JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

3 May 2007 *

In Case T-219/04,

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent,

applicant,

v

Commission of the European Communities, represented by T. van Rijn and S. Pardo Quintillán, acting as Agents,

defendant,

ACTION for annulment of Commission Regulation (EC) No 1438/2003 of 12 August 2003 laying down implementing rules on the Community Fleet Policy as defined in Chapter III of Council Regulation (EC) No 2371/2002 (OJ 2003 L 204, p. 21),

* Language of the case: Spanish.

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

composed of M. Vilaras, President, F. Dehousse and D. Šváby, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the written procedure and further to the hearing on 21 November 2006,

gives the following

Judgment

Legal background

1 Articles 11 to 13 of Chapter III and Articles 30 and 36 of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358, p. 59) provide:

'*Article 11*

Adjustment of fishing capacity

1. Member States shall put in place measures to adjust the fishing capacity of their fleets in order to achieve a stable and enduring balance between such fishing capacity and their fishing opportunities.

2. Member States shall ensure that the reference levels expressed in GT and kW for fishing capacity referred to in Article 12 and paragraph 4 of this Article are not exceeded.

...

4. Where public aid is granted for the withdrawal of fishing capacity that goes beyond the capacity reduction necessary to comply with the reference levels under Article 12(1), the amount of the capacity withdrawn shall be automatically deducted from the reference levels. The reference levels thus obtained shall become the new reference levels.

5. On fishing vessels of 5 years of age or more, modernisation over the main deck to improve safety on board, working conditions, hygiene and product quality may increase the tonnage of the vessel, provided that such modernisation does not increase the ability of the vessel to catch fish. The reference levels under this Article and Article 12 shall be adapted accordingly. The corresponding capacity need not be taken into account for the establishment of the balance of entries and exits by Member States under Article 13.

The detailed rules and conditions for such measures may be adopted in accordance with the procedure laid down in Article 30(2).

Article 12

Reference levels for fishing fleets

1. The Commission shall establish for each Member State reference levels expressed in GT and kW for the total fishing capacity of the Community fishing vessels flying the flag of that Member State in accordance with the procedure laid down in Article 30(2).

The reference levels shall be the sum of the objectives of the Multi-annual Guidance Programme 1997-2002 for each segment as fixed for 31 December 2002 pursuant to Council Decision 97/413/EC.

2. Implementing rules for the application of this Article may be adopted in accordance with the procedure laid down in Article 30(2).

Article 13

Entry/Exit scheme and overall capacity reduction

1. Member States shall manage entries into the fleet and exits from the fleet in such a way that, from 1 January 2003:

(a) the entry of new capacity into the fleet without public aid is compensated by the previous withdrawal without public aid of at least the same amount of capacity,

(b) the entry of new capacity into the fleet with public aid granted after 1 January 2003 is compensated by the previous withdrawal without public aid of:

(i) at least the same amount of capacity, for the entry of new vessels equal or less than 100 GT, or

(ii) at least 1.35 times that amount of capacity, for the entry of new vessels of more than 100 GT.

2. From 1 January 2003 until 31 December 2004 each Member State which chooses to enter into new public aid commitments for fleet renewal after 31 December 2002 shall achieve a reduction in the overall capacity of its fleet of 3% for the whole period in comparison to the reference levels referred to in Article 12.

3. Implementing rules for the application of this Article may be adopted in accordance with the procedure laid down in Article 30(2).

...

Article 30

Committee for fisheries and aquaculture

1. The Commission shall be assisted by a Committee for Fisheries and Aquaculture.

2. Where reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply.

The period laid down in Article 4(3) of Decision 1999/468/EC shall be set at 20 working days.

...

4. The Committee shall adopt its rules of procedure.

...

Article 36

Entry into force

This Regulation shall enter into force on 1 January 2003.'

2 Articles 6, 7 and 14 of Commission Regulation (EC) No 1438/2003 of 12 August 2003 laying down implementing rules on the Community Fleet Policy as defined in Chapter III of Council Regulation (EC) No 2371/2002 (OJ 2003 L 204, p. 21) ('the contested regulation'), provide:

'*Article 6*

Fishing capacity of the fleet on 1 January 2003

For the purposes of Article 7 the fishing capacity in terms of tonnage (GT_{03}) and power (kW_{03}) at 1 January 2003 shall be determined taking into account, in

accordance with Annex II, the entries of vessels which are based on an administrative decision by the Member State concerned taken between 1 January 2000 and 31 December 2002 in conformity with the legislation applicable at that time, and in particular in accordance with the national entry/exit regime notified to the Commission under Article 6(2) of Decision 97/413/EC, and which take place not later than three years after the date of the administrative decision.

Article 7

Monitoring of entries and exits

1. In order to comply with Article 13 of Regulation (EC) No 2371/2002 each Member State shall ensure that at all times the fishing capacity in tonnage (GT_t) is equal to or less than the fishing capacity at 1 January 2003 (GT_{03}) as adjusted by:

(a) deducting:

(i) the total tonnage of vessels leaving the fleet with public aid after 31 December 2002 (GT_a);

(ii) 35% of the total tonnage of vessels of more than 100 GT entering the fleet with public aid granted after 31 December 2002 (GT_{100});

(b) and adding

(i) the total tonnage increases granted under the provisions of Article 11(5) of Regulation (EC) No 2371/2002 (GT_S);

(ii) the result of the re-measurement of the fleet (Δ (GT - GRT)).

Each Member State shall ensure that the following formula is complied with:

$$GT_t \leq GT_{03} - GT_a - 0{,}35\ GT_{100} + GT_S + \Delta\ (GT - GRT)$$

...

Article 14

This Regulation shall enter into force on the seventh day following that of its publication in the *Official Journal of the European Union.*

It shall apply from 1 January 2003.'

3 Article 6(2) of Council Decision 97/413/EC 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), which was adopted on the basis of Article 11 of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1), provides:

'Among the means to reduce fishing effort, each Member State shall determine in its programme the reduction in the capacity of each fleet segment which will permit the objectives to be achieved. This reduction in capacity shall be ensured by the establishment in each Member State of a permanent regime to control the renewal of the fleet. This regime shall determine, segment by segment, the ratio of entries/exits of vessels that will ensure over the period that the fishing capacity by type of vessel will be brought down to the determined levels.'

4 Article 3 of Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community (OJ, English Special Edition 1952-1958, p. 59) provides:

'Documents which an institution of the Community sends to a Member State or to a person subject to the jurisdiction of a Member State shall be drafted in the language of such State.'

5 Article 6 of Council Regulation No 1 provides:

'The institutions of the Community may stipulate in their rules of procedure which of the languages are to be used in specific cases.'

6 Articles 4 and 7 of Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1999 L 184, p. 23) are worded as follows:

'*Article 4*

Management procedure

1. The Commission shall be assisted by a management committee composed of the representatives of the Member States and chaired by the representative of the Commission.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time-limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 205(2) of the Treaty, in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

3. The Commission shall, without prejudice to Article 8, adopt measures which shall apply immediately. However, if these measures are not in accordance with the opinion of the committee, they shall be communicated by the Commission to the Council forthwith. In that event, the Commission may defer application of the measures which it has decided on for a period to be laid down in each basic instrument but which shall in no case exceed three months from the date of such communication.

4. The Council, acting by qualified majority, may take a different decision within the period provided for by paragraph 3.

...

Article 7

1. Each committee shall adopt its own rules of procedure on the proposal of its chairman, on the basis of standard rules of procedure which shall be published in the *Official Journal of the European Communities*.

Insofar as necessary existing committees shall adapt their rules of procedure to the standard rules of procedure.

...'

