JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
28 January 2004 *

In Joined Cases T-142/01 and T-283/01,

Organización de Productores de Túnidos Congelados (OPTUC), established in Bermeo (Spain), represented, in Case T-142/01, by J.-R. García-Gallardo Gil-Fournier and M. Moya Díaz, lawyers, and, in Case T-283/01, by J.-R. García-Gallardo Gil-Fournier and J. Guillem Carrau, lawyers,

applicant,

v

Commission of the European Communities, represented by S. Pardo Quintillán and, in Case T-142/01, also by L. Visaggio, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

supported by

Organización de Productores Asociados de Grandes Atuneros Congeladores (Opagac), established in Madrid (Spain), represented by J. Casas Robla and V. Arrastia de Sierra, lawyers,

intervener in Case T-142/01,

APPLICATIONS for the annulment of Commission Regulation (EC) No 584/2001 of 26 March 2001 amending Regulations (EC) No 1103/2000 and (EC) No 1926/2000 providing for the granting of compensation to producer organisations in respect of tuna delivered to the processing industry from 1 July to 30 September 1999 and from 1 October to 31 December 1999 (OJ 2001 L 86, p. 4), and for the annulment of Article 2(2) of and the annex to each of Commission Regulations (EC) No 585/2001 of 26 March 2001, No 808/2001 of 26 April 2001, No 1163/2001 of 14 June 2001 and No 1670/2001 of 20 August 2001, providing for compensation to producer organisations for tuna delivered to the processing industry between 1 January and 31 March 2000, 1 April and 30 June 2000, 1 July and 30 September 2000 and 1 October and 31 December 2000 (OJ 2000 L 86, p. 8; OJ 2000 L 118, p. 12; OJ 2000 L 159, p. 10 and OJ 2000 L 224, p. 4 respectively),

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

composed of: V. Tiili, President, P. Mengozzi and M. Vilaras, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 September 2003,

gives the following

Judgment

Legal and factual background

1 Article 18 of Council Regulation (EEC) No 3759/92 of 17 December 1992 on the common organisation of the market in fishery and aquaculture products (OJ 1992 L 388, p. 1), as amended by Council Regulation (EC) No 3318/94 of 22 December 1994 (OJ 1994 L 350, p. 15), provides for the grant of a compensatory allowance when it is observed that, for a given quarter, the price of tuna intended for the processing industry is lower than a specific triggering threshold. It is worded as follows:

'1. An allowance may be granted to the producers' organisations for the quantities of products listed in Annex III [different species of tuna] caught by their members, then sold and delivered to processing industries established within the customs territory of the Community and intended for the industrial manufacture of products falling within CN code 1604. This allowance shall be granted when, for a given quarter:

— the average selling price recorded on the Community market

and

— the free-at-frontier price referred to in Article 22 plus, where appropriate, the applicable countervailing charge

are both lower than a triggering threshold equivalent to 91 % of the Community producer price for the product in question.

The Member States shall prepare or update and notify to the Commission the list of the industries referred to in this paragraph before the start of each fishing year.

2. The amount of the allowance in any case may not exceed:

— either the difference between the triggering threshold and the average selling price of the product in question on the Community market,

— or a flat-rate amount equivalent to 12 % of this threshold.

3. The maximum total quantity of each of the products eligible for the allowance shall be limited to an amount equal to the average of the quantities sold and delivered, under the terms set out in paragraph 1, during the equivalent quarter in the three fishing years preceding the quarter for which the allowance is paid.

4. The amount of the allowance granted to each producers' organisation shall be equal to:

— the ceiling laid down in paragraph 2 for the quantities of the product in question which have been disposed of in accordance with paragraph 1 and which do not exceed the average of the quantities sold and delivered under the same conditions by its members in the equivalent quarter in the three fishing years preceding the quarter for which the allowance is paid,

— 50 % of the ceiling laid down in paragraph 2 for the quantities of the product in question which exceed the quantities referred to in the first indent and which are equal to the surplus of the quantities resulting from the allocation of the quantities eligible pursuant to paragraph 3 among the producers' organisations.

The allocation shall be made proportionally between the producers' organisations in question on the basis of their respective average production in the equivalent quarter in the three fishing years preceding the quarter for which the allowance is paid.

5. The producers' organisations shall allocate the allowance granted to their members proportionally on the basis of the quantities produced by them and sold and delivered in accordance with paragraph 1.

6. Detailed rules for the application of this Article, in particular the amount and the conditions under which the allowance is granted, shall be adopted in accordance with the procedure laid down in Article 32.'

2 On the basis of Regulation No 3759/92, as amended, and in particular Article 18(6), the Commission adopted, on 21 January 1998, Regulation (EC) No 142/98 laying down detailed rules for granting the compensatory allowance for tuna intended for the processing industry (OJ 1998 L 17, p. 8).

3 On 1 July 1998, three undertakings (Nicra 7 SL, Aitzugana SL and Igorre SL, 'the undertakings concerned') who were members of the Organización de Productores de Túnidos Congelados (Frozen Tuna Producers' Organisation, hereinafter 'OPTUC' or 'the applicant'), one of two tuna producers' organisations established in Spain, left OPTUC and joined the other organisation, the Organización de Productores Asociados de Grandes Atuneros Congeladores (Organisation of Associated Operators of Large Tuna Freezing Vessels, 'Opagac').

4 On 30 July 1998, the Spanish authorities notified the Commission of that change of membership and provided information concerning the landings of tuna in 1995, 1996, 1997 and the first half of 1998 by vessels belonging to those undertakings, so that the Commission could amend the 'statistics' compiled, for the purpose of granting the compensatory allowance referred to in Article 18 of Regulation No 3759/92, on the basis of the information previously sent by the Spanish authorities.

