OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 11 December 2007 [1]

1. The appellants are owners of vessels which formed part of the Irish fishing fleet. Before the Court of First Instance, they sought the annulment of Decision 2003/245/EC [2] ('the contested decision'), by which the Commission rejected their requests to increase the 'safety tonnage' [3] of their vessels.

2. In the judgment under appeal, [4] the Court of First Instance found that the appellants had no interest in bringing an action, as at the date of the contested decision they had not built, and hence did not own, the vessels in question. It also found that the appellants were not individually concerned by the contested decision since the vessels in question were 'fictitious'. [5]

3. The Court of First Instance therefore rejected their applications as inadmissible. In relation to 19 other applicants, it declared the applications admissible and annulled the contested decision.

4. Three of the four unsuccessful applicants [6] have appealed. They ask the Court to set aside the judgment of the Court of First Instance insofar as it dismissed their applications, and to annul the contested decision.

1 — Original language: English.

2 — Decision of 4 April 2003 on the requests received by the Commission to increase MAGP IV objectives to take into account improvements on safety, navigation at sea, hygiene, product quality and working conditions for vessels of more than 12 m in length (OJ 2003 L 90, p. 48).

3 — An increase to the tonnage of a vessel in order to render her more seaworthy or to provide safer working conditions for her crew, without increasing her available tonnage for carrying fish.

4 — Joined Cases T-218/03 to T-240/03 *Boyle and Others* v *Commission* [2006] ECR II-1699.

5 — Paragraph 62 of the judgment under appeal.

6 — The fourth, O'Neill Fishing Co. Ltd (Case T-239/03), is not involved in the present appeal.

Legal context

5. Article 4(2) of Council Decision 97/413/EC [7] is worded as follows:

'In the multiannual guidance programmes for Member States,[8] increases in capacity resulting exclusively from safety improvements shall justify, on a case-by-case basis, an increase by the same amount of the objectives for fleet segments where they do not increase the fishing effort of the vessels concerned.'

6. According to point 3.3 of the annex to Commission Decision 98/125/EC: [9]

'Member States may at any time submit to the Commission a programme of safety improvements. In accordance with Articles 3 and 4 of Decision 97/413 … the Commission will decide whether any capacity increase foreseen by such a programme justifies a corresponding increase in the objectives of the MAGP IV …'

Factual background

7. Between 1999 and 2001, the Irish Department of Communications, Marine and Natural Resources ('the Department') and the Commission exchanged correspondence relating to Article 4(2) of Decision 97/413.

8. During that period, each of the appellants requested the Department to approve an increase in capacity for safety improvements, in application of Article 4(2) of Decision 97/413 and of point 3.3 of the annex to Decision 98/125.

9. By letter of 14 December 2001, the Department requested the Commission to increase

7 — Decision of 26 June 1997 concerning the objectives and detailed rules for restructuring the Community fisheries sector for the period from 1 January 1997 to 31 December 2001 with a view to achieving a balance on a sustainable basis between resources and their exploitation (OJ 1997 L 175, p. 27).

8 — Abbreviated as MAGPs.

9 — Decision of 16 December 1997 approving the multiannual guidance programme for the fishing fleet of Ireland for the period from 1 January 1997 to 31 December 2001 (OJ 1998 L 39, p. 41; 'MAGP IV').

the polyvalent segment [10] of the Irish fleet by 1304 gross tonnes ('GT') and the pelagic segment [11] by 5335 GT under Article 4(2) of Decision 97/413. (Other Member States made similar requests in respect of vessels in their fishing fleets.)

10. The Department's letter stated that it was prompted by the requests of 38 owners of vessels who had altered or replaced their vessels, or who intended to do so. It was accompanied by documentation relating to the vessels concerned, which included those of the appellants.

11. On 4 April 2003 the Commission adopted the contested decision. The operative part reads as follows:

'*Article 1*

Eligibility of requests

The requests to increase MAGP IV tonnage objectives will be considered eligible subject to the following conditions:

(1) the requests have been forwarded on a case-by-case basis by the Member State before 31 December 2001;

(2) the vessel must be properly registered in the Fleet Register of the Community;

(3) the vessel concerned has an overall length of 15 m or more;

(4) the increase in tonnage is the result of modernisation works over the main deck performed or to be performed on an existing registered vessel at least five

10 — This segment comprises multi-purpose vessels and includes small inshore vessels, and medium and large offshore vessels targeting whitefish, pelagic fish and bivalve molluscs: see the 2005 Annual Report of the Licensing Authority for Sea-fishing Boats of the Irish Department of Communications, Marine and Natural Resources ('the 2005 Annual Report'), at p. 7, available online at http://www.dcmnr.gov.ie/NR/rdonlyres/1293CB76-B763-43A7-8AB9-F1F696245A28/0/LicensingAuthAnnRept051.pdf.

