JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
23 October 2001 *

In Case T-155/99,

Dieckmann & Hansen GmbH, established in Hamburg (Germany), represented by H.J. Rabe, lawyer, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by M. Niejahr and G. Berscheid, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for, first, annulment of Commission Decision 1999/244/EC of 26 March 1999 amending Decision 97/296/EC drawing up the list of third countries from which the import of fishery products is authorised for human consumption (OJ 1999 L 91, p. 37) and, secondly, damages for loss allegedly suffered by the applicant,

* Language of the case: German.

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

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 20 February 2001,

gives the following

Judgment

Legislation

1 Council Directive 91/493/EEC of 22 July 1991 (OJ 1991 L 268, p. 15) lays down the health conditions for the production and the placing on the market of fishery products for human consumption.

2 Articles 3 to 9 of that directive and the annex thereto set out the specific health conditions to which the production and placing on the market of fishery products are subject and with which operators must comply in order to ensure safe, good-quality products for Community consumers.

3 So far as concerns imports from third countries, Chapter II of Directive 91/493 (Articles 10 to 12) contains the rules applicable in the field of veterinary checks. According to Article 11(1), for each third country or group of third countries, specific import conditions are fixed depending on the health situation in the third country concerned. Under Article 11(3), when fixing specific import conditions, particular account must be taken of: '(a) the legislation of the third country; (b) the organisation of the competent authority of the third country and of its inspection services, the powers of such services and the supervision to which they are subject, as well as their facilities for effectively verifying the implementation of their legislation in force; (c) the actual health conditions during the production, storage and dispatch of fishery products intended for the Community; and (d) the assurances which a third country can give on the compliance with the standards laid down in Chapter V of the Annex'.

4 According to Article 11(7) of Directive 91/493, '[p]ending the fixing of the import conditions referred to in paragraph 1, the Member States shall ensure that the conditions applied to imports of fishery products from third countries shall be at least equivalent to those governing the production and placing on the market of Community products'.

5 Directive 91/493 was supplemented by Council Decision 95/408/EC of 22 June 1995 on the conditions for drawing up, for an interim period, provisional lists of third country establishments from which Member States are authorised to import certain products of animal origin, fishery products or live bivalve molluscs (OJ 1995 L 243, p. 17).

6 Article 2(2) of that decision authorises the Commission to draw up a list not of establishments but of third countries or parts of third countries from which the import of fishery products is authorised where the competent authority of the third country has provided the Commission with guarantees at least equivalent to those provided for by Directive 91/493.

7 Article 2(3) of Decision 95/408 provides that the Commission may, in accordance with the procedure laid down in Article 5, modify or complete the lists provided for in paragraphs 1 and 2 to take account of new information received.

8 Pursuant to Decision 95/408, the Commission adopted Decision 97/296/EC of 22 April 1997 drawing up the list of third countries from which the import of fishery products is authorised for human consumption (OJ 1997 L 122, p. 21). In an annex appended to that decision is set forth the first list of third countries meeting the conditions laid down in Article 2(2) of Decision 95/408, namely, countries from which the importation of fish products may be authorised where the competent authority of the third country has provided the Commission with guarantees at least equivalent to those provided for by Directive 91/493.

The facts

9 The applicant, Dieckmann & Hansen GmbH, was a German company which had imported caviar for the last 130 years. It imported fresh caviar in large units (1.8 kg tins), packaged it in small portions and sold these on to its customers inside and outside the Community. The applicant purchased its caviar mainly from the sole producer of caviar in Kazakhstan, the Atyraubalyk company, established in Atyrau.

10 In 1997, the Kazakh authorities applied to the Commission for inclusion of their country in the list of countries from which the import of fishery products is authorised in the Community. The application related to fresh caviar and pike fillets, as the Commission explained at the hearing.

11 The Commission replied to the Kazakh authorities by sending them a questionnaire in order to determine whether the legislation, the administrative procedures and monitoring existing in that country corresponded to the guarantees required by Directive 91/493. In view of the replies received from the Kazakh authorities, the Commission considered that, as regards caviar, those authorities had provided guarantees at least equivalent to those provided for by Directive 91/493. On the other hand, as regards pike fillets, the Commission was of the opinion that, bearing in mind the greater complexity involved in preparing that product to make it fit for export, such guarantees had not been provided. Accordingly, on 30 June 1998, the Commission adopted Decision 98/419/EC amending Decision 97/296/EC (OJ 1998 L 190, p. 55). It took the view, in the third recital of the preamble, that Kazakhstan had shown that it satisfied the equivalence conditions referred to in Article 2(2) of Decision 95/408 and included it in the list set out in Decision 98/419 under the title 'Countries and territories meeting the terms of Article 2(2) of Council Decision 95/408/EC'. A footnote referring to the inclusion of Kazakhstan in that list read: 'Only authorised for imports of caviar'.

