicant, on the basis of the judgment by the Court of First Instance in Case T-241/00 *Le Canne* v *Commission* [2002] ECR II-1251, claimed that insufficient reasons were provided for the decision of 19 March 2001.

125 In that regard, the Court recalls that it is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the legal nature of the measure in question, and the reasoning of the institution which adopted the measure must be stated clearly and unequivocally, so as to inform the persons concerned of the justification for the measure adopted and to enable the Court to exercise its power of review (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy* v *Commission* [1988] ECR 219, paragraph 71).

126 In the case of a decision reducing Community financial aid for a project not carried out as specified, the statement of the reasons for such a measure must include an indication of the reasons for which the alterations taken into account have been judged to be unacceptable. Considerations relating to the extent of those alterations or their lack of prior authorisation cannot, by themselves, constitute sufficient reasoning in that respect (*Le Canne* v *Commission*, cited in paragraph 124 above, paragraph 55).

127 Nevertheless, the question whether the statement of reasons for a measure meets the requirements of Article 235 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytravel and Brink's France* [1998] ECR I-1719, paragraph 63).

128 In the present case, it should be pointed out that, in contrast to the case which led to the judgment in *Le Canne* v *Commission* (cited in paragraph 124 above), the decision of 19 March 2001, as well as the letter of 18 May 2000, contains precise information on the nature of the contested modification and on why the

importance of that modification justifies the reduction in financial aid decided on in the present case. It clearly and unequivocally shows that the Commission is complaining of the fact that, without its knowledge, until November 1998, the vessel *Aziz* carried out its activities in the Moroccan fishing zone and not, as specified, in the Senegalese fishing zone, although the requirement to exploit and, where appropriate, use the fishery resources of the waters of the third country referred to in the decision to grant aid constitutes an essential condition of that aid, as is clear from both Article 21a of Regulation No 4028/86 (see above, paragraph 2), to which the decision of 19 March 2001 explicitly refers, and Annex I to Regulation No 1956/91 (see above, paragraph 12), referred to in both the letter of 18 May 2000 and the decision of 19 March 2001.

129 It follows that the applicant's argument that the statement of reasons is inadequate cannot be upheld.

130 Following the analysis set out in paragraphs 118 to 120 above, the claim for annulment of the decision of 19 March 2001 must therefore be rejected as unfounded.

131 The claim for annulment must therefore be dismissed in its entirety.

2. The claim for damages

132 In support of its claim for damages, the applicant, after recalling the conditions in which the Community may incur non-contractual liability, argues that the unlawful conduct complained of in the present case derives from the fact that the

Commission, failing to comply with essential procedural requirements, suspended the payment of the balance of aid from 11 September 1998, the date when the applicant sent its activities report with a view to the payment of the balance of the aid, until 4 May 2000, the date of the part payment of the balance of the aid, and reduced the aid initially granted.

133 As regards the damage suffered by the applicant, it is of an economic order and derives from the late and incomplete nature of the payment of the balance of the aid. One way to calculate the amount of that damage is to refer to the document drafted by external consultants on 29 June 2000, which shows that, on that date, the total amount of that damage, related to the need to resort to a bank loan and to ask suppliers to accept a later date for payment, to increases in purchase prices, to the loss of previously agreed rebates and to an increase in the applicant's liabilities, reached ESP 25 600 000 (about ECU 155 000). To that must be added the damage to the applicant's image, the costs of legal assistance and the loss of time due to the hours devoted to the case by staff members.

134 The damage suffered by the applicant could also be calculated on the basis of the interest due to it as the result of the late and incomplete payment of the balance of the aid. In that case, the economic damage to the applicant is equivalent to the total amount resulting from the application of an interest rate of 8% per annum to, first, the amount of ECU 283 859 for the period between 11 September 1998 and 4 May 2000 and, second, the amount of ECU 300 445 for the period between 11 September 1998 and the date when the Commission pays the balance of the aid following the annulment of its suspension and reduction decisions.

135 The applicant asks the Court to determine, under its unlimited jurisdiction, the amount of damages and interest to be awarded it according to one of the two calculations set out in the two preceding paragraphs.

136 As regards the causal relation, the applicant claims that the damage it suffered was caused solely and directly by the unilateral and unlawful suspension and reduction of the initial aid.

137 In that regard, the Court would observe, first, that consideration of the claim for annulment clearly shows that the Commission did nothing unlawful in its adoption of the decision to reduce the aid. Since the Community does not incur non-contractual liability without, *inter alia*, proof of the unlawfulness of the alleged conduct of the institution concerned (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44), the claim for damages as it relates to the decision reducing the aid must be dismissed as unfounded.

138 Secondly, the claim for damages must be considered in so far as it is based on the fact that the Commission, failing to comply with the rules of procedure specified for that purpose, suspended the aid initially granted to the applicant.

139 It should be recalled, as regards the admissibility of such claims, which can be considered by the court of its own motion as it concerns public policy, that while a claim for damages based on the second paragraph of Article 288 EC is an independent form of action in the system of remedies available in Community law, so that the fact that an application for annulment is inadmissible does not in itself render a claim for damages inadmissible (see, *inter alia*, Case T-514/93 *Cobrecaf and Others* v *Commission* [1995] ECR II-621, paragraph 58, and the case-law cited), a claim for damages must nevertheless be held to be inadmissible when it is actually aimed at securing withdrawal of an individual decision which has become definitive and would, if upheld, have the effect of nullifying the legal effects of that decision (Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraphs 32 and 33, and *Cobrecaf and Others* v *Commission*, cited above, paragraph 59).