11 — This segment comprises vessels engaged predominantly in fishing for pelagic species (primarily herring, mackerel, horse mackerel and blue whiting): see the 2005 Annual Report, at p. 7.

years old on the starting date of the works. In the case where a vessel has been lost at sea, the increase in tonnage is the result of a greater volume over the main deck of the replacement vessel with respect to the vessel that was lost;

(5) the increase in tonnage is justified in order to improve safety, navigation at sea, hygiene, product quality and working conditions;

(6) the volume under the main deck of the modified vessel or the replacement vessel is not increased.

Requests to increase the MAGP IV power objectives will not be eligible.

Article 2

The requests that are accepted according to the criteria fixed in Article 1 are those listed in Annex I.

The requests that are rejected according to the criteria fixed in Article 1 are those listed in Annex II.

Article 3

This Decision is addressed to the Kingdom of Belgium, Ireland, the Kingdom of the Netherlands, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.'

12. The list of 'rejected requests' in Annex II to the contested decision included the appellants' requests in respect of new vessels to replace, respectively, the MFV Westward Isle (Flaherty), the MFV Menhaden (Murphy) and the MFV Golden Rose (Ocean Trawlers), none of which had been lost at sea.

Procedure before the Court of First Instance and judgment under appeal

13. Before the Court of First Instance, 23 applicants sought annulment of the contested decision insofar as it rejected their requests for an increase in the capacity of their vessels. The requests all related to the construction of new vessels to replace existing vessels which had not been lost at sea. They invoked the Commission's absence of power, breach of the duty to state reasons and breach of the principle of equal treatment.

14. The Court of First Instance first examined an objection to admissibility raised by the Commission, to the effect that the applicants were not directly and individually concerned by the contested decision for the purposes of Article 230 EC. It dismissed that objection, on the grounds, essentially, (i) that the decision was to be considered to be a series of individual decisions, each affecting the legal situation of the owners of the vessels listed in the annexes, including the applicants, who were characterised by reference to all other persons and distinguished individually in the same way as an addressee of the decision and (ii) that it directly affected the applicants' legal situation, leaving no discretion to the addressees entrusted with the task of implementing it. [12]

15. However, in view of Ireland's answers to questions put to it by way of measures of organisation of procedure, the Court of First Instance, of its own motion, raised the question of whether Thomas Flaherty (Case T-224/03), Ocean Trawlers Ltd (Case T-226/03), Larry Murphy (Case T-236/03) and O'Neill Fishing Co. Ltd (Case T-239/03) [13] had an interest in bringing proceedings. It concluded in paragraph 62:

'It follows from those answers that the requests submitted by those four applicants were based on their intention at the material time to have vessels built and given the names set out in Annex II to the contested decision. It transpired, however, that those applicants did not have those vessels built, so that at the date of the contested decision they were not in fact owners of the vessels in question. It follows that those applicants had no interest in bringing an action. In any event, they are not individually concerned by the contested decision since the vessels in question are fictitious.'

16. The Court of First Instance then annulled the contested decision in so far as it applied to the vessels of the remaining 19 applicants. It found that the Commission had exceeded its powers by adopting, in the contested decision, criteria not provided for in the relevant applicable rules, [14] in particular by rejecting all applications for extra safety tonnage achieved not by modification of existing vessels but by building new vessels in the place of existing vessels. [15]

17. The appellants submit that the finding on the admissibility of their actions was incorrect in law. They request that the Court

12 — Paragraphs 42 to 60 of the judgment under appeal.

13 — Not involved in the current appeal: see footnote 6.

14 — Paragraph 134 of the judgment under appeal.

15 — Paragraphs 102 to 132 of the judgment under appeal. Since maritime history contains a long and melancholy catalogue of instances where modified and/or 'improved' vessels have subsequently suffered structural failure and foundered in bad weather, one may perhaps be thankful for the fishermen's sake that the Court of First Instance reached the conclusion that it did.

set aside the judgment under appeal in so far as it dismissed their applications and ordered them to bear their own costs. They also ask the Court to annul the contested decision and order the Commission to pay the costs of the whole proceedings.

Analysis

18. In the course of both the written and oral proceedings, the parties have discoursed at length on a number of factual considerations which do not appear to me to be relevant in the context of this appeal, the purpose of which is to determine whether the Court of First Instance's finding in paragraph 62 of its judgment can be upheld as a matter of law.