12 Prior to the express inclusion of Kazakhstan, as regards caviar, in the list of authorised countries, the applicant imported Kazakh caviar into the Community in compliance with the transitional arrangements provided for by Article 11(7) of Directive 91/493, that is to say, under the control of the Member States (the Federal Republic of Germany in this case), which were to '[apply] conditions... to imports of fishery products from third countries... at least equivalent to those governing the production and placing on the market of Community products'.

13 Following a request from the Kazakh authorities seeking the addition of horse meat and pike fillets to the number of products authorised for importation into the Community, the Commission decided to visit Kazakhstan in order to check whether the health conditions prevailing in that country made it possible to contemplate authorising importation of the aforementioned products.

14 From 19 November to 2 December 1998, three veterinary experts instructed by the Commission thus carried out an inspection visit to Kazakhstan. During that visit, the Commission experts verified the structure, organisation and working methods of the competent health and veterinary authorities of Kazakhstan and, to that end, met with the national authorities on several occasions, paid visits to state laboratories and inspected two pike fillet processing factories and a horse slaughterhouse. During their mission the experts did not inspect the caviar production plants belonging to the Atyraubalyk company, since the visit took place during the season when those plants are closed, when the factory ships are in port.

15 Following that visit, the Community experts drew up a final report in which they concluded that the competent authorities in Kazakhstan were not able to comply with the Community requirements for the production and the placing on the market of horse meat and fishery products and the experts recommended that the Commission should 'not contemplate adding Kazakhstan to the list of countries authorised to export meat and fishery products until the shortcomings found have been properly dealt with'. They further stated that 'that means that imports of caviar should not be authorised either. The Commission must contemplate suspending Kazakhstan from the list in Part II of the Annex to Commission Decision 97/296/EC'.

16 On 28 January 1999, the Commission adopted Decision 1999/136/EC amending Decision 97/296 (OJ 1999 L 44, p. 61) in order to include in the list of third countries from which the import of fishery products is authorised for human consumption a whole series of third countries having provided information that they satisfied the equivalence conditions referred to in Article 2(2) of Decision 95/408. Decision 97/296, as amended, still included Kazakhstan in the list of countries and territories from which the import of fishery products was authorised. That decision was published in the Official Journal on 18 February 1999.

17 On 23 February 1999, the Standing Veterinary Committee examined a proposal for a decision amending Decision 97/296 to exclude Kazakhstan from the list of third counties from which importation of fishery products was authorised.

18 On 5 March 1999, the applicant concluded a contract for the supply of 9 500 kg of fresh caviar from Kazakhstan through Dostree Trading Limited, established in Cyprus, and took an option for a subsequent consignment of 6 000 kg, from the spring 1999 caviar production of the Atyraubalyk company, in order to cover its requirements for the period between spring 1999 and spring 2000.

19 On 26 March 1999, the Commission adopted Decision 1999/244/EC amending Decision 97/296 (OJ 1999 L 91, p. 37, 'the contested decision'). The contested decision bans imports of caviar from Kazakhstan in view of 'the seriousness of the deficiencies observed during an inspection visit' and deletes the reference to that country from Part II of the list of third countries from which the import of fishery products is authorised for human consumption. That decision was published in the Official Journal on 7 April 1999.

20 Following that ban, the applicant found it impossible to perform the supply contract for 9.5 tonnes of Kazakh caviar.

21 On 24 June 1999, the applicant's shareholders decided that the company would definitively cease trading on 31 December 1999. On 21 July 1999, the applicant sent a letter of dismissal to each of its employees to take effect on 31 December 1999, the date on which the company was actually wound up.

Procedure and forms of order sought

22 By application lodged on 25 June 1999 at the Court Registry, the applicant brought the present action.

23 On hearing the report of the Judge-Rapporteur, the Fifth Chamber of the Court of First Instance decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure, to put a series of questions to the applicant and the Commission. By letters of 29 January and 1 February 2001, the applicant and the Commission replied to the Court's questions.

