JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
13 March 2003 *

In Case T-125/01,

José Martí Peix SA, established in Huelva (Spain), represented by J.-R. García-Gallardo Gil-Fournier and D. Domínguez Pérez, lawyers,

applicant,

v

Commission of the European Communities, represented initially by L. Visaggio, and subsequently by S. Pardo Quintillán, acting as Agents, assisted by J. Guerra Fernández, lawyer, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

APPLICATION to annul the Commission decision of 19 March 2001 reducing the aid granted to José Martí Peix SA by Commission Decision C(91) 2874 final/11 of 16 December 1991, as amended by Commission Decision C(93) 1131 final/4 of 12 May 1993 for a project to create a joint enterprise in the fisheries sector,

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

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,
Registrar: B. Pastor, Deputy Registrar,

having regard to the written procedure and further to the hearing on 28 November 2002,

gives the following

Judgment

Legislative framework

1 On 18 December 1986 the Council adopted Regulation (EEC) No 4028/86 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7). That regulation, as amended in turn by

Council Regulation (EEC) No 3944/90 of 20 December 1990 (OJ 1990 L 380, p. 1), by Council Regulation (EEC) No 2794/92 of 21 September 1992 (OJ 1992 L 282, p. 3) and by Council Regulation (EEC) No 3946/92 of 19 December 1992 (OJ 1992 L 401, p. 1), provides in Title VIa (Articles 21a to 21d) that the Commission may grant various kinds of financial aid to joint enterprise fisheries projects, of amounts differing according to the tonnage and age of the vessels in question, in so far as those projects satisfy the conditions set by the regulation.

2 'Joint enterprise' is defined, in Article 21a of Regulation No 4028/86, as follows:

'For the purposes of this Title, "joint enterprise" means a company incorporated under private law comprising one or more Community shipowners and one or more partners from a third country with which the Community maintains relations, associated under a joint enterprise agreement set up for the purpose of exploiting and, where appropriate, using the fishery resources of waters falling within the sovereignty and/or jurisdiction of such third country, primary consideration being given to the supply of the Community market.'

3 Article 21d(1) and (2) of Regulation No 4028/86 lays down the detailed rules governing the submission of a request for financial aid and the procedure for granting it. Article 21d(3) states that, for projects qualifying for financial aid, the beneficiary is to forward to the Commission and to the Member State a periodic report on the activities of the joint enterprise.

4 Article 44(1) of Regulation No 4028/86 provides:

'1. Throughout the period for which aid is granted by the Community, the authority or agency appointed for the purpose by the Member State shall send to the Commission on request all supporting documents and all documents showing that the financial or other conditions imposed for each project are satisfied. The Commission may decide to suspend, reduce or discontinue aid, in accordance with the procedure laid down in Article 47:

— if the project is not carried out as specified, or

— if certain conditions imposed are not satisfied, or

— ...

Decisions shall be notified to the Member State concerned and to the beneficiary.

The Commission shall take steps to recover any sums unduly paid.'

5 On 21 June 1991 the Commission adopted Regulation (EEC) No 1956/91 laying down detailed rules for the application of Regulation No 4028/86 as regards measures to encourage the creation of joint enterprises (OJ 1991 L 181, p. 1).

6 Article 5 of Regulation No 1956/91 provides that Community aid is not to be paid until the joint enterprise has been created in the third country concerned and the transferred vessels have been definitively removed from the Community register of fishing vessels and registered at a port in the third country in which the joint enterprise is based. It adds that, without prejudice to those conditions, where Community aid consists partly or fully of a capital subsidy, an initial payment of not more than 80% of the total amount of the subsidy may be made. The application for payment of the balance of the subsidy is to be accompanied by the first periodic progress report on the activity of the joint enterprise. The payment application is to be submitted not earlier than 12 months after the date of the first payment.

7 Article 6 of Regulation No 1956/91 provides that the periodic report referred to in Article 21d(3) of Regulation No 4028/86 must be sent to the Commission every 12 months for three consecutive years and must contain the particulars specified in Annex III to Regulation No 1956/91, presented in the form shown in that annex.