7 Finally, Articles 3, 4 and 9 of the rules of procedure of the Committee for Fisheries and Aquaculture, in the version applicable at the material time, provide:

'*Article 3*

The Chairman shall send the invitation to the meeting, the agenda and draft measures on which the committee is asked to give an opinion and any other working papers to the Permanent Representations of the Member States in accordance with [the second paragraph of] Article 9.

Those documents shall reach the Permanent Representations of the Member States no later than eight days before the date of the meeting ...

Article 4

When the Committee's opinion is required, if a substantive change is made to the proposal, or if a proposal, whose subject matter has been added to the agenda, has been submitted during the meeting, or if a new item is added to the agenda, the Chairman, at the request of the representative of a Member State, shall postpone the vote until the end of the meeting; if there are specific difficulties, the Chairman may extend the meeting until the following day.

...

Article 9

...

Correspondence for members of the committee shall be addressed to the Permanent Representations, a copy shall be sent directly to the person designated for this purpose by that Member State.'

Background to the dispute

8 By fax of 13 June 2003, the Commission transmitted to the Member States, in their official languages, a draft regulation laying down the implementing rules on the Community fleet policy defined in Chapter III of Regulation No 2371/2002. The

draft was the subject of a preliminary discussion by the Committee on Fisheries and Aquaculture ('the Committee') at a meeting on 25 June 2003.

9 On 1 July 2003, the Commission invited the representatives of the Member States to a Committee meeting on 15 and 16 July 2003. The invitation was drafted in French, English and German. The invitation stated that the draft regulation was to be discussed and put to a vote at the meeting on 16 July 2003.

10 On 7 July 2003, the Permanent Representative of Spain to the European Union sent a letter to the Director-General of the Commission Directorate-General (DG) 'Fisheries', in which it stated that the Kingdom of Spain did not regard itself as having been officially invited to attend the meeting, since the invitation had not been sent to it in Spanish. By the same letter, the Permanent Representative requested confirmation of the availability of interpretation into and out of Spanish at that meeting.

11 The draft regulation presented by the Commission was discussed at the Committee meeting on 16 July 2003 which was attended by the Spanish delegation. During the meeting the Commission introduced a series of amendments to the draft and distributed to the Committee members a document setting out the proposed amendments which was written only in English.

12 Following that meeting the Kingdom of Spain's Permanent Representative sent a letter, dated 17 July 2003, to the Director-General of DG 'Fisheries'. By that letter, the Permanent Representative first set out his complaints about the language in which the invitation sent to the Kingdom of Spain had been written (see paragraph 10 above). Second, he criticised the introduction by the Commission of a substantive

amendment written only in English to the original draft which had been sent in Spanish, complaining that, in spite of the Spanish delegation's reservations, the Commission had compelled the Committee to vote in order to obtain its opinion on the draft regulation. The Permanent Representative also mentioned the fact that the Spanish delegation had requested that its complaints were recorded in the minutes of the Committee meeting and had asked the Director-General to send it a copy of them in order to check that its complaints had been accurately recorded.

13 On 12 August 2003, the Commission adopted the contested regulation. Recital 13 in the preamble states that the Committee has not issued an opinion on those measures within the time-limit set by its chairman.

Procedure and forms of order sought by the parties

14 By application lodged at the Court Registry on 4 November 2003, the Kingdom of Spain brought these proceedings, which were registered under case number C-464/03.

15 By order of 8 June 2004, the Court referred the case to the Court of First Instance, in accordance with Council Decision 2004/407/EC, Euratom of 26 April 2004 amending Articles 51 and 54 of the Protocol on the Statute of the Court of Justice (OJ 2004 L 132, p. 5).

16 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for by Article 64 of the Rules of Procedure of the Court of First Instance, requested the Commission to produce certain documents. The Commission complied with that request within the time-limit prescribed.

17 The Kingdom of Spain claims that the Court of First Instance should:

— annul the contested regulation;

— order the defendant to pay the costs.

18 The Commission contends that the Court should:

— declare the fourth plea in law to be manifestly inadmissible or, alternatively, to dismiss it as devoid of substance;

— dismiss the remainder of the action as unfounded;

— order the Kingdom of Spain to pay the costs.

Law

19 In support of its action, the Kingdom of Spain puts forward five pleas in law alleging, respectively, infringement of an essential procedural requirement of the procedure for adoption of the contested regulation relating to the rules governing languages as set down by Regulation No 1; infringement of the principle of the hierarchy of

norms, in so far as Article 7(1) of the contested regulation infringes the provisions of Article 13 of Regulation No 2371/2002; infringement of the latter principle in so far as Article 7(1) of the contested regulation infringes the provisions of Article 11(5) of Regulation No 2371/2002; infringement of the principle of the protection of legitimate expectations, and the allegedly arbitrary nature of the contested regulation.

The first plea: infringement of essential procedural requirements of the procedure for the adoption of the contested regulation

Arguments of the parties

20 The Kingdom of Spain observes that, in accordance with Article 3 of Regulation No 1 and the case-law (Case C-263/95 *Germany* v *Commission* [1998] ECR I-441, paragraph 32), notifications addressed to a Member State must be made in the official language of that State, within the time-limit laid down for each management committee.

21 Therefore, the contested regulation is void, in so far as, first, the invitation to the Committee meeting on 15 and 16 July 2003 was not addressed to the Kingdom of Spain in Spanish and, second, a substantive amendment introduced during that meeting was drafted only in English.

22 Furthermore, contrary to the Commission's submissions, the amendments contained in the new version of the draft, introduced at the meeting on 16 July 2003, were not minor but substantial. As the regulation concerned is very technical and contains mathematical formulae the explanations provided by the Commission

in its defence cannot be accepted. The explanation of the formulae and the further information provided affect the entire regulation, which could be understood only by the author and not the delegations which did not have the opportunity to study the document in the course of a technical meeting with the composure and concentration required by that type of regulation.

23 As regards the Commission's argument as to delays arising from the translation into all the official languages of documents submitted to the committees, the Kingdom of Spain states that so-called efficiency cannot take precedence over legal safeguards for the Member States.

24 Finally, at the hearing, the Kingdom of Spain added that the failure to present the amendments concerned in Spanish should have led to the postponement of the vote on the draft regulation to a later meeting of the Commission, as the Kingdom of Spain requested during the meeting on 16 July 2003.

25 The Commission replies that, in this case, there has not been any infringement of the essential procedural requirements in the procedure for adoption of the contested regulation capable of resulting in its annulment. In that connection, it relies on the case-law according to which a procedural irregularity entails the annulment in whole or in part of a legislative act only if it is shown that, in the absence of such irregularity, the act might have been substantively different (Case 150/84 *Bernardi* v *Parliament* [1986] ECR 1375).

26 First, as regards the invitation to the Committee meeting of 15 and 16 July 2003, the Commission recalls that the Committee and all other committees which are involved in procedures for the adoption of implementing measures act within the scope of the Commission's powers. Since the Commission has three working languages, namely French, English and German, it takes the view that invitations to

committee meetings may legitimately be drafted in those three languages. Article 3 of Regulation No 1 refers to the 'documents' that the Institutions send to a 'Member State', and does not apply to the relationship between the Commission and committees such as the committee concerned in this case. In accordance with the wording of Article 6 of Regulation No 1 the Commission was entitled to provide, in the standard internal rules of procedure it published, that invitations to committee meetings must be sent in the three working languages mentioned above.

27 The Commission points out that, in general, the Member States have not encountered any problem with the practice of sending them invitations to committee meetings in the three working languages. More particularly, the Spanish delegation received the invitations relating to the Committee meeting in May and June 2003 in those three languages without expressing any reservations. Furthermore, following the contested invitation, the Spanish delegation took part in the meeting of 16 July 2003 and participated in the discussion and the vote relating to the draft regulation and did in fact therefore express its point of view on the draft, since interpretation into and out of Spanish was provided.

28 The Commission argues in that regard that, in order to be able to manage the meetings of the various committees which support it efficiently, invitations cannot be translated into all the official languages as a matter of course.