19. The Court of First Instance dismissed the appellants' applications as inadmissible on two grounds: (i) lack of interest in bringing an action, on the ground that, although the appellants had had the 'intention at the material time to have vessels built and given the names set out in Annex II to the contested decision', they 'did not have those vessels built, so that at the date of the contested decision they were not in fact owners of the vessels in question'; and (ii) lack of individual concern, since the vessels in question were 'fictitious'.

20. It is important to bear in mind that, in the remainder of its judgment (no part of which is called in question by the Commission), the Court of First Instance (i) dismissed — without distinguishing between the present appellants and the other 19 applicants — the Commission's objection that none of the applicants was directly and individually concerned by the contested decision and (ii) found that the Commission had been wrong to reject requests on the ground that the increased safety tonnage resulted from the building of new vessels rather than the modification of existing vessels.

21. The appellants submit, inter alia, that the finding of inadmissibility in their regard is incompatible with those other findings. In essence, I agree, for the reasons set out below, and I do not consider it necessary for that purpose — or appropriate, in the context of an appeal — to examine the other considerations put forward, of a more factual nature.

Interest in bringing proceedings

22. According to settled case-law, an action for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested

measure annulled. That interest must be vested and present. It is evaluated as at the date on which the action is brought. [16]

23. At paragraph 62 of its judgment, the Court of First Instance took ownership of the replacement vessels at the date of the contested decision as the crucial factor in deciding the appellants' lack of interest. At no point in that judgment did it make any specific finding that the 19 other appellants did own replacement vessels at that date, but it may be assumed to have been satisfied on that score, or its decision on admissibility would have been purely arbitrary.

24. It thus proceeded on the basis that applicants who had already built (or perhaps were already building) replacement vessels of which they were owners on the date of the contested decision had an interest in having that decision annulled, whereas applicants who had not taken such steps had no such interest.

25. That approach appears to me to be wholly flawed.

26. The procedure with which this case is concerned is an authorisation procedure. A certain tonnage is authorised for the fishing fleet of each Member State, and specific increases in that tonnage may be authorised by Commission decision if the relevant criteria are fulfilled.

27. It is certainly true that the procedure does not appear to entail any prohibition on effecting the work required for such an increase in tonnage before authorisation is accorded. Nor, however, does it preclude waiting for authorisation before effecting the work. Indeed, the latter might be seen by many to be the more prudent, not to say the more correct, approach.

28. If, as the Court of First Instance found, an increase in safety tonnage by the construction of a replacement vessel was eligible for authorisation, then any person who sought authorisation for such an increase clearly has an interest in seeking annulment of a decision refusing that authorisation. It is no doubt true that the interest is more urgent for those who had already, at the time of the decision, committed expenditure to the construction in question, but it is present for all. Annulment of the decision means, for all those whose requests were refused, that authorisation is again possible, and such authorisation, if forthcoming, means that whatever steps remain to be taken in order to achieve or

16 — See, for a recent example of this case-law, Case T-136/05 *Salvat Père & Fils and Others* v *Commission* [2007] ECR II-4063, paragraph 34, and the judgments to which it refers.

use the increased safety tonnage may now be taken. No grounds are given in the judgment under appeal for distinguishing between applicants on the basis of the extent to which they had already anticipated authorisation before the date of the contested decision, and no such grounds appear to me to exist.

29. The Commission's arguments to the effect that interest may lapse during the course of the proceedings and that the appellants' interest is based on a future, hypothetical event therefore fall away.

Individual concern

30. The other criterion on which the Court of First Instance stated the appellants' actions to be inadmissible was a lack of individual concern within the meaning of Article 230 EC. It accepted that all the applicants were directly concerned by the contested decision and that the ownership of vessels named in the annexes was sufficient to establish individual concern, distinguishing the appellants solely on the ground that the vessels in question were 'fictitious'.

31. It seems to me that that there are two possibilities as to what the Court of First Instance may have meant by that word.

32. The ordinary meaning of 'fictitious' relates to something that is not genuine or is feigned to exist and therefore exists only in the imagination. Applied to the present case, it would imply that the appellants did not really want to replace their original vessels with alternative vessels incorporating additional safety tonnage, or that it was merely a vague idea or plan to which no effect of a discernible kind was given.

33. There is however no finding of fact in the judgment under appeal to support such a view. It cannot be deduced from the mere fact that the appellants had not yet, at the date of the contested decision, built or commenced building the intended replacement vessels.

34. The alternative construction is that, by 'fictitious', the Court of First Instance merely intended to indicate that the vessels did not exist.

35. It is true that, as the Commission submits, whether a particular vessel has been built or not is a question of fact which

cannot be the subject of an appeal, barring a distortion of the evidence by the Court of First Instance. The conclusion to be drawn from that fact (in particular, whether the fact that a planned vessel has not yet been built means that an applicant is not individually concerned) is, however, a question of law that may properly be appealed.