8 Article 7 of Regulation No 1956/91 provides:

'Member States shall keep at the Commission's disposal, for a period of three years following the payment of the balance of the Community aid, all the documents, or certified copies thereof, used for calculation of the aid provided for in Regulation (EEC) No 4028/86 together with the complete files on the applicants.'

9 Part B of Annex I to Regulation No 1956/91 includes a note, headed 'important', which reads as follows:

'The applicant/applicants is/are reminded that, for a joint enterprise to benefit from a premium within the meaning of Regulation (EEC) No 4028/86 as amended by Regulation (EEC) No 3944/90, the enterprise must, in particular:

— concern vessel(s) measuring more than 12 metres between perpendiculars, which are technically suited to the fishing operations planned, have been in operation for more than five years, fly the flag of a Member State, are registered in a Community port and are to be transferred definitively to the third country concerned under the joint enterprise...;

— be intended to engage in the exploitation and, where applicable, value-added processing of fishery resources falling within the control or sovereignty of the third country concerned;

— envisage supplying the Community market by priority;

— be based on a contractual agreement to found a joint enterprise.'

10 On 18 December 1995 the Council adopted Regulation (EC, Euratom) No 2988/95 on the protection of the European Communities financial interests (OJ 1995 L 312, p. 1), which states, *inter alia*:

'*Article 1*

1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.

...

Article 3

1. The limitation period for proceedings shall be four years as from the time when the irregularity referred to in Article 1(1) was committed. However, the sectoral rules may make provision for a shorter period which may not be less than three years.

In the case of continuous or repeated irregularities, the limitation period shall run from the day on which the irregularity ceases. In the case of multiannual programmes, the limitation period shall in any case run until the programme is definitively terminated.

The limitation period shall be interrupted by any act of the competent authority, notified to the person in question, relating to investigation or legal proceedings concerning the irregularity. The limitation period shall start again following each interrupting act.

However, limitation shall become effective at the latest on the day on which a period equal to twice the limitation period expires without the competent authority having imposed a penalty, except where the administrative procedure has been suspended in accordance with Article 6(1).'

Background to the proceedings

11 In October 1991 the company José Martí Peix SA (hereinafter 'the applicant') submitted to the Commission, through the Spanish authorities, an application for Community financial aid under Regulation No 4028/86, for a project to create a joint Spanish-Angolan fisheries enterprise. That project provided for the transfer, with a view to fishing activities, of three vessels — the *Pondal*, the *Periloja* and the *Sonia Rosal* — to the joint enterprise created by the applicant, the Portuguese company Iberpesca — Sociedades de Pesca Ltda and an Angolan partner, Empromar N'Gunza.

12 By decision of 16 December 1991 (hereinafter 'the aid decision') the Commission granted the project referred to in the preceding paragraph (project SM/ESP/17/91, hereinafter 'the project') Community aid for a maximum amount of ECU 1 349 550. That decision provided that the Kingdom of Spain would supplement the Community aid by an aid payment of ECU 269 910.

13 In November 1992 the joint enterprise, named Ibermar Empresa de Pesca Ltda, was created and registered in Luanda, Angola. In December 1992 the three vessels of the joint enterprise were registered at the port of Luanda.

14 By decision of 12 May 1993, in response to an application by the applicant, the Commission adopted a decision amending the decision to grant assistance. The amendment took the form of replacing the third country partner, Empromar N'Gunza, by the company Marang, Pesca and Industrias de Pesca Ltda.

15 On 18 May 1993 the Commission received via the Spanish authorities an application for payment of the first instalment of the aid, dated 10 May 1993. That application was accompanied by a set of documents and certificates relating to the creation of the joint enterprise, the registration of the vessels at the port of Luanda, their removal from the Community register and the obtaining of the required fishing licences.