29 Second, as regards the document distributed during the Committee meeting on 16 July 2003, the Commission makes the following observations. First, it recalls that the draft regulation put to the vote at the meeting on 16 July 2003 had been transmitted to the Kingdom of Spain in Spanish by fax of 13 June 2003, which the latter does not deny. The covering letter accompanying it, written in English, indicates to the Member States to which it was addressed that the draft regulation

concerned is sent in their language. Therefore, the circumstances of this case are not, the Commission argues, comparable to those in the case which gave rise to the judgment in *Germany* v *Commission*, cited in paragraph 20 above. In that case the draft in German of the legislative act which was to be voted on had not been sent to the German delegation within the time-limits.

30 Next, the Commission challenges the assertion that the document submitted at the meeting of 16 July 2003 constitutes a substantive amendment of the draft regulation concerned. According to the Commission, the document introduced only two substantive amendments to the draft, namely amendment of the dates provided for in Article 6 and the insertion of footnotes in Annex I to the draft. Those amendments, which did not in any way affect Article 7 of the draft, were introduced in order to take account of requests made by the Member States, and do not raise any problems of comprehension. As regards the rest, the amendments are simply matters of form and presentation which are intended to improve, clarify and simplify the drafting of certain provisions and are, therefore, easily understood.

31 Their comprehension was facilitated by the fact that they had been read and explained in detail at the meeting by the Commission's representative. The Spanish delegation was able to follow the reading of the amendments and the explanations provided in Spanish as, in accordance with its request, interpretation into and out of Spanish was available.

32 Furthermore, the Commission observes that translating as a matter of course into all the official languages documents which introduce only minor amendments to a text which has already been sent to the delegations leads to unacceptable delays in the committees' work. According to the Commission, the provisions of Regulation No 1 cannot be interpreted in such a way as to prevent committees from properly performing their duties by creating unjustified impediments.

33 Finally, as regards the complaint made by the Kingdom of Spain at the hearing (see paragraph 24 above), the Commission submits that it must be rejected on the grounds that it is out of time and, therefore, inadmissible.

Findings of the Court

34 This plea in law consists of two parts alleging two separate infringements of Regulation No 1. First, the invitation to the meeting on 15 and 16 July 2003 was written only in English, French and German and not Spanish and, second, at the meeting of 16 July 2003 the Commission distributed an amended version of its original draft regulation written only in English and refused to postpone the vote on the draft until a subsequent Committee meeting.

35 It must be observed that, according to settled case-law, the infringement of Regulation No 1 when the act was adopted constitutes a procedural irregularity, which could, however, entail the annulment of the act ultimately adopted only if, were it not for that irregularity, the procedure could have led to a different result (see judgment in Joined Cases C-465/02 and C-466/02 *Germany and Denmark* v *Commission* [2005] ECR I-9115, '*Feta II* judgment', paragraph 37, and the case-law cited).

36 As regards the first part of this plea, it must be stated that, following the invitation sent by the Commission to the Kingdom of Spain, Spain's representatives took part in the meeting on 15 and 16 July 2003. In those circumstances, it cannot be argued that in the absence of the alleged irregularity the procedure for the adoption of the regulation would have led to a different result in that regard. An invitation to a meeting, sent to the Kingdom of Spain in Spanish, would also have resulted in its

representatives participating in the meeting concerned, which they did as a result of the invitation in dispute. It follows that the first part of the first plea must be rejected as devoid of relevance, without there being any need to examine the question of the language in which the invitation sent to the Kingdom of Spain should have been drafted.

37 As for the second part of this plea, it must be recalled that the draft regulation concerned was discussed and put to the vote at the Committee meeting on 16 July 2003 (see paragraphs 9 and 12 above). As is apparent from the minutes of the meeting, produced at the request of the Court of First Instance by the Commission, the latter, at the beginning of the meeting, orally proposed a number of amendments to the original draft regulation and distributed to the Committee members 'for a better understanding of the amendments' a document containing those amendments written in English. The majority of those amendments were either purely formal or corrections of typing errors, with the exception of two substantive amendments, one of which concerned the extension of the reference period referred to in Article 6 of the draft from one to three years while the other added footnotes to Annex I to the draft entitled 'Reference levels by Member State'. The Kingdom of Spain expressed 'doubts as to the procedure proposed by the Commission' and requested that the 'proposed amendments [be transmitted to it] in writing also in Spanish, and insisted that the Commission postpone the vote'. The Kingdom of Spain was supported in its action by the Kingdom of Belgium, the Hellenic Republic, the Italian Republic and the Portuguese Republic.

38 It is also apparent from the minutes of the Committee meeting that all the amendments proposed by the Commission were closely read and were explained in detail by the Commission's representative. At the end of that reading the Kingdom of Spain, supported by the four other Member States mentioned above, repeated its reservations. After the various Member States had adopted a position on the draft regulation, as amended, the draft was put to the vote without, however, obtaining the qualified majority required for the Committee's opinion to be adopted. The meeting thus ended, after it had been recorded in the minutes that the result of the vote was equivalent to 'an absence of opinion' of the Committee.

39 In light of those considerations it is appropriate to determine whether, as the Kingdom of Spain argues, failure to submit the amendments to the draft regulation in Spanish at the Committee meeting on 16 July 2003 and the refusal by the Commission's representative, the Chairman of the Committee, to postpone the vote on the draft to a subsequent meeting constitute procedural irregularities capable of leading to the annulment of the contested regulation.

40 As regards the first complaint, it must be observed that Article 3 and the second paragraph of Article 9 of the Committee's rules of procedure (see paragraph 7 above) are sufficient indication of the intention to ensure that Member States have the time necessary to study documents relating to a point in the Committee's agenda, which may be particularly complex, require many contacts and discussions between various administrations, the consultation of experts in various fields or consultation with professional organisations. It cannot be presumed that all the persons to be consulted have a command of a foreign language sufficient to enable them to understand a complex text. Therefore, the abovementioned provisions must be interpreted as meaning that the documents concerned must be sent to each Member State in its official language, as provided in Article 3 of Regulation No 1 (see, to that effect, the judgment of 10 February 1998 in *Germany* v *Commission*, cited in paragraph 20 above, paragraphs 27 and 31, and the Opinion of Advocate General Ruiz-Jarabo Colomer in that judgment [1998] ECR I-443, point 16). Such was in fact the case in these proceedings since the original draft regulation was transmitted to the Member States in their official language within the time-limits set down and had been the subject of a preliminary examination at the Committee meeting on 25 June 2003.

41 However, that obligation does not exist as regards proposed amendments to a document, which has already been duly transmitted to the Committee members, made during a Committee meeting. Nothing in the Committee's rules of procedure requires such proposals to be submitted in writing in all the official languages. Therefore, it is open to the Commission in a Committee meeting to make such proposals orally. Without prejudice to the possible postponement of the vote until the end of the meeting or, in the event of particular difficulties, to the extension of the meeting until the following day, pursuant to Article 4 of the Committee's rules of procedure, the possibility of submitting the amendments orally in a Committee

meeting exists, even if the amendments made to the draft added into the meeting's agenda are substantive. The argument put forward by the Kingdom of Spain, that the Commission is obliged to submit proposed amendments in writing in all the official languages, is not easily reconciled with the abovementioned provision of the rules of procedure since, if that argument were to be accepted, it would be practically impossible to make substantive amendments to a draft at a meeting.

42 In this case, the Court finds that, as is apparent from the minutes of the Committee meeting of 16 July 2003, the proposal for amendments to the original draft regulation, submitted at the beginning of the meeting, was made orally. The document distributed by the Commission at that meeting must therefore be regarded as an illustration or simply a visual aid in order to 'better understand' the amendments proposed orally by the Commission. Since the Commission could properly have chosen to make only an oral presentation of its proposals, without distributing any document, no complaint can reasonably be based on the fact that the document distributed was written only in English.