5 On 17 December 1999 the Council adopted Regulation (EC) No 104/2000 on the common organisation of the markets in fishery and aquaculture products (OJ 2000 L 17, p. 22) which repealed and replaced, from 1 January 2001, Regulation No 3759/92. Article 27 of Regulation No 104/2000 reproduced the wording of Article 18 of Regulation No 3759/92, as amended, except for the amendments to the second indent of Article 18(1) and the article cited in Article 18(6).

6 The Commission went on to adopt, on the basis of Regulation No 3759/92 and in particular Article 18(6), Regulations (EC) No 1103/2000 of 25 May 2000 (OJ 2000 L 125, p. 18) and No 1926/2000 of 11 September 2000 (OJ 2000 L 230, p. 10) providing for the granting of compensation to producers' organisations in respect of tuna delivered to the processing industry during the quarterly periods 1 July to 30 September 1999 and 1 October to 31 December 1999. Among the producers' organisations receiving those allowances are OPTUC and Opagac.

7 On 20 July 2000, the Spanish authorities, who had noticed that the Commission had not made the requested amendments, asked OPTUC and Opagac to provide it with the figures relating to the amount of tuna marketed by the undertakings concerned in the territory of the European Union in 1996 and 1997 and in the first half of 1998. They stated that those organisations had only provided them before with the data relating to the landings made by those undertakings, although it was the amounts marketed in the European Union which were covered by a compensatory allowance.

8 On 16 October 2000, the Spanish authorities sent the Commission the definitive data on the quantities of tuna sold and delivered to the Community processing industry ('quantities marketed') by the members of those two producers' organisations between 1 July 1995 and 30 June 1998.

9 Since Regulations Nos 1103/2000 and 1926/2000 had not taken into account the transfer of the undertakings concerned from OPTUC to Opagac, for the purposes of the allocation between the producers' organisations of the quantities eligible for the compensatory allowance ('the quantities eligible for compensation'), Opagac, taking the view that the quantities which had been allocated to it by those regulations were therefore incorrect, brought an action on 24 November 2000 before the Court of First Instance seeking the annulment of the relevant provisions of those regulations (Case T-359/00).

10 On 26 March 2001 the Commission adopted, on the basis of Regulation No 104/2000, and in particular Article 27(6), Regulation (EC) No 584/2001 of 26 March 2001 amending Regulations Nos 1103/2000 and No 1926/2000 (OJ 2001 L 86, p. 4). The Commission acknowledged, in recitals 3 to 5 in the preamble to Regulation No 584/2001, that the final data sent on 16 October 2000 by the Spanish authorities did affect the allocation of the quantities eligible for compensation between OPTUC and Opagac as set out in the annexes to Regulations Nos 1103/2000 and 1926/2000, and that they were to be amended as a result.

11 The new allocation of the quantities eligible for compensation regarding the third and fourth quarters of 1999, laid down in annexes I and II to Regulation No 584/2001 which replace the annexes to Regulations Nos 1103/2000 and 1926/2000, is marked, as compared with the allocation under the latter regulations, by a reduction of the quantities allocated for each quarter to OPTUC in respect of 'yellowfin tuna not weighing more than 10 kg' and 'skipjack or stripe-bellied bonito', and by a corresponding increase in the quantities allocated to Opagac for the same products in the same quarters.

12 Following the adoption of Regulation No 584/2001, by order of the President of the Fourth Chamber of the Court of First Instance of 21 June 2001, Case T-359/00 was removed from the Register of cases before the Court of First Instance.

13 On the basis of Regulation No 104/2000, and, in particular, Article 27(6), the Commission also adopted in succession Regulations (EC) Nos 585/2001 of 26 March 2001 (OJ 2001 L 86, p. 8), 808/2001 of 26 April 2001 (OJ 2001 L 118, p. 12), 1163/2001 of 14 June 2001 (OJ 2001 L 159, p. 10) and 1670/2001 of 20 August 2001 (OJ 2001 L 224, p. 4), providing for compensation to producer organisations for tuna delivered to the processing industry between 1 January and 31 March 2000, between 1 April and 30 June 2000, between 1 July and 30 September 2000 and between 1 October and 31 December 2000 respectively.

14 Article 2(1) of each of those four regulations lays down the total quantities eligible for compensation for the quarter in question, and Article 2(2) defines, by reference to an annex in the same regulation, the allocation of the total quantities between the producers' organisations. It is common ground that that allocation is made, *inter alia*, by attributing to Opagac and deducting from OPTUC the previous production averages of the undertakings concerned.

15 Finally, on 9 November 2001, the Commission adopted Regulation (EC) No 2183/2001 laying down detailed rules for the application of Council Regulation (EC) No 104/2000 as regards granting the compensatory allowance for tuna intended for the processing industry (OJ 2001 L 293, p. 11). That regulation repeals Regulation No 142/98 and is applicable from 1 January 2002. Article 3 is worded as follows:

'1. The allowance shall be granted to producer organisations, subject to the limits laid down in Article 27(3) of Regulation ... No 104/2000, for the products listed in Annex III to that Regulation, caught by their members and sold and delivered to processors established within the customs territory of the Community for complete and definitive processing into products covered by HS heading 1604.

2. The Member States shall check the maximum totals fixed in Article 27(3) of Regulation ... No 104/2000 with respect to any changes which might have occurred in the membership of producer organisations. They shall inform the Commission thereof.'

Procedure

16 By application lodged at the Court Registry on 21 June 2001, the applicant brought an action for annulment against, first, Regulation No 584/2001 and, second, Article 2(2) and the annexes to Regulations Nos 585/2001, 808/2001 and 1163/2001 (Case T-142/01).

