ORDER OF THE COURT (First Chamber)
14 October 1999 *

In Case C-437/98 P,

Industria del Frio Auxiliar Conservera SA (Infrisa), established in Bermeo, Spain, represented by I. Sáenz-Cortabarría Fernández and M. Morales Isasi, of the Vizcaya Bar, with an address for service in Luxembourg at the Chambers of Guy Harles, 8-10 Rue Mathias Hardt,

appellant,

APPEAL against the order of the Court of First Instance of the European Communities (Second Chamber) in Case T-136/95 *Infrisa* v *Commission* [1998] ECR II-3301, seeking to have that order set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by J. Guerra Fernández, of its Legal Service, acting as Agent, with an address for service in Luxembourg at

* Language of the case: Spanish.

the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant at first instance,

THE COURT (First Chamber),

composed of: L. Sevón (Rapporteur), President of the Chamber, P. Jann and M. Wathelet, Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

after hearing the views of the Advocate General,

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 3 December 1998, Industria del Frio Auxiliar Conservera SA ('Infrisa') brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the order of the Court of First Instance of 15 September 1998 in Case T-136/95 *Infrisa* v *Commission* [1998] ECR II-3301 ('the contested order'), in which the Court of First Instance dismissed as manifestly unfounded its action for the annulment of Commission Decision 95/119/EC of 7 April 1995 concerning certain protective measures with regard to fishery products originating in Japan (OJ 1995 L 80, p. 56; 'the contested decision'), to the extent that those measures relate to fishery products en route to the Community at the time of publication of the decision, and for damages in respect of the losses incurred as a result thereof.

2 Article 1 of the contested decision provides:

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

3 The contested decision is based on Article 19 of Council Directive 90/675/EEC of 10 December 1990 laying down the principles governing the organisation of veterinary checks on products entering the Community from third countries (OJ 1990 L 373, p. 1), and was adopted in consideration of the fact that:

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

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

4 Paragraphs 13 to 15 of the contested order show that, in January 1995, Infrisa decided to purchase 250 tonnes of frozen albacore tuna from the Japanese company Itochu Corporation. A quantity of 50 tonnes, which arrived on 5 April 1995, underwent a health check, following which it was cleared through customs. However, the quantity of 200 tonnes, which was on its way to the Community at the date on which the contested decision became applicable, 9 April 1995, was refused entry to the Community pursuant to that decision.

5 On 3 July 1995, Infrisa brought an action before the Court of First Instance for the annulment of the contested decision on the ground that the Commission should have taken into account the fact that the products were on their way towards the Community. It also applied for damages against the Commission. That action was dismissed as manifestly unfounded.

6 In its appeal, Infrisa requests the Court of Justice to set aside the contested order and to give judgment on its action for annulment and damages or, in the alternative, to give judgment only on the action for annulment and refer the claim for damages back to the Court of First Instance or, in the further alternative, to refer the action as a whole back to the Court of First Instance.

7 In support of its appeal, Infrisa puts forward three pleas in law. The first plea alleges that the Court of First Instance erred in law by holding that the dismissal by the Court of Justice of certain pleas of invalidity in its judgment in Case C-183/95 *Affish* v *Rijksdienst voor de Keuring van Vee en Vlees* [1997] ECR I-4315, which was delivered in the context of a preliminary-ruling procedure, necessarily entailed the dismissal by order of Infrisa's action. The second plea alleges that, by the manner in which it treated new evidence submitted to it, the Court of First instance infringed the rights of the defence and the right to effective judicial protection. Finally, the appellant complains that the Court of First Instance infringed its own Rules of Procedure so far as its composition was concerned.

8 The Commission maintains that the first and third pleas are manifestly unfounded and that the second is manifestly inadmissible or, in the alternative, manifestly unfounded, and it therefore requests that the appeal be dismissed by order.

9 It should be borne in mind that, under Article 119 of the Rules of Procedure of the Court of Justice, where the appeal is clearly inadmissible or clearly unfounded, the Court may dismiss it by reasoned order at any time, without opening the oral procedure.