24 The parties presented oral argument and answered the questions put to them by the Court at the hearing of 20 February 2001.

25 At the hearing, the applicant withdrew the claims for annulment contained in its application, on account of the winding up the undertaking on 31 December 1999. Therefore, it claims that the Court should:

— order the Commission to make good the damage arising from the loss of business it allegedly suffered as a result of the ban on importing caviar from Kazakhstan, damage calculated at DEM 8 725 320.45 (instead of the DEM 8 371 794 initially claimed in the application) with interest at 8% per annum from the date when the present action was brought;

— order the Commission to make good the losses suffered as a result of having to dismiss its staff and cease trading, in view of the impossibility of importing Kazakh caviar;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss as unfounded the claims for compensation for the alleged damage;

— dismiss as inadmissible the claim for greater compensation for loss of business made by the applicant in the reply;

— order the applicant to pay the costs.

The claims for compensation

27 According to established case-law, in order for the Community to incur non-contractual liability the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage (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, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 54).

28 It must be ascertained whether the applicant has demonstrated that those various conditions are met in the present case.

The unlawfulness of the conduct alleged against the Commission

Arguments of the parties

29 The applicant's main argument is that as the contested decision is an unlawful Community measure which is individual, and thus administrative, there is no need, in the present case, for there to be a sufficiently serious breach of a superior rule of law for the protection of individuals for Community liability to be incurred, in accordance with the case-law of the Court (Case 5/71 *Schöppenstedt* v *Council* [1971] ECR 975, paragraph 15). That additional requirement applies only for legislative action involving choices of economic policy, which is not the case here.

30 In the alternative, in the event that the view taken is that the non-contractual liability of the Community can be incurred in the present case only if there is a 'sufficiently serious breach of a superior rule of law for the protection of individuals', the applicant submits that its claims are also well founded. Thus, it argues that the Commission has committed a sufficiently serious breach of the principles of sound administration and the protection of legitimate expectations

and points out that those principles are superior rules of law for the protection of individuals, in accordance with *Schöppenstedt*, cited above. Furthermore, by adopting the aforementioned decision, the Commission acted without regard to its duty of care and in breach of essential procedural requirements and the duty to state reasons required by Community law.

31 The applicant claims that the Commission misassessed the facts found in the inspection report drawn up by the veterinary experts whom it had instructed, which did not say that there had been no inspection of caviar production carried out during their visit to Kazakhstan.

32 The Commission infringed the principle of sound administration in accepting the findings on importation of caviar made by the veterinary experts in their report and which the applicant considers implausible. That error, in its turn, meant that the case was not adequately dealt with at the meeting of the Veterinary Committee of 23 February 1999 and persisted until the adoption of the contested decision, as the defective and misleading statement of reasons also shows.

33 The applicant argues that the Commission led it to believe legitimately that Kazakhstan would continue to feature on the list of countries authorised to import fishery products by adopting Decision 99/136/EC on 28 January 1999 without calling in question Kazakhstan's presence on that list. Since it was not aware of the inspection visit when the supply contract was concluded, the applicant claims that it could not be held to have known the exact state of the case and legitimately expected to be able to continue to import caviar from Kazakhstan. Thus, encouraged by that expectation, it concluded on 5 March 1999 the supply contract for 9.5 tonnes of caviar from Kazahkstan and shortly thereafter paid approximately USD 614 000 in advance. Finally, the applicant submits that the Commission could not take any ad hoc decision in order to alter

the existing legal situation without taking account of the situation of traders who — relying on the expectation that the existing legal situation would be maintained — had already entered into supply contracts and should, to that end, have informed such operators timeously.

34 The applicant adds that the Commission cannot claim that the contested decision is intended to protect the health of consumers and that such protection takes precedence over 'economic considerations'. The Commission could not rely on overriding public interest in order to alter the legal situation as it has done, since caviar from Kazakhstan has never put the health of consumers at risk. Since not the slightest evidence of such a risk to health was adduced, it cannot, in itself, take precedence over the legitimate expectations of the traders. Finally, the applicant observes that the principle of sound administration and the duty of care placed on the Commission the clear obligation of examining, carefully and impartially, all the relevant aspects of the individual case for removing a third country from the list (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 73). The supervisory duty incumbent on the Commission also serves to protect the interests of traders, who may suffer serious financial loss as a result of the discretionary decisions taken in the field of economic legislation.