17 By application lodged at the Court Registry on 13 November 2001, the applicant then brought an action for annulment against Regulation No 1670/2001 (Case T-283/01), asking the Court of First Instance to order the joinder of that case with Case T-142/01.

18 In Case T-142/01 the written procedure was completed on 13 February 2002.

19 In Case T-283/01 the written procedure was completed on 12 February 2002, since the applicant had not applied for leave to supplement the file, following notification of the decision of the Court of First Instance, adopted in accordance with Article 47(1) of its Rules of Procedure, not to proceed to a second exchange of pleadings.

20 By application lodged at the Court Registry on 31 May 2002 Opagac applied for leave to intervene in Case T-142/01 in support of the form of order sought by the defendant. The defendant has not objected to the application for leave to intervene. The applicant did not submit any observations in that regard within the period prescribed.

21 By order of the President of the Fourth Chamber of the Court of First Instance of 27 February 2002, Cases T-142/01 and T-283/01 were joined for the purposes of the oral procedure and the final judgment, on account of the connection between them, in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

22 By order of 27 September 2002, the President of the Fourth Chamber of the Court of First Instance gave leave to intervene to Opagac (hereinafter also referred to as 'the intervener') in Case T-142/01 in support of the form of order sought by the defendant. However, since the application for leave to intervene was lodged after the expiry of the period referred to in Article 116(6) of the Rules of Procedure, the intervener was given leave to submit its observations, on the basis on the Report for the Hearing which would be communicated to it, only during the oral procedure.

23 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure and, as a measure of organisation of procedure provided for in Article 64 of the Rules of Procedure, requested the applicant and the defendant to reply in writing to certain questions. The parties complied with that request within the periods prescribed.

24 On 17 September 2003 the intervener informed the Court of First Instance that it would not take part in the hearing and sent written observations on the substance of the case, supposedly drafted in the light of the Report for the Hearing which had been sent to it. Those observations have not, however, been placed on the file, since the intervener had leave only to make oral observations at the hearing.

25 The main parties presented oral argument and replied to the questions put to them by the Court at the hearing on 18 September 2003.

Forms of order sought

26 In Case T-142/01, the applicant submits that the Court of First Instance should:

— annul Regulation No 584/2001;

— annul Article 2(2) of and the annex to each of Regulations Nos 585/2001, 808/2001 and 1163/2001;

— order any measure it deems appropriate in order to ensure that the Commission complies with its obligations under Article 233 EC and, in particular, order it to carry out a fresh examination of the situation;

— order the defendant to pay the costs.

27 In Case T-283/01, the applicant submits that the Court of First Instance should:

— annul Article 2(2) of and the annex to Regulation No 1670/2001;

— order any measure it deems appropriate in order to ensure that the Commission complies with its obligations under Article 233 EC and, in particular, order it to carry out a fresh examination of the situation;

— order the defendant to pay the costs.

28 In both cases, the defendant contends that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

29 In its application in intervention relating to Case T-142/01 the intervener supports the form of order sought by the defendant and asks that the applicant be ordered to pay the costs.

Admissibility of the application in Case T-142/01

30 As a preliminary point, it must be observed that, according to settled case-law, time-limits for appeals are a matter of public policy and are not subject to the discretion of the parties or the Court, since they were laid down with a view to ensuring clarity and legal certainty. Therefore, although the defendant in its

defence and rejoinder did not raise a plea of inadmissibility in case T-142/01, the Court must examine, even of its own motion, whether the action was brought within the prescribed period (see, in particular, Case 4/67 *Collignon* v *Commission* [1967] ECR 365, at p. 372; Case 108/79 *Belfiore* v *Commission* [1980] ECR 1769, paragraph 3; Case 227/83 *Moussis* v *Commission* [1984] ECR 3133, paragraph 12; Case T-29/89 *Moritz* v *Commission* [1990] ECR II-787, paragraph 13).

31 In that connection the Court of First Instance, as a measure of organisation of procedure, invited the applicant and the defendant to make submissions as to whether, in the light of the fifth paragraph of Article 230 EC and Articles 101 and 102 of the Rules of Procedure, the action in Case T-142/01 was not lodged out of time with regard to Regulations Nos 584/2001 and 585/2001, published on 27 March 2001.

Arguments of the parties

32 The applicant submits that the action was brought within the prescribed periods. It argues, in particular, that, in accordance with the Spanish version of Article 102(1) of the Rules of Procedure, the period prescribed for bringing proceedings began to run on 11 April 2001. It follows from the phrase 'a partir del final del decimocuarto día siguiente a la fecha de la publicación del acto en el Diario Oficial' ('from the end of the 14th day after publication thereof in the Official Journal') that the day from which the time-limit is calculated is the beginning of the 15th day following the publication of the act, in this case on 11 April 2001 at 00.00 hrs. The applicant argues that that interpretation is in accordance with the reasoning underpinning Articles 101 and 102 of the Rules of Procedure, which take account of the beginning, and not the end, of the period prescribed for bringing proceedings. From that point of view, it is not justifiable to set the beginning of the period at midnight, at the end of a day which has already elapsed, instead of setting it at 00.00 hrs, the start of a new day, because otherwise the parties would not be guaranteed a full and complete use of the time-limits. By adding 10 days' extension of time on account of distance, the period prescribed for bringing proceedings expired on 21 June 2001 at midnight.

33 In the alternative, if the Court of First Instance does not accept that interpretation, the applicant, who argues that the Spanish version of the Rules of Procedure is ambiguous and presents particular difficulties of interpretation, relies on the existence of an excusable error.

34 The defendant takes the view that the action brought against Regulations Nos 584/2001 and 585/2001 is out of time, because it should have been lodged at the latest by midnight on 20 June 2001.