36. For the same reasons *mutatis mutandis* as I have set out above regarding interest, [17] I do not accept that the existence or ownership of the replacement vessels at the date of the contested decision, at the date of the commencement of proceedings before the Court of First Instance or at the date of the judgment under appeal is the correct test to determine whether the appellants are individually concerned by the contested decision.

37. At the hearing the Commission sought to compare the appellants with a person who might one day buy a Ferrari. It argued that the intention does not make such a person the actual (present) owner of a Ferrari, nor does it individualise him enough to be able to attack any decision concerning Ferraris. The Commission is quite right about the hopeful, some-day Ferrari owner. However, the comparison that it seeks to draw with the appellants' situation does not stand up to scrutiny.

38. As the Court of First Instance found in paragraphs 42 to 60 of its judgment, all the applicants were individually concerned by the contested decision because they had made individual requests for authorisation for extra safety tonnage, because those requests were submitted and examined on a case-by-case basis, and because they were individually identified as the owners of the vessels listed in Annex II to the decision.

39. That situation cannot be compared to that of an individual who hopes to buy a Ferrari one day and seeks to challenge a general measure concerning Ferraris which might frustrate his ambition.

40. The Commission further argues that while a vessel is still on the drawing board, its ownership cannot be ascribed to any particular party. Thus, the party who merely possesses the plan for a particular vessel at a particular moment cannot be individually concerned. The plans submitted might

17 — See points 22 to 28.

(alternatively or additionally) subsequently be used by a different party.

41. That argument appears to me to be irrelevant.

42. All plans, whether for new vessels or for modifications to existing vessels, may be copied or reused in various ways, with or without changes. However, as the Commission itself submitted at the hearing and as is clear from the legal context, requests for safety tonnage are examined on a case-by-case basis. If granted, the safety tonnage accrues to the specific application. Whether the same plans are used subsequently or additionally in a different context, the authorisation for extra safety tonnage accrues solely to the owner of a particular designated vessel.

43. I conclude that, depending on what it meant by the use of the word 'fictitious', the Court of First Instance either applied an incorrect legal classification to the facts, or applied a test to determine the appellants' individual concern that was incorrect in law.

Conclusion on the appeal

44. For the reasons given above, I conclude that the judgment of the Court of First Instance should be set aside in so far as it declared the applications by the appellants inadmissible.

Substance of the action at first instance

45. Article 61 of the Statute of the Court of Justice provides that the Court of Justice may, where the decision of the Court of First Instance is quashed, itself give final judgment in the matter where the state of the proceedings so permits.

46. It will not usually be appropriate for the Court of Justice, after overturning a finding of inadmissibility, to proceed to examine the substance of the case at first instance. In most cases, by definition, the arguments on the substance will not have been examined by the Court of First Instance, and the state of the proceedings will thus not permit the Court of Justice to reach a decision.

47. In the present case, however, once the admissibility of the appellants' actions is accepted, there is nothing to differentiate them from the other 19 applicants. All the

actions formed part of a common series, all the applicants were represented by the same lawyers, and the Court of First Instance examined all the arguments together, drawing no distinction between individual applicants. It reached its decision on grounds which were equally applicable to all those applicants.

48. The substantive analysis in the judgment under appeal can therefore be applied without modification to the appellants, producing precisely the outcome that they originally sought. The judgment should therefore be quashed only in so far as it declared inadmissible the applications by the appellants.

49. Since, however, the Court of First Instance confined the annulment of the contested decision to annulment of its effect upon the vessels of those applicants whose applications had been declared admissible, it is also necessary for this Court to annul the contested decision in so far as it applies to the vessels of the appellants. This would put the appellants in the same position as the applicants that were successful before the Court of First Instance and are now awaiting a new decision of the Commission on their application for safety tonnage.

Costs

50. Under Article 69(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. The appellants have applied for costs, and the Commission's arguments on appeal should in my view be unsuccessful. The Commission should therefore bear the costs.

Conclusion

51. I am accordingly of the opinion that the Court should:

— set aside the judgment of the Court of First Instance in Cases T-224/03, T-226/03, and T-236/03 in so far as it dismissed the applications for the annulment of

Commission Decision 2003/245/EC as inadmissible and ordered the appellants to bear their own costs;

— annul Commission Decision 2003/245/EC of 4 April 2003 on the requests received by the Commission to increase MAGP IV objectives to take into account improvements on safety, navigation at sea, hygiene, product quality and working conditions for vessels of more than 12 m in length overall in so far as it applies to the vessels of the appellants;

— order the Commission to pay the costs.