16 On 24 June 1993 the Commission paid 80% of the aid.

17 On 20 May 1994 the applicant sent the Spanish authorities an application for payment of the balance of the aid. It attached to that application a first periodic

progress report on activity, for the period from 20 April 1993 to 20 April 1994. That report stated, *inter alia*:

'Our long-term objectives have had to be modified owing to the sinking of the *Pondal* on 20 July 1993. We immediately asked the Angolan authorities responsible for fisheries to replace it by another vessel of our fleet, but at the time of drafting this report we have not yet obtained the authorisation for that substitution...'

18 The Commission received the application referred to in paragraph 17 on 7 September 1994 and paid the balance of the aid on 14 September 1994.

19 On 6 November 1995 the Commission received the second periodic progress report, dated 19 June 1995, for the activity period from 20 May 1994 to 20 May 1995. That report referred to the sinking of the *Pondal* on 20 July 1993 and described the difficulties encountered in replacing that vessel, owing to the reluctance of the Angolan authorities.

20 By letter of 20 December 1996 the Commission, since it had not received the third periodic progress report, requested information on that subject from the Spanish authorities, which replied by letter of 22 January 1997 that the report was being drafted.

21 On 20 February 1997 the Spanish authorities received a letter from the applicant, dated 31 January 1997, in which it described the management difficulties experienced by the joint enterprise, caused by the demands made by the Angolan partner and, on the basis of those difficulties, sought a change in third country for

the vessels *Periloja* and *Sonia Rosal*. In that letter, the applicant notified the transfer of those two vessels to the joint enterprise Peix Camerún SARL and applied for authorisation to present the third periodic progress report on activity in the context of the latter enterprise.

22 By letter of 4 February 1997 received by the Commission on 5 March 1997, the Spanish authorities forwarded the requests made by the applicant, with the relevant documentation, and declared themselves in favour of those requests.

23 On 4 April 1997 the Commission replied to the Spanish authorities that the third periodic activity report should have been submitted in September 1996 and that, consequently, that report must be presented following on from the preceding reports and not in the new perspective proposed by the applicant.

24 By letter of 18 June 1997 the Commission asked the Spanish authorities to send the third periodic activity report as soon as possible.

25 In September 1997 the third periodic activity report, covering the period from 20 May 1995 to 20 May 1996, was received by the Commission. In it mention was made of the conduct of the Angolan partner which prevented the pursuit of normal fishing activities. It was stated that the most recent landings of fish from Angola took place in March 1995 and that, in the light of the difficulties arising from that conduct, the Community partners had decided to sell their shares in the joint enterprise to the Angolan partner and to repurchase the vessels which had been transferred to the project. The report mentioned that, after their repurchase, the vessels had been transferred by the applicant to a Nigerian port, where they had undergone repairs until 1996.

26 By letter of 6 March 1998 the applicant, in reply to a request by the Spanish authorities on 26 February 1998, provided the latter with clarifications as regards the implementation of the project. That letter stated that the joint enterprise's vessels had left Angolan waters during the first quarter of 1995. The documents annexed to that letter showed that the Community shipowners sold their shares in the joint enterprise to the Angolan partner on 3 February 1995.

27 By letter of 26 June 1998 the Commission asked the Spanish authorities to provide information concerning the state of the project. In reply to that letter, on 2 July 1998 those authorities sent the Commission the applicant's letter of 6 March 1998.

Pre-litigation procedure

28 In a letter of 26 July 1999 addressed to the applicant and to the Spanish authorities, Mr Cavaco, Director-General of the 'Fisheries' Directorate of the Commission (DG XIV), announced that, in accordance with Article 44(1) of Regulation No 4028/86, the Commission had decided to reduce the aid initially granted to the project on the ground that, in contrast to the requirements laid down in that regulation and by Regulation No 1956/91, the joint enterprise had not exploited for three years the fisheries resources of the third country mentioned in the decision to grant assistance. As regards the vessel *Pondal*, that letter stated that it was possible to deduce from the documents received by the Commission that the vessel had been exercising its activities from 20 April to 20 July 1993 — that is, for three months — when it sank, which justified a reduction in aid of ECU 160 417. Nevertheless, it added that the Commission's calculation was subject to obtaining information establishing that that sinking constituted a case of *force majeure*. As regards the *Periloja* and *Sonia Rosal*, it stated that the information available to the Commission showed that those two vessels had exercised their activities in Angolan waters on behalf of the joint