Findings of the Court

35 Since in the present case, the action is directed against a measure published in the *Official Journal of the European Communities*, it should be recalled, first, that under Article 102(1) of the Rules of Procedure, '[w]here the period of time allowed for commencing proceedings against a measure adopted by an institution runs from the publication of that measure, that period shall be calculated, for the purposes of Article 101(1)(a), from the end of the 14th day after publication thereof in the Official Journal'.

36 Secondly, under Article 101(1) of the Rules of Procedure, when reckoning periods of time prescribed, in particular, by the EC Treaty or those Rules for taking any procedural step, the day during which the event from which they are calculated took place is not to be taken into account; such periods are to end with the expiry of whichever day in the last month (if the period concerned is expressed in months) falls on the same date as the day during which the event from which they are to be calculated took place.

37 It must be observed that in Article 102(1) of the Rules of Procedure it is stated that those periods are to be calculated, for the purposes of Article 101(1)(a), 'from the end of the 14th day after publication'. Article 102(1) of the Rules therefore allows the applicant 14 full days as well as the normal period of two months, and the day from which the time-limit is calculated is, therefore, postponed until the 14th day following publication of the measure in question (order of the Court of First Instance in Case T-126/00 *Confindustria and Others* v *Commission* [2001] ECR II-85, paragraph 15).

38 Since the present action concerns the two-month period prescribed in the fifth paragraph of Article 230 EC, the day from which this is calculated was accordingly postponed from 27 March 2001, the date of publication of Regulations Nos 584/2001 and 585/2001 in the *Official Journal of the European Communities*, to 10 April 2001, which allowed the applicant a further period of 14 full days, including the day of 10 April 2001 until midnight (*Confindustria and Others* v *Commission*, cited above, paragraph 16).

39 Under Article 101(1)(b) of the Rules of Procedure, according to which a time-limit expressed in months ends with the expiry of whichever day in the last month falls on the same date as the day on which it began, this period expired at the end of 10 June 2001.

40 The fact that that date fell on a Sunday did not mean that the time-limit was extended, in accordance with the first subparagraph of Article 101(2) of the Rules of Procedure, until the end of the next working day. The time-limit had been increased by 10 days on account of distance, in accordance with Article 102(2). According to settled case-law, the first subparagraph of Article 101(2) of the Rules of Procedure only applies in cases where the time-limit, including the extension on account of distance, ends on a Saturday, Sunday or official holiday (order of 15 May 1991 of the Court of Justice in Case C-122/90 *Emsland-Stärke* v *Commission*, not published in the ECR, paragraph 9; Joined Cases T-80/89, T-81/89, T-83/89, T-87/89, T-88/89, T-90/89, T-93/89, T-95/89, T-97/89,

T-99/89, T-100/89, T-101/89, T-103/89, T-105/89, T-107/89 and T-112/89 *BASF and Others* v *Commission* [1995] ECR II-729, paragraph 62, and orders of the Court of First Instance in Case T-85/97 *Horeca-Wallonie* v *Commission* [1997] ECR II- 2113, paragraphs 25 and 26, and *Confindustria and Others* v *Commission*, paragraph 18).

41 In the present case, taking into account a 10-day extension on account of distance, the full period of time allowed for lodging an action against Regulations Nos 584/2001 and 585/2001 expired on Wednesday 20 June 2001 at midnight, since that day is not mentioned on the list of official holidays drawn up in Article 1 of Annex I to the Rules of Procedure of the Court of Justice in force at the material time, applicable to the Court of First Instance in accordance with the second subparagraph of Article 101(2) of the Rules of Procedure.

42 It follows that the present action, lodged on 21 June 2001, was out of time as regards Regulations Nos 584/2001 and 585/2001.

43 In so far as the applicant relies on the wording of the Spanish version of Article 102(1) of the Rules of Procedure to dispute the fact that its action was brought out of time or, in the alternative, to justify an excusable error, it must be observed, first, that the terms used in Article 102(1) of the Spanish version of the Rules of Procedure are clear and in no way support the interpretation put forward by the applicant. By stating that the time-limit for bringing the action is calculated 'a partir del final del decimocuarto día siguiente a la fecha de publicación del acto en el Diario Oficial', that provision clearly means that the 15th day after the publication of the act, in this case 11 April 2001, is the first day which must be wholly taken into account in order to calculate the period of time allowed for commencing proceedings.

44 Second, according to settled case-law, the strict application of the Community rules on procedural time-limits serves the requirements of legal certainty and the

need to avoid any discrimination or arbitrary treatment in the administration of justice (Case 42/85 *Cockerill-Sambre* v *Commission* [1985] ECR 3749, paragraph 10, and Case 152/85 *Misset* v *Council* [1987] ECR 223, paragraph 11; order of the Court of First Instance in Case T-74/99 *Meyer* v *Council* [1999] ECR II-1749, paragraph 13). The rules governing the time-limits applicable in the present case do not pose any particular difficulty of interpretation; accordingly, it cannot be accepted that this is a case of excusable error on the part of the applicants, justifying derogation from the strict application of the abovementioned rules (*Confindustria and Others* v *Commission*, cited above, paragraph 21).

45 Finally, the applicant has not established or even put forward an argument of unforeseeable circumstances or of *force majeure*, which would allow the Court of First Instance to waive the time-limit in question on the basis of the second paragraph of Article 45 of the Statute of the Court of Justice, applicable to proceedings before the Court of First Instance under Article 53 of that Statute.

46 It is clear from the foregoing that the application in Case T-142/01 must be dismissed as inadmissible in so far as it is directed against Regulations Nos 584/2001 and 585/2001.

Substance of the case

47 The Court will therefore only consider the substance of the applications for the annulment of Regulations Nos 808/2001, 1163/2001 and 1670/2001. In support of those applications the applicant puts forward two pleas in each of the joined cases. The first plea alleges that the contested measures were adopted without a valid legal basis. The second plea alleges a breach of the principle of protection of legitimate expectations.