35 The Commission considers that, in the present case, the condition that its conduct must be unlawful for it to incur non-contractual liability has not been satisfied.

36 First, it refutes the applicant's argument that a sufficiently serious breach of a superior rule of law for the protection of individuals is not necessary in the present case for Community liability to be incurred. The Commission states that the contested decision is indeed a 'legislative act of general application', adopted by it in the context of the broad discretion conferred on it by Directive 91/493 and Decision 95/408. It acknowledges that the principles of sound administration and of the protection of legitimate expectations do indeed constitute superior rules of law for the protection of the individual, but it denies having committed in

the present case a 'sufficiently serious breach' of those principles, as required by the case-law if the Community is to incur liability. According to the case-law, such a breach could be invoked only if, by adopting the contested decision, it had manifestly and seriously failed to observe the limits on the exercise of its powers, which is not even claimed by the applicant. Finally, it points out that it has a wide discretion when acting with urgency on the protection of the health of consumers and states that, according to the case-law, such protection must take precedence over economic considerations (Case C-183/95 *Affish* [1997] ECR I-4315, paragraphs 43 and 57).

37 Secondly, the Commission claims, in any event, that its conduct in adopting the contested decision was lawful.

38 It denies having acted contrary to the principle of sound administration and the duty of care by banning importation of caviar from Kazakhstan. Article 11(3) of Directive 91/493 provides that in order to adopt a decision granting or withdrawing import authorisation, the applicable legislation of the third country and the facilities of its authorities for effectively verifying the implementation of such legislation, in addition to proper health conditions, are decisive. The experts' report indicated that neither of those two conditions was satisfied in the present case, since the competent Kazakh authorities had not demonstrated an ability, or even a willingness, to enforce the applicable legislation. In view of the experts' account, the Commission had no choice but to impose a total ban on the importation of fishery products from Kazakhstan, if it was not to risk being in breach of its obligations under Directive 91/493 and endangering the health of consumers in the Community. Moreover, it is the general risk which imports from the country in question represent, rather than proof of an actual risk which certain products or consignments present, which is the test when deciding whether to grant or withdraw authorisation.

39 As regards the alleged breach of the principle of the protection of legitimate expectations, the Commission states that that principle cannot be invoked in the present case because it has not created a situation capable of giving rise to legitimate expectations: traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained. Furthermore, even if it had, in the present case, created a situation capable of giving rise to legitimate expectations, it has not thereby offended against that principle by adopting the contested decision because a ban on importations of caviar from Kazakhstan was justified on grounds of the protection of the health of consumers and therefore by an overriding public interest in accordance with the case-law (*Affish*, cited above, paragraph 57).

Findings of the Court

(1) Preliminary remarks

40 The second paragraph of Article 215 of the EC Treaty (now the second paragraph of Article 288 EC) provides that, in the case of non-contractual liability, the Community is, in accordance with the general principles common to the laws of the Member States, to make good any damage caused by its institutions or by its servants in the performance of their duties.

41 The rules developed by the Court with regard to that provision take into account, *inter alia*, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 43, and Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 40).

42 The Court of Justice has held that, where the Community institutions enjoy a wide discretion in implementing their policies, the condition relating to unlawful conduct on the part of the institution is met if it is established that the rule of law infringed is intended to confer rights on individuals and the breach is sufficiently serious (see, to that effect, *Factortame*, cited above, paragraphs 44, 47 and 51, and *Bergaderm and Goupil*, cited above, paragraph 42).

43 As to the requirement that the breach be sufficiently serious, the Court has held that the decisive test for that is whether the Community institution manifestly and gravely disregarded the limits on its discretion (*Factortame*, cited above, paragraph 55, Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 25, and *Bergarderm and Goupil*, cited above, paragraph 43).

44 Nevertheless, where the institution has only a limited discretion, or even none at all, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see, to that effect, Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 28, and *Bergaderm and Goupil*, cited above, paragraph 44).

45 The Court has held, in that regard, that whether a measure taken by an institution is general or individual is not decisive for determining the limits of the discretion enjoyed by the institution (*Bergaderm and Goupil*, cited above, paragraph 46).

46 In those circumstances, examination of Community liability must, in the present case, centre on determining the extent of the discretion enjoyed by the

Commission when it adopted the contested decision without there being any need to decide whether the decision was a legislative or an administrative one.