43 In those circumstances, the Court finds that the Commission has not infringed either the applicable provisions, by submitting its proposal for amendments to the original draft orally during the relevant meeting, or the Member States' 'legal safeguards' as the Kingdom of Spain contends. That is all the more true since interpretation into and out of Spanish was available during the meeting, at the request of the Kingdom of Spain's representatives, who were able therefore to follow in their own language the discussion and explanations provided by the Commission concerning its proposal.

44 As regards the second complaint, put forward by the Kingdom of Spain at the hearing, alleging that the Commission refused to postpone the vote on the draft to a subsequent Committee meeting, it is appropriate, first of all, to examine its admissibility which is challenged by the Commission.

45 Under the first subparagraph of Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

46 However, a plea which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible (Case T-252/97 *Dürbeck* v *Commission* [2000] ECR II-3031, paragraph 39, and Joined Cases T-346/02 and T-347/02 *Cableuropa and Others* v *Commission* [2003] ECR II-4251, paragraph 111).

47 The Court considers that such is the case in these proceedings. The complaint is closely linked to the first complaint in the originating application examined above, according to which the contested regulation, the draft of which was discussed in the Committee meeting of 16 July 2003, is void on the ground that the substantive amendments made in the course of that meeting were not presented in Spanish. In other words, this complaint must be understood as meaning that although the Commission was not in a position at the meeting to distribute the proposed amendments in Spanish, it should at least have postponed the vote until another meeting in order to allow the Spanish representatives the time required to study the proposals written in a language other than the official language of their State. Furthermore, the Kingdom of Spain makes essentially the same objection in paragraph 3 of its originating application, stating that the Commission had compelled the Committee to vote, in spite of the reservations of the Spanish delegation (see paragraph 12 above).

48 However, that complaint must be rejected as unfounded. Neither Article 4 nor any other provision of the Committee's rules of procedure provide for the postponement of a vote until another meeting, even if substantive amendments are made to the draft during the Committee meeting. In the last example, Article 4 merely provides

for the possibility for the Chairman of the Committee to postpone the vote until the end of the meeting. As already stated, that is the case in these proceedings, since the discussion and the vote on the draft regulation concerned were the only matters on the agenda at the Committee meeting of 16 July 2003 and the vote was held at the end of that meeting.

49 In any event, the irregularities alleged by the Kingdom of Spain in the second part of this plea, even if they were to be established, could not lead to the annulment of the contested regulation. Since the Committee did not manage to give an opinion on the measures provided for in the regulation, it was adopted by the Commission which did not, therefore, communicate them to the Council in accordance with Article 30(2) of Regulation No 2371/2002 and Article 4(3) of Decision 1999/468. The Kingdom of Spain, which voted against the draft regulation, would not have been able to oppose it more effectively if it had had the Spanish version of the contested regulation. Therefore, the alleged irregularities could not have had any effect on the measures ultimately adopted (see, to that effect, the *Feta II* judgment, cited in paragraph 35 above, paragraphs 38 to 40).

50 The foregoing considerations are not called into question by the reading of the judgment of 10 February 1998 in *Germany* v *Commission*, paragraph 20 above, relied on by the Kingdom of Spain. In that judgment, the Court annulled the contested decision on the ground that the Commission had not taken account of a request to postpone the vote, made by the Federal Republic of Germany, which had received out of time the version in its official language of the draft decision to be discussed by the relevant committee (*Germany* v *Commission*, cited in paragraph 20 above, paragraphs 26 to 32).

51 In these proceedings the Kingdom of Spain confirmed at the hearing that it had received, in its official language and in good time, the original draft of the regulation, which was recorded in the minutes of the hearing.

52 Furthermore, contrary to the Committee's rules of procedure, Article 2(7) of the rules of procedure of the committee concerned in the judgment of 10 February 1998 in *Germany* v *Commission*, cited in paragraph 20 above, provided that, if the draft of the provisions to be discussed was not sent to the Member States within the time-limits set down, that point of the agenda was to be postponed to a subsequent meeting if a Member State so requested (*Germany* v *Commission*, cited in paragraph 20 above, paragraph 17).

53 Finally, in contrast to the facts of this case, in the case which gave rise to the judgment of 10 February 1998 *Germany* v *Commission*, paragraph 20 above, the committee concerned had adopted an opinion which the Commission subsequently followed (*Germany* v *Commission*, paragraph 20 above, paragraph 32; see also the final recital in the preamble to Commission Decision 95/204/EC of 31 May 1995 implementing Article 20(2) of Council Directive 89/106/EEC on construction products (OJ 1995 L 129, p. 23)), which was annulled by that judgment.

54 It is clear from all of the foregoing that the second part of the first plea is unfounded and must be rejected together with the first plea in its entirety.

The second plea: infringement of the principle of the hierarchy of norms, in so far as Article 7(1) of the contested regulation infringes the provisions of Article 13 of Regulation No 2371/2002

Arguments of the parties

55 The Kingdom of Spain recalls that Article 7 of the contested regulation was adopted in order to implement the provisions of Article 13 of Regulation No 2371/2002. Article 13 refers only to the entry of new capacity into the fleet, distinguishing

between whether or not it received public aid and requiring, as the sole condition, the withdrawal of other capacities in accordance with a number of implementing rules. There is absolutely no requirement that the capacity expressed as tonnes of the fishing fleet is not to exceed the formula set out in Article 7(1) of the contested regulation. Therefore, in order to implement the entry/exit scheme laid down in Article 13 of Regulation No 2371/2002, it is not necessary to require Member States to comply with that formula.

56 The Kingdom of Spain adds that Article 11(2) of Regulation No 2371/2002, which requires that Member States ensure that the reference levels expressed in GT and kW for fishing capacity referred to in Article 12 and Article 11(4) are not exceeded, shows that the only limits imposed on Member States by the Council are the reference levels established by the Commission for each Member State. By contrast, Article 11(2) does not by any means authorise the establishment of the limits referred to in Article 7(1) of the contested regulation, that is limits on the real level of the fleet, measured in GT and kW, which indicate the current state of the fleet possessed by each Member State.

57 The Kingdom of Spain submits that the reference levels established by the Commission by way of the Multi-Annual Guidance Programmes ('MAGP'), which have succeeded one another for a number of years, are complied with when Member States ensure that their real fleet level is less than or equal to the reference level. That is the case, in particular, in Spain whose real fleet level has, since 1992, always been below the reference level. At the end of 2003, the difference between the real Spanish fleet level and the applicable reference level could be estimated at approximately 240 000 GT, a figure which greatly exceeds the entire fleet of certain Member States such as the Netherlands and Ireland, and 535 067 kW.

58 That reduction is the result of a considerable effort by the Kingdom of Spain and is due, in part, to withdrawals with public aid and, for the remainder, to withdrawals

without public aid as a result of the policy pursued in relation to the construction of vessels. Therefore, of that difference in capacity referred to in the previous paragraph, 90 000 GT and 182 660 kW were released without public aid.

59 Therefore, the Kingdom of Spain has withdrawals made without public aid since 1997 on its file which it could take into account in order to comply with its obligation, laid down in Article 13(1)(a) and (b), to compensate for the entry of new capacity into its fleet by the withdrawal of at least the same amount of capacity without public aid. The obligation not to exceed the real fishing fleet level as it existed on 1 January 2003, provided for in Article 7 of the contested regulation, would deprive the Kingdom of Spain of that possibility and would suffer damage, particularly as compared to other Member States which have not complied with their obligations concerning the reference level established by the Commission in the MAGP.

60 Furthermore, Article 7 of the contested regulation renders legally inoperative the establishment of reference levels applicable to each Member State by its Article 4, since by Article 7 the Commission establishes new more restrictive levels without the authorisation of the Council.