First plea, alleging that the contested measures were adopted without a valid legal basis

48 The applicant submits, first, that the Commission wrongly adopted Regulations Nos 808/2001, 1163/2001 and 1670/2001 on the legal basis of Regulation No 104/2000 and, second, that by those regulations the Commission allocated, without any legal basis, the quantities eligible for compensation between the two producers' organisations in question, based on a transfer of rights from OPTUC to Opagac, leading to a significant reduction in OPTUC's average production and, therefore, in the compensation due to it.

First part: the contested Regulations were adopted on an incorrect legal basis

— Arguments of the parties

49 The applicant claims that Regulation No 104/2000 constitutes an incorrect legal basis, which did not authorise the adoption of Regulations Nos 808/2001, 1163/2001 and 1670/2001. In that connection, it points out that the quarterly periods referred to by those regulations are all prior to 31 December 2000 and, therefore, were covered by Regulation No 3759/92 and not Regulation No 104/2000, since the latter regulation took effect only from 1 January 2001.

50 The defendant points to the fact that Regulation No 104/2000, and in particular Article 27(6), constituted the only valid legal basis for Regulations Nos 808/2001, 1163/2001 and 1670/2001, which were all adopted in the course of 2001, and

determined the compensatory allowances in respect of the second, third and fourth quarters of 2000 respectively.

51 However, it states that it was the conditions laid down in Regulation No 3759/92 which had to be taken into consideration when a decision was taken relating to the grant of a compensatory allowance for those quarters. That was the case here, as it is apparent from recital 3 in the preamble to Regulations Nos 808/2001, 1163/2001 and 1670/2001. Therefore the applicant is wrong to plead that Regulation No 104/2000 was applied to those quarters.

— Findings of the Court

52 In the first part of the first plea, which concerns the application of the law *ratione temporis*, a distinction must be made, in the light of the imprecise nature of the applicant's claims, between the substantive element, concerning identification of the provisions relevant to the compensatory allowance governing the situations envisaged in the contested regulations, and the procedural element, concerning the identification of the legal basis properly speaking, that is to say the provision on which the adoption of the acts is based, by determining the powers of the Community and the procedures which must be followed for their adoption.

53 First, as regards the substantive element, it must be observed that recital 3 in the preamble to Regulations Nos 808/2001, 1163/2001 and 1670/2001 states that 'the conditions laid down by Regulation ... No 3759/92 should be retained in order to take a decision on granting the compensatory allowance on the products in question for [the period referred to in each of the regulations]'.

54 The Commission therefore applied the relevant provisions of Regulation No 3759/92 in the three contested regulations. The substantive element of the applicant's plea has, therefore, no factual basis.

55 Furthermore, it is common ground that the applicant, by the present applications, is contesting only the allocation of the quantities eligible for compensation to the producers' organisations OPTUC and Opagac ensuing from Article 2(2) of and the annex to each of Regulations Nos 808/2001, 1163/2001 and 1670/2001, and that there is no difference in the content of the relevant provisions of Regulation No 3759/92, as amended, and those of Regulation No 104/2000 governing the allocation of quantities eligible for compensation to the producer organisations (hereinafter 'POs'). The wording of Article 18(3) to (5) of Regulation No 3759/92, as amended, is identical to that of Article 27(3) to (5) of Regulation No 104/2000.

56 Since there is no temporal conflict in the present case, even supposing that, in Regulations Nos 808/2001, 1163/2001 and 1670/2001, the Commission had applied the relevant provisions of Regulation No 104/2000, the substantive element of the applicant's complaint is in any case unfounded.

57 Second, as regards the procedural element, it must be observed that the contested regulations all mention in the citation of their legal basis Regulation No 104/2000 'and in particular Article 27(6) thereof'.

58 Therefore, the Commission adopted the contested regulations, *inter alia*, on the legal basis of Article 27(6), which lays down that detailed rules for the application of Article 27 of Regulation No 104/2000, in particular the amount and the conditions under which the allowance is granted, are to be adopted in accordance with the procedure laid down in Article 38(2) of Regulation

No 104/2000, which in turn refers to Articles 4 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23). Likewise, Article 18(6) of Regulation No 3759/92, as amended, states that the detailed rules for the application of that article, and in particular the amount and the conditions under which the allowance is granted, are to be adopted in accordance with the procedure laid down in Article 32 of that regulation.

59 The applicant confines itself to criticising the choice of Regulation No 104/2000 as the legal basis for the contested regulations, implying that the Commission should have referred to Regulation No 3759/92, as amended. However, it gives no indication of any difference in the procedural arrangements in those regulations which could give rise to a temporal conflict.

60 In any event, even supposing that such a conflict could arise in this case, it must be recalled that procedural rules are generally deemed to apply to legal situations arising before their entry into force (Joined Cases 212/80, 213/80, 214/80, 215/80, 216/80 and 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 9).

61 Therefore, in pointing out that Regulation No 104/2000 entered into force after the quarterly periods referred to by the contested regulations, the applicant has by no means proved that the Commission's choice of that regulation as the legal basis for the contested regulations was wrong.

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

Second part: the allocation between the POs of the quantities eligible for compensation by the contested regulations has no legal basis

— Arguments of the parties

63 The applicant claims that the allocation between the POs of the quantities eligible for compensation effected by the contested regulations has no valid legal basis, either in Regulation No 3759/92, in Regulation No 142/98 implementing the latter, or in Regulation No 104/2000, since none of those texts lay down provisions authorising the Commission, where there is a change of membership in the POs, to deduct from one PO the outgoing member's share of production during three preceding fishing years in order to transfer it to another PO. In particular, both the second subparagraph of Article 18(4) of Regulation No 3759/92, as amended, and the second subparagraph of Article 27(4) of Regulation No 104/2000 provide that one of the main parameters for the calculation and allocation between the POs of the quantities of tuna eligible for compensation is the determination of the average production for each PO in the equivalent quarter in the three fishing years preceding the quarter for which the allowance is paid.