(2) The extent of the Commission's discretion in the present case

47 The Commission purports to have acted with a view to ensuring the protection of the health of European consumers and lays claim, consequently, to a broad discretion.

48 The case-law indicates that the Community legislature has in relation to the common agricultural policy a discretionary power which corresponds to the political responsibilities given to it by Articles 40 to 43 of the EC Treaty (now, after amendment, Articles 34 to 37 EC) (Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 97, and Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraphs 91 and 120).

49 According to Article 3(p) of the EC Treaty (now, after amendment, Article 3(p) EC), Article 129(1) of the EC Treaty (now, after amendment, Article 152(1) EC) and Article 129 A of the EC Treaty (now, after amendment, Article 153 EC), in the implementation of all Community policies and activities, the institutions must ensure a high level of protection of the health of humans, in particular of consumers.

50 In that regard, the Court of Justice has moreover held that efforts to achieve objectives of the common agricultural policy cannot disregard requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, requirements which the Community institutions must take into account in exercising their powers (Case 68/86 *United Kingdom* v *Council* [1988] ECR 855, paragraph 12, and Case C-180/96 *United Kingdom* v *Commission*, cited above, paragraph 120). The Court of Justice has also held that the protection of public health must take precedence over economic considerations (see, on that point, the order in Case C-180/96 R *United Kingdom* v *Commission* [1996] ECR I-3903, paragraph 93, and *Affish*, cited above, paragraph 43).

51 The purpose of Council Directive 91/493 is to lay down the health conditions for the production and the placing on the market of fishery products for human consumption. By Decision 95/408, the Council supplemented that directive by laying down conditions for drawing up, for an interim period, provisional lists of establishments in third countries from which Member States are authorised to import certain products of animal origin, fishery products or live bivalve molluscs. It is clear from both the letter and the spirit of those two acts and from their legal basis, namely Article 43 of the Treaty, that those acts fall within the scope of the common agricultural policy and are intended to guarantee the protection of public and animal health (see also, to that effect, *Affish*, cited above, paragraph 43). It follows that where the Community legislature adopts measures establishing arrangements for supervision of importations of fishery products from third countries, such as Directive 91/493 and Decision 95/408, it enjoys a broad discretion.

52 Accordingly, the Commission must also be recognised as having wide discretion where it adopts measures implementing arrangements for the supervision of importations of fishery products, such as whether a third country is to be entered in or removed from the list of third countries authorised to export fishery products to the Community. In those two cases, the examination which the Commission must undertake consists in determining whether the third country in question provides, so far as concerns fishery products which it envisages exporting or actually exports, health guarantees equivalent to those required within the Community pursuant to Directive 91/493. It is for the Commission to

analyse the situation in the country in question on the basis of the information available and by reference to the parameters set out in Article 11(3) of Directive 91/493, that is to say, to the legislation in force in that third country, the organisation of its competent authorities and its inspection services, the powers of such services and the supervision to which they are subject, their facilities for effectively verifying the implementation of the relevant legislation, health and hygiene during the production, storage and dispatch of fishery products intended for the Community and, finally, the assurances which the third country can give on compliance with the standards laid down in Chapter V of the Annex to Directive 91/493.

53 Moreover, withdrawal of authorisation is expressly provided for by the legislature at Article 2(3) of Decision 95/408, as follows: 'the Commission may, in accordance with the procedure laid down in Article 5, modify or complete the lists provided for in paragraphs 1 and 2 to take account of new information received'. The word 'may' makes it clear that the Commission enjoys a wide discretion when adopting a withdrawal decision based on that article (see, to that effect, *Exporteurs in Levende Varkens*, cited above, paragraph 92).

54 Finally, the Commission must *a fortiori* be recognised as having wide discretion when it is called upon to assess the importance of information received following an inspection visit to the third country concerned in the light of the factors set out in Article 11(3) of Directive 91/493 and, therefore, to decide whether such new data contradict or alter the information previously obtained by the institution concerning the ability of the country in question to observe, in practice, the requirements of the directive.

55 In view of all the foregoing, it must be concluded that the Commission enjoys a wide discretion where, as here, it adopts a decision to remove a country from the list of third countries from which the import of fishery products is authorised.

56 It follows that, in the present case, the Community may incur liability only if the applicant proves that the Commission manifestly and gravely disregarded the limits on its discretion and that it thereby committed a sufficiently serious breach of Community law.