61 Therefore, the Kingdom of Spain takes the view that, with the adoption of Article 7 of the contested regulation, the Commission has infringed the principle of the hierarchy of norms which, according to settled case-law, requires that in adopting provisions for the implementation of a basic regulation, the Community authority empowered to do so does not exceed the powers conferred on it by the regulation or refrain from applying it (Case C-103/96 *Eridania Beghin-Say* [1997] ECR I-1453 and Case C-179/97 *Spain* v *Commission* [1999] ECR I-1251).

62 The Commission states that Article 7(1) of the contested regulation merely converts the provisions of Articles 11 and 13 of Regulation No 2371/2002 into a formula in

order to facilitate the calculations to be made by the competent technical staff in each national administration. Therefore, the formula reflects the obligation of the Member States to ensure that at all times their fishing capacity in tonnage (GT_t) is equal to or less than the fishing capacity at 1 January 2003 (GT_{03}), reduced, first of all, by the total tonnage of vessels leaving the fleet with public aid referred to in Article 11(4) of Regulation No 2371/2002 [- GT_a] and, second, by 35% of the total tonnage of vessels of more than 100 GT entering the fleet with public aid granted, referred to in Article 13(1)(b)(ii) of Regulation No 2371/2002 [- 0.35 GT_{100}] and increased, first, by the total tonnage increases granted under the provisions of Article 11(5) of Regulation No 2371/2002 (+ GTS) and, second, as the result of the re-measurement of the fleet (+ Δ (GT - GRT)).

63 The Commission takes the view that by introducing the compensation scheme for entries and exits of the fleet, laid down in Article 13 of Regulation No 2371/2002, the Council has limited the real fleet levels, which the argument put forward by the Kingdom of Spain appears not to take into account. That limit is independent of the obligation not to exceed the reference levels laid down in Article 11(2) of Regulation No 2371/2002, which also leads to a limit on the real fleet level of each Member State.

64 As regards the Kingdom of Spain's argument that Article 7 of the contested regulation prevents account reductions without public aid to the Spanish fishing fleet supposedly made since 1997 from being taken into account to compensate for new entries, the Commission replies that the words 'from 1 January 2003' in Article 13 of Regulation No 2371/2002 applies both to the entry of new capacities in the fleet and to the obligation to withdraw which those entries require. Therefore, it is Article 13 which prevents the withdrawal of capacities prior to that date from being taken into account.

65 Therefore, the Kingdom of Spain's claims do not have any relationship to Article 7 of the contested regulation and fail to have regard for the provisions of Article 13 of

Regulation No 2371/2002. In reality, those claims concern the scheme approved by the Council which, contrary to the Kingdom of Spain's assertions, has not established any connection between the achievement by a Member State of the objectives of the fourth MAGP and the obligations laid down in Article 13. The Kingdom of Spain has not challenged Regulation No 2371/2002, which established the scheme, in good time.

Findings of the Court

66 It must be recalled that, in accordance with the principle of the hierarchy of norms, an implementing regulation may not derogate from the rules contained in the act to which it gives effect (Case 38/70 *Deutsche Tradax* [1971] ECR 145, paragraph 10, *Spain* v *Commission*, cited in paragraph 61 above, paragraph 20, and Case T-64/92 *Chavane de Dalmassy and Others* v *Commission* [1994] ECR-SC I-A-227 and II-723, paragraph 52). Therefore, it must be determined whether the provisions of Article 7 (1) of the contested regulation are in accordance with Article 13 of Regulation No 2371/2002 which they implement.

67 It is clear from the parties' written submissions that they differ as to the interpretation of Article 13. According to the Commission, the words 'from 1 January 2003' in Article 13(1) refer both to the entries into the fishing fleet and withdrawals to compensate for them, so that only withdrawals made after that date may be taken into account. By contrast, the Kingdom of Spain takes the view that all withdrawals of capacity from the fishing fleet of a Member State, including withdrawals prior to 1 January 2003, are capable of compensating for an entry in the fleet made after that date. Thus, according to that interpretation, the only limit imposed on Member States' fleets by Regulation No 2371/2002 is that provided for in Article 11(2), namely the reference levels established by the Commission for each Member State pursuant to Article 12(1) of that regulation.

68 It must be observed that Article 7(1) of the contested regulation is consistent with the Commission's interpretation of Article 13(1) of Regulation No 2371/2002. A Member State complies with the mathematical formula in Article 7(1) of the contested regulation only by ensuring that the entry of new capacity into its fleet, from 1 January 2003, is compensated for by withdrawals of capacity of at least the same amount, also made after that date. Therefore, in order to determine the merits of this plea it is appropriate to examine whether the interpretation of Article 13 of Regulation No 2371/2002 suggested by the Commission is correct.

69 The Court considers that that is indeed the case, for the following reasons.

70 First, the very logic of a scheme of compensation for entries into the fishing fleet by equivalent withdrawals necessarily requires that entries and withdrawals must be taken into account from one and the same date. The opportunity to compensate for new entries by withdrawals made prior to that date might lead to double compensation, where the earlier withdrawals have already been compensated for by earlier entries. The Kingdom of Spain's interpretation of Article 13 of Regulation No 2371/2002, according to which entry of new capacity into the fishing fleet may be compensated for not only by new exits but also withdrawals made since 1997 and not compensated for by equivalent entries, does not call that logic into question but seeks to move the date from which the balance of entries and exits is to be established, by backdating it to 1997. As the Commission rightly points out, such an interpretation has no basis in Article 13(1) of Regulation No 2371/2002, which requires the balance of entries and exits to be established from 1 January 2003.

71 Second, it is clear from recital 12 in the preamble to Regulation No 2371/2002 that the establishment of 'national entry/exit schemes' is among the specific measures to facilitate the achievement of the objective of reducing the Community fishing fleet, which also include establishing reference levels for fishing capacity which must not

be exceeded. An interpretation of Article 13 of Regulation No 2371/2002, according to which a Member State could compensate for entries of vessels into its fishing fleet made after 1 January 2003 with withdrawals not compensated for prior to that date, would be contrary to that objective. Such an interpretation would permit a Member State, within the framework of its national entry/exit scheme, to increase the capacity of its fishing fleet as compared with that existing on 1 January 2003 and, therefore, would prevent the attainment of the objective laid down by Regulation No 2371/2002 which is the overall reduction of the Community fishing fleet.

72 Third, the reference in Article 13(1) of Regulation No 2371/2002 to 'previous' withdrawals which are to be taken into account in no way implies that those withdrawals may be prior to 1 January 2003. That word is merely designed to exclude the possibility of compensation for an entry by a withdrawal subsequent to it. Such a possibility, which is not excluded in a simple entry/exit compensation scheme, would be contrary to the objective of reducing the Community fishing fleet, since it would entail an increase in the fleet, even if it were only temporary, so long as the exit to compensate for a previous entry had not been made. Moreover, such a possibility could be the cause of a multitude of practical problems, particularly where a planned future exit, intended to compensate for an entry already made, did not take place.

73 Fourth, the interpretation of Article 13 of Regulation No 2371/2002 put forward by the Commission is confirmed by Council Regulation (EC) No 1242/2004 of 28 June 2004 granting derogations to the new Member States from certain provisions of Regulation (EC) No 2371/2002 relating to reference levels of fishing fleets (OJ 2004 L 236, p. 1). Regulation No 1242/2004 did not establish reference levels for the Member States concerned, as the view was taken that it would be superfluous since maintaining the capacity of the fishing fleet at the time of their accession on 1 May 2004 is fully implemented by the entry/exit scheme provided for in Article 13 of Regulation No 2371/2002 (see recitals 2, 3 and 4 in the preamble to Regulation No 1242/2004). If, as the Kingdom of Spain submits, the only limit imposed by Regulation No 2371/2002 on the Member States was that relating to compliance

with the reference levels, Regulation No 1242/2004 ought to have fixed reference levels for the new Member States too. That development appears, therefore, to confirm the approach put forward by the Commission, according to which the reference levels are only necessary for the Member States who exceeded them on 1 January 2003, and which will become superfluous once all the Member States comply with them.