64 In support of that argument, the applicant relies on the case-law of the Court, from which it is clear that an implementing regulation adopted pursuant to a power contained in the basic regulation cannot derogate from the provisions of that regulation (Case 38/70 *Deutsche Tradax* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1971] ECR 145).

65 Furthermore, the applicant adds that the provisions implementing Regulation No 104/2000, contained in Regulation No 2183/2001, do not provide the Commission with a legal basis enabling it to transfer the average production from

one PO to another where there is a change of membership by their members. By that regulation, in particular Article 3(2), the Commission merely transferred responsibility for resolving the problem of producers' changes of membership to the Member States. In any event, the applicant submits that Regulation No 2183/2001 was not applicable at the material time.

66 As regards the purpose of the compensatory allowance at issue, the applicant identifies it as being to promote the European tuna processing industry and to guarantee that producers are able to dispose of the part of their production that they cannot sell on the market for fresh products. A ceiling on the quantities eligible for compensation is set to ensure that it is not more profitable to send tuna for processing than to sell it as a fresh product.

67 Furthermore, the applicant points out the fact that the recipients of the compensatory allowances are the POs and not the producers. That is clear, in particular, from Article 3(1) of Regulation No 2183/2001.

68 The fact that the allowances granted to the POs, who incur significant management costs, may vary considerably within a short space of time, as was the case with the adoption of the contested regulations, adversely affects the POs' budgetary stability and, ultimately, the purpose for which they were created. The POs, whose role in its fishing policy the Commission is trying to reinforce, are the perfect instrument by which to concentrate supply with regard to demand and to regulate prices.

69 The applicant submits that a distinction should be made between the criteria for the allocation to the POs of the quantities eligible for compensation — consisting in assigning to the POs quantities proportionate to the average

production of each of them during the same quarter of the three preceding fishing years — and the allocation of those quantities between the members of the PO, which is done on the basis of their production during the period under consideration. The applicant claims that it should have received, for the quarters referred to in the contested regulations, an amount reflecting its average production during the same quarter of the three fishing years preceding the quarter in question.

70 Both in its allegations of fact and in the arguments concerning its first plea, the applicant asserts that the undertakings which left it on 1 July 1998 to join Opagac did not comply with OPTUC's articles of association, in particular Article 12, which provides that, in accordance with the Community rules on the recognition of POs, a member may leave the organisation only after three years from its date of joining, and on condition that it has given the organisation one year's written notice by registered letter. The applicant claims that those undertakings all left OPTUC without complying with the second of those conditions, Aitzugana and Igorre having also breached the first condition.

71 The applicant states that since the departure of those undertakings from OPTUC only took effect from 1 July 1999, the Commission should have taken into consideration, in the allocation of the quantities eligible for compensation between the POs, different figures for the reference quarters in 1997, 1998 and 1999.

72 The defendant accepts that neither Regulation No 3759/92 nor its detailed implementing rules expressly mention the case of changes of membership within a PO. It takes the view, however, that the applicant is wrong to dwell on the existence of a legal vacuum in the relevant rules. The solution adopted in the contested regulations, consisting in the determination of the allowance due to a PO for a given quarter by allocating to that PO the previous production average of all the producers who, during that quarter, were its members, follows from the interpretation of those rules, given the objective pursued by the introduction of

ceilings calculated on the basis of previous production averages, which is to prevent abnormal development of production, the corollary of which would be a drift in associated costs.

73 The defendant rejects the applicant's arguments based on the requirement of PO budgetary stability, pointing out that they are financed by their own resources, essentially the subscriptions of their members and possible national and Community aid, and that the compensatory allowance is granted to producers and not to the POs.

74 Finally, it pleads, with regard to the applicant's allegations that its articles of association were breached by the undertakings concerned and that the disaffiliation of those undertakings took effect on 1 July 1999, that these are unsupported by evidence and were made belatedly.

— Findings of the Court

75 By the second part of its first plea, alleging the absence of a legal basis justifying the allocation between the POs of the quantities eligible for compensation by the contested regulations, the applicant does not call into question the Commission's power to allocate the quantities eligible for compensation to the POs, but the way in which the Commission, by the contested regulations, carried out that allocation in the light of the change of PO membership of the undertakings concerned.

76 Clearly, a change of PO membership is not expressly provided for by Article 18 of Regulation No 3759/92, as amended, or by other provisions that the defendant might have taken into consideration at the time when the contested regulations were adopted.

77 However, according to the case-law of the Court, when there is a lacuna in the rules on the common organisation of a market, a solution must be sought in the light of the aims and objectives of the common organisation of the market, taking account of considerations of a practical and administrative nature (Case 159/73 *Hannoversche Zucker* v *Hauptzollamt Hannover* [1974] ECR 121, paragraph 4).

78 It is appropriate, in particular, to examine whether Article 18 of Regulation No 3759/92, as amended, may be interpreted as meaning that, even in the absence of information on the detailed rules for allocation of the quantities eligible for compensation where there is a change of PO membership, the method that the Commission must follow in such a case can be inferred from its provisions (see, by way of analogy, Case 87/82 *Rogers* v *Darthenay* [1983] ECR 1579, paragraphs 16 to 21). Furthermore, with a view to interpreting a provision, it is appropriate to consider, in addition to its wording, the general scheme and the purpose of the regulatory system of which that provision forms part (Joined Cases C-267/95 and C-268/95 *Merck and Beecham* [1996] ECR I-6285, paragraph 22).