(3) Observance by the Commission of the limits on its discretion

57 It is relevant to recall the factual circumstances surrounding, first, the authorisation granted in June 1998 to import caviar from Kazakhstan and, secondly the ban on importing those goods imposed in March 1999.

58 As regards the authorisation to import caviar from Kazakhstan granted in June 1998, it must first be stated that the contested decision was adopted in the context of the implementation by the Commission of Council Decision 95/408 introducing provisional arrangements for the supervision of importations of fishery products from third countries pursuant to Directive 91/493. The third recital of the preamble to Decision 95/408 indicates that the Council deemed it necessary, 'in order to allow the time necessary to carry out Community inspections in third countries to verify that their establishments comply with Community provisions and to avoid a disruption in trade from third countries, [that] a simplified approval system should be applied for an interim period'.

59 Next, it is clear from the explanations provided by the defendant during the hearing that, in the context of the provisional arrangements for the supervision of imports, the Commission must decide on the basis of documentary evidence,

rather than on the basis of the outcome of a preliminary inspection in the third country requesting authorisation pursuant to Article 2(2) of Decision 95/408, whether that country is able to provide guarantees at least equivalent to those provided for in Directive 91/493. In that regard, the Commission bases itself on the replies given by the authorities of the third country to a questionnaire drawn up by it in order to enable it to determine whether the fishery products in question appear to offer sufficient health guarantees to allow them to be imported into the Community, without having to be inspected on the spot beforehand or upon their arrival in the Community.

60 In the present case the Kazakh authorities had requested in 1997 authorisation to export pike fillets and caviar to the Community. In view of the replies of the those authorities to the Commission's questionnaire, authorisation was granted for importation of caviar, in view of the simplicity of the production process of that product, by contrast with the very complex preparation necessary for pike fillets intended for export. It was in those circumstances that the Commission took the view that Kazakhstan provided health guarantees at least equivalent to those provided for in Directive 91/493 solely in the case of caviar.

61 As regards the contested decision, it must be borne in mind that it was adopted in the light of the final report drawn up by the three Community experts, who undertook an inspection in Kazakhstan from 19 November to 2 December 1998 in order to check whether the health conditions in that country made it possible to contemplate authorising importation of horse meat and pike fillets into the Community.

62 It is appropriate to recall the main points of the findings of that report.

63 With regard to the health situation, the report points out that it 'is not entirely clear so far as concerns the main diseases which affect animals in Kazakhstan,' adding:

'[There] seems to be no requirement to notify the main diseases, unless the animal is being moved (transported). However, a list of reportable equine diseases has been provided with the questionnaire.'

64 So far as concerns national veterinary legislation, the experts point out that it 'is limited'. The report continues:

'In general, Soviet veterinary legislation appears to be still in force. That legislation cannot be considered to be equivalent to Community legislation. There is no specific legislation regarding the production and marketing of fishery products.'

65 As to the conduct of the competent authority, the experts observe that it is 'not familiar with the Community system of authorisation nor with Community legislation and requirements' and state as follows: '[T]he exportation of fishery products (other than caviar) intended for certain Community Member States continues to be carried out with the permission of the competent authority. Community legislation does not permit this'. The report also states that '[p]rior to the Community inspection, the central authorities had provided very little (if any) assistance'.

66 As regards laboratories, the experts state that they 'offer mediocre facilities and a limited amount of modern equipment, but seem to work satisfactorily having regard to the tests they carried out'. The report goes on to state:

'The staff appear conscientious and competent. Records are quite complete, but a number of deficiencies have been found in certain cases'.

67 In respect of the production sites visited, the report states as follows: '[T]he problems found in the slaughterhouses visited relate mainly to structural deficiencies, bad hygiene practice and inadequate veterinary supervision'. Similarly, the report points out that: 'the problems found in the fish processing factory visited relate essentially to certain structural deficiencies and, in one case, to deficiencies in maintenance. The role of the veterinary services in the supervision of the fish processing factories is not clear'.

68 The experts consider that 'having regard to the abovementioned factors, it must be concluded that the competent authorities in Kazakhstan are not able to comply with Community requirements regarding the production and marketing of horse meat and fishery products'.