The first plea in law

10 By its first plea, Infrisa complains that the Court of First Instance committed an error in law by holding that the *Affish* judgment, which was delivered in the context of a preliminary-ruling procedure, could justify the dismissal of the action by reasoned order pursuant to Article 111 of the Rules of Procedure of the Court of First Instance, without taking any further steps in the proceedings. That judgment did not expressly declare the contested decision to be valid. There was therefore nothing to prevent that decision from being declared invalid in a subsequent judgment for other reasons than those on which the Court of Justice ruled.

11 In any event, the Court of First Instance did not specify the reason for which a judgment confirming the validity of a decision in the context of a preliminary-ruling procedure constituted a sufficient basis for finding that the action was clearly devoid of any foundation in law, especially since the question referred for a preliminary ruling in *Affish* did not concern goods that were en route to the Community at the time when the contested decision entered into force.

12 Finally, Infrisa submits that the dismissal of the application for annulment cannot entail the dismissal of the application for compensation for the loss suffered. The Court of First Instance should therefore have examined Infrisa's application for compensation in the light of the Community's liability by virtue of an act which, in itself, is lawful.

13 The Commission maintains, on the other hand, that the Court of First Instance did in fact analyse the pleas in law put forward, finding at the conclusion of that examination that, save for the plea alleging infringement of the principle of legal certainty, they had already been analysed by the Court of Justice in the *Affish* judgment. In those circumstances, in following that precedent, the Court of First Instance acted in conformity with the system of judicial review established by the Treaty. In this case, the identity in substance between the two cases was obvious and there was no possibility of pleading new circumstances.

14 According to the Commission, the Court of First Instance would therefore have acted correctly if it had limited itself to analysing the new plea and the new contentions raised in respect of the pleas already analysed in the *Affish* judgment. However, the contested order shows that the Court of First Instance did not content itself with merely referring to the *Affish* judgment as regards the pleas already dealt with in that judgment, but itself examined the substance of them.

15 As regards the application for compensation, the Commission states that, as the Court of First Instance held, in the absence of any illegality in the contested decision or of any other measures or conduct by the Community such as to render the Community liable, the conditions for establishing the non-contractual liability of the Community are not satisfied.

16 The Court would point out, as a preliminary observation, that, under Article 111 of the Rules of Procedure of the Court of First Instance, where an action is manifestly inadmissible or manifestly lacking any foundation in law, the Court may give a decision on the action by reasoned order, without taking any further steps in the proceedings.

17 In that respect, it should be recalled that, in paragraph 27 of the *Affish* judgment, having reformulated the question referred to it for a preliminary ruling, the Court considered whether, inasmuch as the contested decision imposed a total prohibition on the importation of consignments of fishery products from the whole of Japanese territory, it should be declared invalid for infringement of the principle of proportionality and whether it constituted a misuse of powers. It also assessed the validity of the decision in relation to the principle of equality, the principle of the protection of legitimate expectations and Article 190 of the EC Treaty (now Article 253 EC).

18 The Court ruled that examination of the contested decision had not revealed any factors capable of affecting its validity.

19 Moreover, in paragraph 58 of the *Affish* judgment, the Court expressly rejected the possibility of recourse to a protective measure consisting in the inspection upon importation of the fishery products already dispatched at the time when the contested decision was adopted.

20 As regards the action which Infrisa brought before it, the Court of First Instance found, in paragraphs 28 to 30 of the contested order, that five of the six pleas submitted, namely those alleging infringement of the general principles of the protection of legitimate expectations, proportionality and equal treatment, the obligation to provide reasons and misuse of powers, had already been raised in substance in *Affish*, so that more detailed appraisal was necessary only in respect of the sixth plea, alleging infringement of the principle of legal certainty, and of the arguments specifically raised in support of the five other pleas.

21 Accordingly, in paragraphs 31 to 37 of the contested order, the Court of First Instance examined that sixth plea, alleging breach of the principle of legal certainty, and noted, in paragraph 33, that, by its very wording, the contested decision was applicable with immediate effect from the date of its publication to all imports of fishery products originating in Japan. It held, in paragraph 34, that the fact that the contested decision had material effects on goods en route to the Community did not deprive it of its character as a decision applicable *ex nunc*, that is to say to all goods imported as from the day on which it was published. It held, in paragraphs 35 and 36, that, in the absence of any retroactive effect, that decision had not infringed the principle of legal certainty and that the plea alleging such infringement was clearly lacking in foundation. That plea was thus examined and appraised by the Court of First Instance independently of the *Affish* judgment.