74 Fifth, the interpretation of Article 13 put forward by the Commission is confirmed by the preparatory documents for Regulation No 2371/2002. It is clear from document No 15414/02 of the Council Presidency of 12 December 2002, which summarised the positions of the various national delegations on the draft which then became Regulation No 2371/2002, and which was made public via the Council's register of documents, that six Member States, namely the Hellenic Republic, the Kingdom of Spain, the French Republic, the Republic of Finland, the Italian Republic and the Portuguese Republic had submitted that it was clear from Article 12 of the draft (now Article 13 of Regulation No 2371/2002) that the aim is to avoid exceeding the reference levels. The Court decided at the hearing to place that document on the case-file, after providing a copy of it in the language of the case to the parties and having invited them to submit any observations, which was recorded in the minutes of the hearing. The Kingdom of Spain did not comment on that document.

75 Likewise, the European Parliament, in its legislative resolution on the same draft (legislative proposal for a Council regulation on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (COM(2002) 185 — C5-0313/2002 — 2002/0114(CNS) (OJ 2004 C 27 E, p. 112)), had also formulated an amendment No 42 which sought to replace the words 'at any time, the total fishing capacity of entries into the fleet shall not exceed the total fishing capacity of exits from the fleet' in the draft regulation submitted by the Commission to the Council with the words 'the reference levels are not exceeded'. It must be stated that those proposals were not accepted by the Council in the version finally adopted of Article 13 of Regulation No 2371/2002.

76 As regards the Kingdom of Spain's argument alleging that Member States which have fully complied with the reference levels are penalised by the transformation of the capacity of their fishing fleets existing on 1 January 2003 into a threshold which from then on must not be exceeded, it must be stated, in the light of the foregoing considerations, that that is a direct consequence of Article 13 of Regulation No 2371/2002. As the Commission rightly observes, the Kingdom of Spain did not challenge Article 13 in good time, nor did it raise a plea of illegality against it before the Court.

77 It follows that, contrary to the Kingdom of Spain's submission, the provision in Article 7(1) of the contested regulation does not infringe Article 13 of Regulation No 2371/2002. Therefore, the second plea must be rejected as unfounded.

The third plea: infringement of the principle of the hierarchy of norms, in as far as Article 7(1) of the contested regulation infringes the provisions of Article 11 of Regulation No 2371/2002

Arguments of the parties

78 The Kingdom of Spain points out that Article 11(5) of Regulation No 2371/2002 expressly provides that the Member States need not take into account the increase in tonnage of fishing vessels of five years of age or more resulting from modernisation over the main deck to improve safety on board, working conditions, hygiene and product quality in order to establish the balance of entries and exits referred to in Article 13. Article 7(1) of the contested regulation includes, among the factors to be taken into consideration for determining the capacity in tonnage of the Member States' fishing fleets, the GT_s which corresponds to the increase in

question. Accordingly, by including that factor, which should be excluded in accordance with the provisions of Article 11(5) of Regulation No 2371/2002, Article 7 of the contested regulation infringes the principle of the hierarchy of norms and the case-law of the Court set out in paragraph 61 above.

79 The Commission observes that this plea shows that the Kingdom of Spain has not grasped the scope of Article 7(1) of the contested regulation. According to the Commission, if the GT_s factor had not been included in the mathematical formula laid down in that provision, the tonnage increase owing to modernisation would have to be compensated for by an exit from the fleet of the same amount of capacity. That consequence would have led to a result contrary to that intended by Article 11(5) of Regulation No 2371/2002. Therefore, it was necessary to include the GT_s factor preceded by a plus sign in the formula contained in Article 7(1) of the contested regulation. That article simply converted the exclusion from consideration of the increases in capacity deriving from the modernisation of vessels, provided for in Article 11(5) of Regulation No 2371/2002, into a mathematical formula.

Findings of the Court

80 As the Commission rightly observed, this plea is based on an incorrect understanding of the effect of the mathematical formula referred to in Article 7(1) of the contested regulation. In order to comply with that formula each Member State must ensure that the capacity in tonnage of its fishing fleet (GT_t) remains permanently less than or equal to that existing on 1 January 2003 (GT_{03}).

81 The modernisation of fishing vessels referred to in Article 11(5) of Regulation No 2371/2002 entails an increase in the capacity of the fleet (GT_s), which means that

the effective capacity (GT_t) becomes, by the addition of the increase in question, greater than that existing on 1 January 2003 (GT_{03}). In order to maintain the equilibrium, the formula referred to in Article 7(1) of the contested regulation provides that the factor GT_t is compared to the factor GT_{03} plus the factor GT_s ($GT_{03} + GT_s$).

82 It follows, contrary to the Kingdom of Spain's submissions, that the obligation arising from Article 11(5) of Regulation No 2371/2002 not to take account of the increases in capacity referred to by that provision requires the addition of the factor GT_s to the factor GT_{03} in the formula laid down in Article 7(1) of the contested regulation. Otherwise the provisions of Article 11(5) would be infringed, since the Member State concerned would be obliged in that case to withdraw a capacity at least equal to the increase owing to modernisation from its fishing fleet in order to reduce its capacity (GT_t) and not to exceed the capacity existing on 1 January 2003 (GT_{03}).

83 It is clear from the foregoing considerations that this plea must be rejected as unfounded.

The fourth plea: infringement of the principle of the protection of legitimate expectations

Arguments of the parties

84 The Kingdom of Spain relies on an infringement of the principle of the protection of legitimate expectations since the contested regulation is applicable retroactively, that is from 1 January 2003, which might adversely affect the parties concerned. In

its reply, the Kingdom of Spain stated that the damage to the parties concerned arose from the introduction, by the contested regulation, of a new limit to the real level of the fishing fleet not provided for in Regulation No 2371/2002. In those circumstances, the Kingdom of Spain takes the view that the argument that the retroactive effect of the contested regulation is justified, since it merely establishes the implementing rules for Regulation No 2371/2002 entered into force on 1 January 2003, is not valid because any parties concerned could not guess the new limits that the Commission intended to introduce.

85 The Commission submits, as its principal argument, that that plea is manifestly inadmissible as it does not comply with Article 38(1)(c) of the Rules of Procedure of the Court of Justice and the related case-law. According to the Commission, the basic legal and factual particulars on which this plea is founded do not appear anywhere in the originating application, since the Kingdom of Spain merely puts forward damage which is purely hypothetical arising from the retroactive effect of the contested regulation for the parties concerned, without clearly identifying the latter or explaining the nature and origin of the damage they suffered.

86 In the alternative, the Commission takes the view that this plea is unfounded. The case-law allows that a Community act may exceptionally take effect at a point in time before its publication where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (Case 98/78 *Racke* [1979] ECR 69, paragraph 20, and Case 99/78 *Weingut Decker* [1979] ECR 101, paragraph 8; Case C-337/88 *SAFA* [1990] ECR I-1, paragraph 13; Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 17; Case C-244/95 *Moskof* [1997] ECR I-6441, paragraph 77; and Case C-110/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 151). In this case, as the sole purpose of the contested regulation is to lay down the implementing rules for the obligations imposed by Regulation No 2371/2002 without adding any new element to it, the date of application of the contested regulation can only be the date on which Regulation No 2371/2002 comes into force, that is 1 January 2003.

87 The Commission observes that the Kingdom of Spain's argument that the contested regulation incorporates measures not provided for in Regulation No 2371/2002 is based on an incorrect premiss, since the new limit alleged to be introduced by the reference in the contested regulation to the real level of the fishing fleet is only the application of the entry/exit scheme provided for in Article 13 of Regulation No 2371/2002, as the Commission explained in its reply to the second plea.