69 The experts also recommend that the Commission should 'not contemplate adding Kazakhstan to the list of countries authorised to export meat and fishery products until the shortcomings found have been properly dealt with'. They add: 'That means that imports of caviar should not be authorised either. The Commission must contemplate suspending Kazakhstan from the list in Part II of

the annex to Commission Decision 97/296/EC' and that 'in any event, entry on the list should not be contemplated before a fresh visit takes place to confirm what action has been taken'. In that regard, the experts advocate that a programme of technical assistance in veterinary matters should be planned for Kazakhstan concerning in particular the legislation to be developed and the authorities and laboratories responsible for its application.

70 Finally, the experts advise the Kazakhstan authorities to take measures with a view to setting up a consistent system for monitoring and eradicating animal diseases, monitoring importations from third countries, familiarising themselves and the factories concerned with current Community legislation and requirements, putting in place appropriate veterinary legislation which takes account of Community legislation in the field, and making use of the technical assistance offered by the Commission or other international organisations.

71 It is apparent from the report that the general situation in Kazakhstan so far as concerns the veterinary legislation in force, current health policy and veterinary supervision, food manufacturing and processing practices, actual health conditions, the ability of the Kazakh authorities effectively to verify application of the legislation in force and their willingness to enforce it does not fulfil the requirements laid down in Directive 91/493.

72 In the circumstances, the Commission was entitled, reconsidering its decision of June 1998, to conclude that Kazakhstan did not provide, in respect of products intended for export, health and hygiene guarantees for the products to be exported equivalent to those required in the Community and, in the interest of protecting the health of European consumers, ban the importation of caviar from that country.

73 The Commission cannot be criticised for having deemed it necessary to act urgently, in view of the potential threat to the health of consumers, nor for having deemed it necessary to ban altogether imports of fishery products from Kazakhstan, since it would otherwise have risked being in breach of the obligations incumbent upon it under Directive 91/493, placing the health of consumers in the Community at risk. Likewise, the applicant cannot criticise the Commission for having considered that the general risk which imports from the country in question represent, rather than proof of actual risk which certain products or consignments present, determines whether authorisation to import is to be granted or withdrawn. The Court of Justice has held in that respect that, where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent (Case C-180/96 *United Kingdom* v *Commission*, cited above, paragraph 99).

74 Accordingly, it must be concluded that the Commission did not overstep the bounds of its discretion in the present case when it reconsidered its assessment of June 1998 of Kazakhstan's ability to ensure that, so far as concerns caviar, health conditions at least equivalent to those provided for by Directive 91/493 were met and when it decided to withdraw its decision to authorise imports of the aforementioned product into the Community.

75 The fact that the Community experts did not visit any of the factory vessels involved in the production of caviar and, therefore, did not provide new information concerning the actual health conditions of the caviar production plants, a fact which is not denied by the Commission, is not such as to alter the foregoing conclusions. Indeed, neither that nor the absence of any indication of possible hygiene deficiencies or problems at the caviar production plants similar to those detected in the pike filletting factories inspected enable the applicant reasonably to argue that the Commission overstepped its discretion when it applied to caviar the negative assessment linked to deficiencies noted during inspections of horse meat and pike filleting production plants. As the

Commission points out, in view of the objectives pursued by Directive 91/493 and Decision 95/408 governing the supervision of importations of fishery products coming from third countries and in the light of the fact that the serious problems identified during the inspection concerned not so much specific difficulties observed on the production sites concerned but deficiencies in the general system of health supervision in Kazakhstan which, in view of their structural nature, were likely to affect also supervision of caviar production, it was entitled to take the view that it should ban imports of caviar without waiting to order an inspection of the caviar production plants when they were working, that is to say in Spring.

76 By acting as it did, the Commission did not offend against the principle of sound administration inasmuch as, contrary to what the applicant maintains, the conclusions to which the Commission arrived are plausible and are not based on a misassessment of the facts, as was stated above. Finally, by adopting the contested decision, the Commission fully observed its obligations to take account of requirements relating to the public interest such as the protection of consumers or the protection of the health and life of humans and animals, in its efforts to achieve objectives of the common agricultural policy (Case 68/86 *United Kingdom* v *Council*, cited above, paragraph 12) and to accord to the protection of public health precedence over economic considerations (order in Case C-180/96 R *United Kingdom* v *Commission*, cited above, paragraph 93, and *Affish*, cited above, paragraph 43).