22 As for the remaining five pleas, it should be noted that the Court of First Instance also examined them individually, whilst taking account of the findings made in their respect in *Affish*.

23 Moreover, in paragraph 42 of the contested order, the Court of First Instance examined more particularly, in the context of the alleged infringement of the principle of the protection of legitimate expectations, Commission Decisions 97/513/EC of 30 July 1997 and 97/515/EC and 97/516/EC of 1 August 1997, relating to certain protective measures in relation to certain fishery products originating in Bangladesh, India and Madagascar respectively (OJ 1997 L 214, pp. 46, 52 and 53), and found that they had been adopted after the contested decision, so that in no circumstances could they have given rise to a legitimate expectation since such an expectation could only be based on situations existing prior to the adoption of a measure.

24 The Court of First Instance was therefore right to apply Article 111 of its Rules of Procedure, taking the view that the grounds of invalidity relied on by Infrisa, even the one which had not been examined by the Court of Justice in *Affish*, could not alter the findings that had been made in that case.

25 As regards the claim for compensation, it should be noted that, before the Court of First Instance, Infrisa based it only on the alleged illegality of the contested decision. It was therefore with good reason that, in the absence of any illegality such as to cause the Community to incur liability, the Court of First Instance, in paragraph 84 of the contested order, held that claim to be unfounded.

26 It should be added in that respect that, contrary to what Infrisa maintains, it cannot be deduced from the wording of paragraph 84 of the contested order that the Court of First Instance regarded the claim for compensation as not being manifestly lacking in foundation. Since it had found that the application for annulment was manifestly unfounded, so too was the claim for compensation.

27 In its appeal, Infrisa raises a further plea, alleging the liability of the Community in respect of a lawful act.

28 In that respect, it should be pointed out that, under Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

29 To allow a party to put forward for the first time before the Court of Justice a plea which it has not raised before the Court of First Instance would mean allowing that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider scope than the one heard by the Court of First Instance. In an appeal, the jurisdiction of the Court of Justice is thus confined to examining the assessment by the Court of First Instance of the pleas argued before it (Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 62).

30 In this case, the plea alleging Community liability in respect of a lawful act was not raised before the Court of First Instance. It is therefore a new plea in law which, as such, is manifestly inadmissible.

31 In consequence, the first plea is in part manifestly inadmissible and in part manifestly unfounded.

The second plea in law

32 In its second plea, Infrisa complains, first, that the Court of First Instance infringed the rights of the defence and the right to effective judicial protection and also that it distorted the sense of the evidence, by not sufficiently taking into consideration the new factors, which Infrisa placed before it by letter of 27 October 1997, constituted by Decisions 97/513, 97/515 and 97/516, and in any event did not examine each of the pleas in law in the light of those new factors. In its submission, those decisions demonstrate that it would have been possible to provide a derogation for products in the course of shipment. Secondly,

the fact that the Court of First Instance gave its ruling without awaiting the outcome of Infrisa's request to the Commission to produce to the Court the opinions of the veterinary committee on the basis of which those decisions and the contested decision were adopted constituted an infringement of the right to a fair procedure.

33 As regards the first complaint, the Commission maintains that Decisions 97/513, 97/515 and 97/516 constitute evidence which was submitted after the close of the written procedure and is therefore inadmissible. Since the Court of First Instance nevertheless took that evidence into consideration in paragraph 42 of the contested order, the Commission submits that the real purpose of the plea is to secure a re-examination of the same evidence and that the plea is therefore inadmissible. In any event, those decisions subsequent to the contested decision were taken in a different context from the latter and could therefore prescribe other measures without contradicting it.

34 In that respect, it is sufficient to note that the appraisal by the Court of First Instance of the evidence put before it does not constitute a point of law which is subject to review by the Court of Justice in the context of an appeal, save where the sense of that evidence has been distorted or the substantive inaccuracy of the Court of First Instance's findings is apparent from the documents in the case-file (see, in particular, Case C-53/92 P *Hilti* v *Commission* [1994] ECR I-667, paragraph 42; Case C-119/97 P *Ufex and Others* v *Commission* [1999] ECR I-1341, paragraph 66).

35 Infrisa has not established that the Court of First Instance distorted the sense of the evidence which it submitted, but merely claims that it did not take that evidence into account. However, it is clear merely from reading paragraph 42 of the contested order that the Court of First Instance examined that evidence and concluded that it did not alter the finding of law at which it had arrived.