79 In the first place, as regards the wording of Article 18(4) of Regulation No 3759/92, as amended, and the general scheme of that article, in particular of Article 18(3) to 18(5), it is clear that the mechanism for the allocation to each PO of the quantities eligible for compensation is broken down into three stages.

80 First, the maximum total of the quantities eligible for compensation is determined in accordance with Article 18(3). It corresponds to the lowest figure, of the total quantities marketed during the quarter in respect of which the allowance is paid ('quarter to be compensated' or 'QC'), and the average of the total quantities marketed in the equivalent quarter of the three fishing years preceding the quarter to be compensated ('the reference period').

81 Second, for each PO the quantities eligible for compensation at 100 % of the ceiling of the allowance, defined in Article 18(2), are allocated in accordance with the first indent of the first subparagraph of Article 18(4). Those quantities correspond, for each PO, to the lowest figure of the quantities marketed in the quarter to be compensated (also referred to below as 'the production for the quarter to be compensated') by its members and the average of the quantities marketed in the reference period (also referred to below as 'average previous production') by its members.

82 Third, where a positive difference is noted between the total of the quantities eligible for compensation, determined in accordance with Article 18(3), and the sum of the quantities eligible for compensation at 100 % allocated to POs in accordance with the first indent of the first subparagraph of Article 18(4), that difference ('the surplus of the quantities') is allocated among the POs, since the corresponding quantities are eligible for compensation at 50 % of the ceiling for compensation defined in Article 18(2).

83 The allocation referred to in the previous paragraph only concerns, however, the POs whose production in the quarter to be compensated exceeds average previous production (the 'POs concerned' within the meaning of the second subparagraph of Article 18(4), in conjunction with the second indent of the first subparagraph of Article 18(4)), and it is carried out, in accordance with the second subparagraph of Article 18(4), on the basis of 'their respective average production' in the reference period.

84 As far as concerns the allocation of quantities eligible for compensation at 100 % (see paragraph 81 above), it should be pointed out that, where the first indent of the first subparagraph of Article 18(4) refers to the average previous production of 'its members', it appears to refer to the undertakings who are members of the PO in the quarter to be compensated.

85 By contrast, as regards the allocation of the quantities eligible for compensation at 50 % by way of allocation of the surplus of the quantities among the POs concerned (see paragraphs 82 and 83 above), the second subparagraph of Article 18(4) refers to 'the respective production' of the POs during the reference period, which leaves room for doubt as to whether this means the sum of the quantities marketed by the producers who were members of the PO in the reference period or the sum of the quantities marketed in that period by the producers who are members of the PO during the quarter to be compensated.

86 Second, as regards the purpose of Article 18 of Regulation No 3759/92, as amended, it must be observed that, according to the 20th recital in the preamble to Regulation No 3759/92, the compensatory allowances provided for by that article are intended to protect the income level of Community producers of tuna for the processing industry from drops in import prices (see, to that effect, Case 264/86 *France* v *Commission* [1988] ECR 973, paragraph 20).

87 Taking account of that purpose, reiterated in the seventh recital in the preamble to Regulation No 3318/94 and in recital 29 in the preamble to Regulation No 104/2000, it must be considered that the recipients of those allowances are the producers and not the POs. Although it is apparent from the wording of several provisions that the compensatory allowance is 'granted' to the POs (see Article 18(1) and (4) of Regulation No 3759/92, as amended, and Articles 2(1) and 4 of implementing Regulation No 142/98) and 'paid' to them by the Member State concerned (Article 7(1) of Regulation No 142/98), it is also clear from the applicable rules that that allowance is to be 'passed on by the [PO] to its members' (Article 7(2) of Regulation No 142/98; see also Article 18(5) of Regulation No 3759/92, as amended).

88 Accordingly, since the POs function only as intermediaries in the arrangements for accounting and the payment of the compensatory allowances, the requirement

of PO budgetary stability, relied on by the applicant, is irrelevant. It is clear from Regulation No 3759/92 itself, and currently from Regulation No 104/2000, that the sources of financing for the POs' activities are quite separate. In that connection, it is sufficient to mention the contributions of the members (see Article 5(1)(d)(3) of Regulation No 104/2000) and, in some circumstances, of non-members (see Article 5(4) of Regulation No 3759/92) and aid from Member States (for example, see Article 7 of Regulation No 3759/92 and Article 10(1) and Article 11 of Regulation No 104/2000).

89 In those circumstances, it must be concluded that, in order to determine the allowance due to a PO for a given quarter, in accordance with Article 18(4) of Regulation No 3759/92, as amended, it is necessary to allocate to it the average previous production of all producers who, in that quarter, are members of that PO.

90 If it were held otherwise, unjustified and unfair distortions would arise for the real beneficiaries of the compensatory allowances, that is the producers, whose level of income which the allowances are intended to protect would be likely to be seriously affected by changes of membership of the POs.

91 If, notwithstanding a change of membership, there was a ceiling on the quantities eligible for compensation for each PO on the basis of the average previous production of the producers who were members of the PO during the reference period, a PO which had accepted new members would, under Article 18(5) of Regulation No 3759/92, as amended, have to allocate between all producers who were members in the quarter to be compensated, including new members, and in proportion to their production during the quarter to be compensated, an allowance which was, however, calculated on the basis of a total quantity eligible for compensation which was not proportionate either to production in the quarter to be compensated or to the average previous production of its members. Essentially, the entry of a new member would unduly penalise the other members

of the PO, by requiring them to share with it, according to their respective production in the quarter to be compensated, an allowance which was still calculated on the basis of total quantities eligible for compensation determined without taking into account the average previous production of the new member.