77 As regards the principle of the protection of legitimate expectations, it is apparent from the case-law that although any trader in whom an institution has aroused justified expectations may rely on that principle, they cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained (see, for instance, Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 33, and *Exporteurs in Levende Varkens*, cited above, paragraph 148). In the present case, the Commission's broad discretion in

the matter empowered it to alter, so far as necessary, the existing situation, so that the applicant could not reasonably harbour a legitimate expectation that that situation would be maintained.

78 Next, it must be borne in mind that the contested decision was adopted in the context of the introduction by the Commission of provisional arrangements for the supervision of importations of fishery products from third countries. The third recital of the preamble to Decision 95/408 indicates that the Council deemed it necessary that, 'in order to allow the time necessary to carry out Community inspections in third countries to verify that their establishments comply with Community provisions and to avoid a disruption in trade from third countries, a simplified approval system should be applied for an interim period'. Therefore, the possibility that Community inspectors might carry out an inspection in Kazakhstan to verify actual conditions was expressly provided for by the applicable legislation.

79 Moreover, the fact that on 28 January 1999, after the inspection report was drawn up and shortly before the conclusion of the contract to import 9.5 tonnes of caviar by the applicant, the Commission adopted Decision 1999/136 amending Decision 97/296 maintaining Kazakhstan on the list of third countries and territories from which importation of fishery products (in this case exclusively caviar) was authorised is not sufficient to show that the Commission had given rise to the applicant's legitimate expectation that the institution would not adopt measures removing Kazakhstan from the list if new information justified so doing. In the present case, it is sufficient to recall that, on the date when Decision 1999/136 was published, neither the results nor the existence of the inspection visit to Kazakhstan were publicly known and that the applicant has admitted that it was not aware of the existence of that mission on the date on which the supply contract was concluded. It could not be aware, therefore, of the facts on which it now claims to have relied when concluding the aforementioned contract.

80 Likewise, the applicant cannot rely on the principle of the protection of legitimate expectations to argue that, in the context of the implementation of the

arrangements for the supervision of importations of fishery products from third countries, the Commission cannot alter the existing legal situation without taking account of the situation of traders. The fact that the Commission did not include transitional provisions in the decision to remove a country from the list of third countries from which the import into the Community of fishery products is authorised based on the overriding public interest of consumer protection, is not something for which it can be criticised, if the objective pursued by the applicable legislation, which seeks to protect effectively the health of consumers in the Community, is not to be compromised. It is apparent from the case-law that an overriding public interest may preclude the adoption of transitional measures in respect of situations which arose before the new rules came into force but which are still subject to change (see, to that effect, Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 44; Case 84/78 *Tomadini* [1979] ECR 1801, paragraph 20; Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraphs 16 and 19; and the order in Case C-51/95 P *Unifruit Hellas* v *Commission* [1997] ECR I-727, paragraph 27). In the first place, protection of public health constitutes an overriding public interest of that kind (*Affish*, cited above, paragraph 57) and, secondly, as held above, the ban on the importation of caviar from Kazakhstan was justified on grounds of the protection of the health of consumers and therefore by an overriding public interest within the meaning of the case-law.

81 Finally, it must be noted that, in any event, the applicant cannot criticise the Commission for having adopted, in March 1999, a hasty decision to ban importations and not to have prudently postponed the adoption of such a decision until such time as it had more information regarding actual procedures followed in the caviar processing establishments in Kazakhstan and the health status of the caviar thus processed. Had the Commission done so, it would indeed have been able to assess with greater certainty the potential degree of risk which importations of that product could pose for the health of European consumers. However, in view of the structural nature of the deficiencies found in Kazakhstan by the Community experts, even in the event that the results of an inspection of the caviar establishments had proved positive, the Commission was entitled to adopt, within the bounds of its broad discretion, a decision to ban importation of caviar, such as the contested decision, pending general improvement in the

applicable legislation and the conditions of veterinary and export supervision and inspection in that country.

82 It follows from the foregoing considerations that the applicant has not established that the Commission overstepped the bounds of its discretion in the present case nor, therefore, that it committed a sufficiently serious breach of Community law.

Conclusion

83 The first condition for Community liability, namely the unlawfulness of the conduct of the institution complained of, not having been satisfied, the claims for damages must be dismissed, without there being any need to consider whether the other conditions are satisfied.

Costs

84 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the form of order sought by the Commission, be ordered to pay its own costs as well as those of the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and those of the Commission.**

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 23 October 2001.

H. Jung

Registrar

J.D. Cooke

President