36 In so far as it concerns the alleged distortion of the sense of the evidence, the second plea in law is manifestly unfounded.

37 As regards, secondly, the request for the production of documents, it should be noted that, under Article 21 of the EC Statute of the Court of Justice, the Court may require the parties to produce all documents and to supply all information which it considers desirable. Article 64(1) of the Rules of Procedure of the Court of First Instance provides that the purpose of measures of organisation of procedure shall be to ensure that cases are prepared for hearing, procedures carried out and disputes resolved under the best possible conditions.

38 Under Article 64(2)(a) and (b) of the Rules of Procedure of the Court of First Instance, measures of organisation of procedure are, in particular, intended to ensure the efficient conduct of the written and oral procedure and to facilitate the taking of evidence, and to determine the points on which the parties must present further argument or which call for measures of inquiry. Under Article 64(3)(d) and Article 64(4) of the Rules of Procedure of the Court of First Instance, those measures may be proposed by the parties at any stage of the procedure, and may consist of asking for documents or any papers relating to the case to be produced.

39 In that respect, it should be pointed out that, whilst it is true that the fourth recital in the preamble to the contested decision refers to the opinion of the Standing Veterinary Committee, with which the measures provided for in the decision complied, the fact remains that the Court of Justice, having examined the recitals in the preamble to the contested decision, held in paragraph 64 of the *Affish* judgment that those recitals were in themselves sufficient to show clearly the sequence of events prior to the adoption of the contested decision.

40 Having regard to that finding by the Court of Justice concerning the grounds on which the contested decision was adopted, the Court of First Instance did not commit any error of law by refusing to order the measures of inquiry requested by Infrisa. On that point, the plea is therefore manifestly unfounded.

41 The same applies as regards the production of the opinions which preceded the adoption of Decisions 97/513, 97/515 and 97/516 and which, as indicated in

paragraph 23 of this order, the Court of First Instance had found to be irrelevant to the action.

42 It follows from the foregoing considerations that the second plea is manifestly unfounded.

The third plea in law

43 In its third plea, Infrisa complains that the Court of First Instance infringed Article 14 of its Rules of Procedure by deciding the case in a Chamber composed of three Judges, whereas the case had previously been assigned to a Chamber of five, and maintains that, given the legal difficulty or the importance of the case, it was not possible to reassign it to a Chamber composed of a smaller number of Judges.

44 The Commission contends that the provision in question must be read as permitting the Court of First Instance to reassign a case to a higher or lower number of Judges.

45 Article 14 of the Rules of Procedure of the Court of First Instance provides:

'Whenever the legal difficulty or the importance of the case or special circumstances so justify, a case may be referred to the Court of First Instance sitting in plenary session or to a Chamber composed of a different number of Judges.

Any decision to refer a case shall be taken under the conditions laid down in Article 51.'

46 Under Article 51 of the same Rules of Procedure, the Chamber hearing the case may propose at any stage of the procedure that the case be referred to a Chamber composed of a different number of Judges.

47 Article 14 of the Rules of Procedure of the Court of First Instance is designed to allow cases to be heard by the Court of First Instance in a composition which is the most appropriate in the circumstances, in accordance with the criteria laid down in that provision. Neither the wording nor the purpose of Article 14 of the Rules of Procedure of the Court of First Instance supports the conclusion that that provision precludes a reassignment of the case, where appropriate, to a bench composed of a lower number of Judges. That interpretation is confirmed in particular by the use in the provision of the word 'different'.

48 This plea is therefore manifestly unfounded.

49 It follows from all the foregoing considerations that the pleas in law submitted in support of the appeal are in part manifestly inadmissible and in part unfounded. The appeal must therefore be dismissed in accordance with Article 119 of the Rules of Procedure.

Costs

50 Under Article 69(2) of the Rules of Procedure of the Court of Justice, applicable to the procedure on appeal by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Infrisa has been unsuccessful, Infrisa must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby orders:

1. **The appeal is dismissed.**

2. **Industria del Frio Auxiliar Conservera SA (Infrisa) is ordered to pay the costs.**

Luxembourg, 14 October 1999.

R. Grass

Registrar

L. Sevón

President of the First Chamber