Findings of the Court

88 Article 38(1)(c) of the Rules of Procedure of the Court of Justice provides that all original applications are to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. That provision is set out in identical terms in Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, and the two provisions simply repeat a requirement in Article 21 of the Statute of the Court of Justice which is applicable to actions brought before the Court of Justice and to those brought before the Court of First Instance alike (Case C-214/05 P *Rossi* v *OHIM* [2006] ECR I-7057, paragraph 36).

89 It follows from the provisions cited above that the basic factual and legal particulars on which the case is based must be indicated coherently and intelligibly in the application itself and must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application (Case C-178/00 *Italy* v *Commission* [2003] ECR I-303, paragraph 6, and judgment of 14 October 2004 in Case C-55/03 *Commission* v *Spain*, not published in the ECR, paragraph 23). Simply pleading the principle of Community law whose infringement is alleged, without stating the legal and factual particulars on which that allegation is based, does not satisfy that requirement (see, to that effect, Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraph 51).

90 In this case, the Kingdom of Spain simply stated in its originating application that setting the date on which the contested decision took effect on 1 January 2003 constituted an infringement of the principle of the protection of legitimate expectations, since it could have entailed harm to the parties concerned, but does not indicate the factual and legal particulars to identify the anticipated damage or the parties concerned. In those circumstances, as the Commission rightly observes, this plea does not satisfy the requirements of the provisions cited above in the Rules of Procedure of the Court of Justice and the Court of First Instance and must be rejected as inadmissible.

91 In any event, the arguments put forward by the Kingdom of Spain in its reply in support of the admissibility of this plea, according to which the damage suffered by the parties concerned arises from the introduction of a new limit to the Member States' fishing fleets in the contested regulation which is not provided for in Regulation No 2371/2002, is simply a repetition of the arguments put forward in the second plea alleging the infringement of the principle of the hierarchy of norms. As already stated that plea is unfounded and must be rejected.

92 Furthermore, in so far as the entry/exit scheme for the fishing fleet, established by Article 13 of Regulation No 2371/2002, entered into force on 1 January 2003, the application of the contested regulation from that date cannot, contrary to the Kingdom of Spain's submissions, infringe the alleged legitimate expectations of the parties concerned.

93 It follows from all of the foregoing that this plea must be rejected.

The fifth plea: the contested regulation is arbitrary

Arguments of the parties

94 The Kingdom of Spain submits that Article 6 of the contested regulation limits the withdrawals of vessels which may be taken into account to the period from 1 January 2000 to 31 December 2002 inclusive, by introducing a limit which does not appear in Regulation No 2371/2002. According to the Kingdom of Spain, the reference levels refer, like the MAGP, to 1997. Furthermore, it is apparent from the expression 'is compensated by the previous withdrawal without public aid', used in Article 13(1)(a) and (b) of Regulation No 2371/2002, that there is no temporal limit as regards the withdrawals which may be taken into account. Accordingly, the limit applied by the contested regulation is arbitrary.

95 The Kingdom of Spain takes the view that the reference levels applied to it by the contested regulation are inadmissible, since the Commission has inserted a new rule into that regulation which makes the reference level useless as a criterion for managing the fleet and penalises the Kingdom of Spain with a reduction of 240 000 GT, while substantial tonnage increases have been granted to the Netherlands, Ireland and the United Kingdom.

96 The approach adopted by the Commission arbitrarily disregards the legitimate interests of the Kingdom of Spain by confusing the concepts of the reference level and the real level of the fleet. The Commission's wide discretion in the evaluation of complex economic situations does not release it from the obligation to comply with the Council's and its own regulations, and does not justify either a restrictive interpretation of the rights that the Kingdom of Spain has acquired by achieving the

fourth MAGP's objectives or placing the Kingdom of Spain on the same footing as Member States who have failed to fulfil their obligations by according it the same treatment, with respect to withdrawals, which is degrading and unacceptable.

97 The Commission points out that Article 6 of the contested regulation constitutes an exception to Article 13 of Regulation No 2371/2002 which does not provide for transitional provisions and which in principle prohibits, from 1 January 2003, any entry of a vessel into the fleet which is not matched by a withdrawal of at least the same amount of capacity. Article 6 merely ensures the transition between the former entry/exit scheme and the new system by taking account of administrative authorisations for construction of vessels previously granted by a Member State. Thus, Article 6 safeguards the right of the holders of an authorisation granted between 1 January 2000 and 31 December 2002 to enter, without a prior withdrawal of the same amount of capacity, their new vessel into the fishing fleet of the Member State concerned. That provision thereby protects the legitimate expectations of ship owners who have an authorisation for construction.

98 Taking account of authorisations granted during a limited period is justified by the exceptional nature of Article 6 of the contested regulation. The Commission points out, in that connection, that in its original draft, that period was fixed at one year, that is from 1 January to 31 December 2002. However, as a result of the observations from various Member States, including the Kingdom of Spain, and information transmitted at the Commission's request by the competent national authorities for fisheries, the Commission decided to extend the reference period from one to three years.

99 That three-year period satisfied the objective criteria, namely the time between the grant of administrative authorisation for construction and the entry of the vessel into the fishing fleet, estimated by the Commission on the basis of its experience, taking account of all the intermediate stages, such as the conclusion of the contract, construction and the launch of the vessel, to be approximately three years.

Moreover, setting the beginning of the reference period at 1 January 2000 corresponded to the beginning of the multi-annual plan relating to structural measures in the fishing sector approved for the period 2000-2006.

100 It follows that the Kingdom of Spain's assertion that the beginning of the reference period for taking account of administrative authorisations granted before 1 January 2003 should date back to 1997 cannot be accepted.

101 The Commission takes the view that, by that assertion, the Kingdom of Spain seeks to extend an exception, provided for in cases in which a national administrative authorisation had previously been granted and which had not been followed up before 1 January 2003 by the actual entry of a new vessel into the fleet, to all the withdrawals from the fleet made since 1997. In any event, the Kingdom of Spain has claimed only that administrative authorisations for construction had been granted before 1 January 2000 in respect of vessels which had not yet entered into the fleet on 1 January 2003.

102 The Commission submits that, by that assertion, the Kingdom of Spain seeks to generalise the exceptional transitional provision in Article 6 of the contested regulation, contrary to Article 13 of Regulation No 2371/2002 and the obligations incumbent on the Commission at the time the implementing rules for that article were adopted.

103 The Commission recalls, furthermore, the wide discretion enjoyed by the Community legislature, according to the case-law, in circumstances which necessitate the evaluation of a complex economic situation, as is the case as far as the common agricultural and fisheries policies are concerned (Case C-4/96 *NIFPO and Northern Ireland Fishermen's Federation* [1998] ECR I-681, paragraphs 41 and

42, and Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 44). The Commission takes the view that in this case the Kingdom of Spain has not produced the slightest evidence that it has manifestly exceeded the limits of that discretion.

104 Finally, the Commission states that the tonnage increases for the other Member States, relied on by the Kingdom of Spain, correspond to the revision of the objectives of the fourth MAGP, requested by those States before 31 December 2002 and in respect of which no decision had yet been adopted on 1 January 2003. The Kingdom of Spain did not make such a request.

Findings of the Court

105 In regard to the common agricultural policy which, by virtue of Article 32(1) EC, also includes fisheries, the case-law recognises the Community institutions as having a discretionary power which reflects the responsibilities which the Treaty imposes on them (Case 265/85 *Van den Bergh en Jurgens* v *Commission* [1987] ECR 1155, paragraph 31; Case C-256/90 *Mignini* [1992] ECR I-2651, paragraph 16, and *NIFPO and Northern Ireland Fishermen's Federation*, cited in paragraph 103 above, paragraph 57).