92 Since the solution applied by the defendant concerning the contested provisions of Regulations Nos 808/2001, 1163/2001 and 1670/2001 can be inferred directly from Article 18(4) of Regulation No 3759/92, as amended, read in the light of the general scheme and purpose of Article 18 itself, it is clear that the defendant has not infringed that article or exceeded its powers of implementation.

93 As regards the applicant's complaints based on the breach of its articles of association by the undertakings concerned and on the fact that their membership ceased on 1 July 1999 (see paragraphs 70 and 71 above), they must be dismissed without there being any need to consider whether a breach of the articles of association of a PO concerning the departure of one of its members must be taken into consideration by the Commission when it adopts regulations on the determination of the quantities eligible for compensation to be allocated to each PO.

94 The defendant rightly pleaded that there was no evidence to support those allegations and that they were made belatedly. First, the applicant has not produced any factual evidence to support its assertion that the three undertakings concerned did not comply with the conditions laid down by Article 12 of OPTUC's articles of association for withdrawal of membership. Second, it has neither claimed nor demonstrated that it submitted in due time to the national authorities or to the Commission any objection as to the validity of the disaffiliation of those undertakings in the light of those articles of association, so

that they could take account of that objection for the purpose of the adoption of the contested regulations.

95 Furthermore, with regard, specifically, to the question of the date on which the disaffiliation came into effect, it is clear that the applicant's argument is invalid. Since, under the contested provisions of Regulations Nos 808/2001, 1163/2001 and 1670/2001, average previous production of the undertakings concerned was deducted from OPTUC, on the ground that those undertaking were from then on members of Opagac in the quarters to be compensated by those regulations, the fact that their disaffiliation came into effect on 1 July 1999 instead of 1 July 1998 is irrelevant, in so far as the quarters to be compensated, that is the second, third and fourth quarters of 2000, were all subsequent to each of those dates.

96 Accordingly, the second part of the first plea must also be dismissed.

Second plea, alleging infringement of the principle of protection of legitimate expectations

Arguments of the parties

97 The applicant submits that it is clear from the case-law of the Court (Case C-368/89 *Crispoltoni* [1991] ECR I-3695 and Case C-310/95 *Road Air* [1997] ECR I-2229) that the retroactive application of an act by a Community institution is contrary to the principle of legal certainty if it places the person

concerned in a less favourable legal situation and if his legitimate expectations are not properly respected. The applicant's legitimate expectations were infringed by Regulations Nos 808/2001, 1163/2001 and 1670/2001, in so far as they applied new legislation retroactively.

98 In that connection, the applicant states that since the regulations initially adopted do not lay down any provision relating to the consequences of a change of membership of a PO, they caused its members to entertain, from the time of their publication, clear and obvious hopes, constituting a legitimate expectation, which all the contested regulations frustrated.

99 The defendant disputes the merits of the applicant's arguments and maintains that the contested regulations did not undermine the principle of protection of legitimate expectations.

Findings of the Court

100 The Court has consistently held that any economic operator to whom an institution has given cause to entertain justified hopes may rely on the principle of the protection of legitimate expectations. On the other hand, if a prudent and circumspect economic operator could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted (Case 78/77 *Lührs* v *Hauptzollamt Hamburg-Jonas* [1978]

ECR 169, paragraph 6, and Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products* v *Commission* [1987] ECR 1155, paragraph 44).

101 In this case, the mere fact that the rules relating to the common organisation of the markets in fishery and aquaculture products and, in particular, Article 18 of Regulation No 3759/92, as amended, did not contain express rules aimed at clarifying the method to be followed in the allocation of the quantities eligible for compensation when there are changes in the membership of the POs, could not give rise, on the part of the applicant or its members, to any legitimate expectation that the method advocated by the applicant would be applied.

102 As it is clear from the analysis of the second part of the first plea (see paragraph 75 et seq.), the Commission has not, moreover, in this case applied any unforeseeable interpretation of the relevant rules and in particular of Article 18 of Regulation No 3759/92, as amended. Like any prudent and circumspect operator, and in the light of the objectives of the arrangements for the compensatory allowance of which it could not have been unaware, the applicant should have had doubts, from the time when it became aware of the change of membership of the undertakings concerned, that it would still be credited with their average previous production.

103 As to the fact that, in Regulations Nos 1103/2000 and 1926/2000, the Commission did not take account of the transfer of members of OPTUC to Opagac when determining the average previous production of each PO, that cannot have given rise to a legitimate expectation, on the part of the applicant or its members, that such a method of accounting would be repeated when any subsequent allocation of quantities eligible for compensation was carried out for the quarters to come. The principle of protection of legitimate expectations cannot be relied on to justify (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 45), or to require, the repetition of a misinterpretation of an act.

104 Finally, since the Commission only interpreted and applied the provisions in force both during the periods of reference referred to by Regulations Nos 808/2001, 1163/2001 and 1670/2001 and during the quarters in respect of which those regulations granted the compensatory allowance, there is no cause in this case to find that there was retroactive application of new rules to situations which arose under the previous rules.

105 This plea cannot, therefore, be upheld.

106 It follows from the foregoing that the present applications must be dismissed in their entirety.

Costs

107 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 successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by the defendant as applied for.

108 Under the third subparagraph of Article 87(4) of those Rules, the Court of First Instance may order an intervener to bear its own costs. In the circumstances of this case, it is appropriate to order the intervener in Case T-142/01 to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. **Dismisses the applications;**

2. **Orders the applicant to pay the costs incurred by the defendant;**

3. **Orders the intervener to bear its own costs.**

Tiili Mengozzi Vilaras

Delivered in open court in Luxembourg on 28 January 2004.

H. Jung V. Tiili

Registrar President