140 Consequently, a claim for damages is inadmissible where its purpose is to secure payment of a sum corresponding to the amount denied to the applicant by reason of a decision which has become definitive (*Cobrecaf and Others* v *Commission*, cited in the preceding paragraph, paragraph 60), as is a claim for damages relating to interest for late payment of such a sum (*Cobrecaf and Others* v *Commission*, cited in the preceding paragraph, paragraph 62).

141 In the present case, it must be borne in mind that the letter of 4 June 1999 contains a decision to suspend aid (see above, paragraph 73) which, according to the case-law of the Court of Justice (*Ca'Pasta* v *Commission*, cited above in paragraph 72, paragraphs 30 to 32 and 36 to 39), constitutes an act having adverse effect, which the applicant could have challenged within the time-limit, but did not. The decision to suspend aid contained in that letter has therefore become definitive.

142 Had a timely action for annulment of that decision to suspend aid been successful, the decision would have been declared void and the Commission would have been required, under the necessary measures it would have been obliged to take in accordance with Article 233 EC in order to comply with the Court's annulment decision, to pay the applicant the part of the aid unpaid on the date of that decision, with interest for late payment calculated on the total amount of the balance (ECU 584 304) from 4 June 1999, the date when the contested decision to suspend was adopted.

143 It is next appropriate to consider the claim for damages put forward by the applicant, in so far as it is based on the allegedly unlawful suspension of aid.

144 As observed in paragraphs 133 and 134 above, the applicant presents two methods of calculating the damage it suffered as a result of the unlawful suspension of the aid. It adds that, 'under its unlimited jurisdiction,... the Court of

First Instance may set damages in [its] favour... on the basis of one of the formulas indicated above' (paragraph 103 of the application). Such a statement suggests that the applicant views the two methods of calculation it has proposed as equivalent and as serving the same purpose in terms of compensation for the alleged damage.

145 The compensation for damage defined under one of those two methods corresponds, as stated in paragraph 134 above, to the payment of late interest applied, first, to the amount of ECU 283 859 for the period from 11 September 1998 to 4 May 2000 and, second, to the amount of ECU 300 445 for the period from 11 September 1998 to the date when that amount is paid.

146 It must be pointed out that the claim for damage based on the alleged unlawfulness of the suspension of the aid, to the extent that it refers, under one of the two methods of calculation put forward by the applicant as equivalent, to the payment of late interest calculated on the amount of the balance of the aid as of 4 June 1999, is actually aimed at the payment of an amount intended to compensate the legal effects inherent in the decision to suspend the aid of 4 June 1999 in terms of the delay experienced in the payment of that balance — legal effects which would have been brought to an end by annulment of that decision following the success of a timely action for annulment, having regard to the measures which the Commission would have been required to take under Article 233 EC in order to comply with the annulment decision (see above, paragraph 142).

147 It follows that, in the light of the case-law considered in paragraphs 139 and 140 above, the claim for damages must, to the extent specified in paragraph 146 above, be held to be inadmissible.

148 It remains to consider the claim for damages in so far as it relates to the period between 11 September 1998 and 4 June 1999.

149 First of all, the documents in the case make clear that 11 September 1998 corresponds to the date on which the Spanish authorities received from the applicant the documents relating to the application for payment of the balance of the aid. Those documents were received by the Commission on 30 September 1998. In the light of the information contained in those documents, the Commission requested further information concerning, in particular, the activities of the vessel *Aziz*, to which the applicant deferred by sending, through the Spanish authorities, the documents which were received by the Commission on 15 October 1998 and 17 November 1998. In so doing, it used the right provided under the first sentence of the first paragraph of Article 44(1) of Regulation No 4028/86 to request, throughout the period for which Community aid is granted, the authority or agency appointed for the purpose by the Member State concerned to send it 'all supporting documents and any document proving that the financial or other conditions set for each project have been satisfied' (see above, paragraph 5).

150 It follows that the Commission cannot be charged with unlawful conduct such as to incur non-contractual liability for the Community for the period between 11 September 1998 and 17 November 1998, the date when the Commission received the additional information it had requested.

151 As regards the period between 18 November 1998 and 4 June 1999, the Court considers that, in respect of the assessment of a complex economic situation (see, to that effect, the case-law cited in paragraph 79 above), and given that, upon reading the documents which it received on 17 November 1998, the Commission found itself confronted with information relating to the activities of the vessel

Aziz which completely contradicted the information it had received in September and October of 1998, no charge of unlawfulness can be levelled at the Commission on the basis of the fact that six and a half months elapsed from the time it received the abovementioned documents until it responded with regard to the applicant.

152 Following the analysis set out in the three preceding paragraphs, the claim for damages as it relates to the period between 11 September 1998 and 4 June 1999 must be rejected as unfounded.

153 In the light of the analysis set out in paragraphs 137 to 152 above, the claim for damages must be dismissed in its entirety.

154 Having regard to all the foregoing considerations, the application as a whole must be dismissed.

Costs

155 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 in the other party's pleadings. Since the applicant has been unsuccessful in both its claim for annulment and its claim for damages, and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

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

Jaeger Lenaerts Azizi

Delivered in open court in Luxembourg on 17 October 2002.

H. Jung K. Lenaerts

Registrar President