106 However, the case-law also recognises that if the examination of the provisions of a measure show a difference in treatment which is arbitrary, that is devoid of adequate justification and not based on objective criteria (Case 106/81 *Kind* v *EEC* [1982] ECR 2885, paragraph 22, Case C-370/88 *Marshall* [1990] ECR I-4071, paragraph 24, and Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981, paragraph 82), that measure must be annulled on the ground that it infringes the prohibition on discrimination referred to in the second subparagraph of Article 34(2), which requires that comparable situations are not treated in a different manner unless the difference in

treatment is objectively justified (*NIFPO and Northern Ireland Fishermen's Federation*, cited in paragraph 103 above, paragraph 58, and Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 67).

107 Therefore, it is necessary to determine whether the provision in Article 6 of the contested regulation reveals an arbitrary difference in treatment. In that connection, it must be observed that that provision is an exception to the rule laid down in Article 13 of Regulation No 2371/2002 which requires account to be taken, for the purposes of the compensation scheme of entries and exits, of the real capacity of the fishing fleet of a Member State existing on 1 January 2003. Article 6 of the contested regulation, together with Annex II thereof laying down the rules applicable to the calculation of fishing capacity in terms of tonnage (GT_{03}) and power (KW_{03}) on 1 January 2003, has the result that fishing vessels entering into the fleet after that date are treated as already forming part of the fleet at that date, where the conditions laid down by Article 6, relating to the existence of an administrative authorisation for construction held by the Member State concerned between 1 January 2000 and 31 December 2002 and compliance with a maximum period of three years between the date of that decision and the entry of the vessel into the fleet, are satisfied.

108 As it is clear from the eighth recital in the preamble to the contested regulation and the explanations provided by the Commission, that exception was introduced for the purposes of the transition between the old entry/exit scheme and the new system established by Regulation No 2371/2002. More specifically, by the exception in question, the Commission sought to ensure the protection of the legitimate expectations of ship owners who held authorisations for construction of a fishing vessel in the national entry/exit scheme established and notified to the Commission in accordance with Article 6 of Decision 97/413, but whose vessel was unable to enter into the fishing fleet of the Member State concerned before 1 January 2003. Taking account of the lack of transitional provisions to regulate that situation in Regulation No 2371/2002, the entry of a vessel into the fishing fleet of the Member State concerned after 1 January 2003 would have been possible without that exception only if it had been accompanied by the withdrawal of another vessel of at least equal capacity.

109 Since such a condition was not foreseeable at the time the authorisation was granted, its subsequent imposition would have infringed the legitimate expectations of the holders of an administrative authorisation who had invested substantial sums in the construction of a fishing vessel whose entry into the fishing fleet would have become problematic. Therefore, Article 6 of the contested regulation enabled the entry into the fishing fleet of such a vessel after 1 January 2003, subject, however, to the condition that the administrative authorisation for construction was issued in the reference period between 1 January 2000 and 31 December 2002, and that the vessel was registered at the latest three years after the date of the administrative decision authorising its construction. The reference period of one year (from 1 January to 31 December 2002) originally proposed by the Commission was extended to three years, at the request of a number of Member States to coincide with the beginning of the MAGP for the period 2000-2006. Furthermore, the imposition of a maximum period of three years between the date on which the decision granting the administrative authorisation for construction was made and the entry of the new vessel into the fishing fleet corresponds, as the Commission argued, to the normal duration for the construction of such a vessel.

110 Taking account of the foregoing, the exception granted by Article 6 of the contested regulation cannot be regarded as being arbitrary. On the contrary, it is based on objective criteria and is fully justified by the need to protect the legitimate expectations of holders of authorisations for the construction of fishing vessels issued before the entry into force of Regulation No 2371/2002.

111 The Kingdom of Spain's argument cannot cast doubt on that finding. It must be observed, in that connection, that the scope of the argument relating to this plea, set out in the Kingdom of Spain's pleadings, is difficult to grasp and the Kingdom of Spain appears to repeat the assertions, which are unfounded, put forward in support of the second plea. More specifically, the Kingdom of Spain submitted in its pleadings that the contested regulation allowed account to be taken of withdrawals made during the period from 1 January 2000 and 31 December 2002, although that period should have dated back to 1997. In that connection, it must be stated, first, that taking account of withdrawals made in the abovementioned period is

authorised by the contested regulation only in so far as those withdrawals led to the grant of corresponding administrative authorisations for construction and that the vessels to be built had not yet entered into the fishing fleet on 1 January 2003.

112 Furthermore, the extension of the reference period to 1997 would be effective only if at the same time the period between the grant of the authorisation and registration of the vessel provided for in Article 6 of the contested regulation was set at a minimum of six years instead of three. At first sight such a period for the construction of a fishing vessel appears to be excessive and does not correspond to the normal period for the construction of such a vessel. Furthermore, in its pleadings, the Kingdom of Spain did not deal at all with the question of the construction time of a fishing vessel and has not therefore stated the reasons why it would be necessary to set a longer period for construction.

113 At the hearing the Kingdom of Spain stated that setting a five-year period for construction was necessary for Spain, on the grounds that, first, the Spanish legislation applicable before the entry into force of Regulation No 2371/2002 allowed holders of authorisations for construction a period of five years within which to construct a new vessel and have it entered into the Spanish fishing fleet and, second, the majority of applications for construction of such vessels in Spain and the limited number of shipyards available meant that, in Spain, the average period for construction of vessels of that type was in fact five years.

114 The Commission replied that it had not received any objective and precise information from Member States requesting an extension of the initial construction period, enabling the exact length of the extension to be granted to be determined. In those circumstances, the Commission reached the conclusion, in the light of its experts' estimates, that a period of three years was amply sufficient for the construction of a vessel of that type.

115 The Kingdom of Spain contests those assertions, arguing that its delegation expressed its views on that issue during the Committee meetings preceding the adoption of the contested regulation. It is clear, from the minutes of the Committee meeting of 16 July 2003, that the Kingdom of Spain did in fact indicate at the meeting that the period proposed by the Commission was too short and, therefore, that the beginning of that period should be backdated to 1998. However, as the Commission submitted, without being contradicted, the Kingdom of Spain has not put forward either the arguments relied on at the hearing or any other reasoning in support of its position.

116 In those circumstances, the Court finds that the Kingdom of Spain's arguments, put forward for the first time at the hearing, are out of time and, therefore, inadmissible. In any event, those arguments are not capable either of calling into question the reasonable and non-arbitrary nature of the three-year period laid down in Article 6 of the contested regulation, or of establishing that the duration of that period is the result of a manifest error of assessment by the Commission. Although the Commission was obliged to set the length of the period in question on the basis of objective criteria and in a non-arbitrary manner, it did not have any obligation to approve all of the Member States' proposals relating to it which, moreover, would have been impossible given the disparate nature of the various national laws in that field.

117 Finally, as regards the increases in the reference levels granted by the Commission to other Member States but not to Spain, it must be stated that they are not such as to establish that Spain was treated in an arbitrary and discriminatory manner. In so far as the Kingdom of Spain itself states that the capacity of its fishing fleet on 1 January 2003 was less than its reference level, an increase in the latter would have been of no benefit to it and would, therefore, have been pointless, since, as stated in the examination of the second plea (see, in particular, paragraphs 69 to 76 above), the compensation scheme for entries and exits established by Regulation No 2371/2002 requires that the capacity of a Member State's fishing fleet exceed its level on 1 January 2003.

118 It is clear from all of the foregoing considerations that this plea must be rejected as unfounded, together with the action in its entirety.

Costs

119 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Kingdom of Spain to pay the costs.

Vilaras Dehousse Šváby

Delivered in open court in Luxembourg on 3 May 2007.

E. Coulon M. Vilaras

Registrar President