enterprise from 20 April 1993 to 20 April 1994 and from 20 May 1994 to 3 February 1995, the date the applicant sold its shares in the joint enterprise, namely for a total period of 21 months, which justified a reduction in the aid of ECU 114 520. In total, the planned reduction therefore amounted to ECU 274 937, the reimbursement of which the Commission intended to claim from the applicant, which had been paid the whole of the aid beforehand. The letter stated that, failing formal agreement to the proposed solution by the applicant within 30 days, the Commission would continue with the procedure for reducing the aid.

29 On 5 October 1999 the applicant sent the Commission its comments on the latter's letter of 26 July 1999. In essence, it provided information seeking to establish that the sinking of the *Pondal* was a case of *force majeure* and stated that it had tried to replace it by another vessel of its fleet but had not been able to do so because of the conduct of the Angolan authorities. As regards the *Periloja* and *Sonia Rosal*, it explained that the difficulties caused by the Angolan partner had obliged it to transfer the activity of those vessels to Cameroonian waters. It pointed out that this change had been notified to the Spanish authorities in January 1997. It stressed that the formal requirements for creating and operating the joint enterprise had been satisfied and that its activities had envisaged supplying the Community market by priority.

30 On 9 November 1999 a meeting took place between the Commission and the applicant.

31 Following that meeting, the applicant sent the Commission a statement of observations on 18 February 2000 in which it pleaded that the facts complained of by the Commission were time-barred and that the Commission had acted in breach of the principles of due care and of good administration.

32 By letter of 25 May 2000 addressed to the applicant and to the Spanish authorities, Mr Smidt, Director-General of the 'Fisheries' Directorate of the Commission, stated that a reading of the documents provided by the applicant on 5 October 1999 had indicated that the sinking of the *Pondal* occurred on 13 January 1993, and not on 20 July 1993 as the applicant had informed the Commission, and that in those circumstances the absence of any reference to that sinking in the application for payment of the first instalment of the aid presented by the applicant in May 1993 and the statement in the first and second periodic reports on the activities of the joint enterprise that the sinking took place on 20 July 1993 constituted irregularities of such a kind as to warrant discontinuing the part of the aid relating to the vessel in question. Since that part of the aid amounted to ECU 525 000 and the Commission confirmed its position as set out on 26 July 1999 as regards the two other vessels belonging to the joint enterprise, that letter proposed to take the total amount of the reduction of the aid to ECU 639 520. The letter also set out the Commission's objections as regards the applicant's claims concerning the time-bar on the proposed measures of reduction and recovery. It stated that if the applicant had not, within 30 days, notified its agreement to the proposed solution or provided information likely to warrant a change in the Commission's position, the Commission would continue the reduction and recovery procedures.

33 On 10 July 2000, the applicant sent the Commission its observations on the latter's letter of 25 May 2000. In essence, it stated that the *Pondal* sank on 13 January 1993 but that it was not removed from the Angolan register until 20 July 1993, which explained why the sinking was not mentioned in the application for payment of the first instalment of the aid and the reference to the latter date in the first periodic report on activity. As regards the two other vessels, it maintained that it was established that it had notified the change of third country to the Spanish authorities in January 1997. It also claimed it had acted in good faith in the matter.

34 On 19 March 2001 the Commission adopted a decision reducing the aid granted to the project to EUR 710 030 and ordering the applicant to reimburse it the amount of EUR 639 520 (hereinafter 'the contested decision').

Procedure

35 It is in that context that, by application lodged at the Registry of the Court of First Instance on 8 June 2001, the applicant brought an action seeking annulment of the contested decision.

36 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of the Rules of Procedure of the Court of First Instance, it put a question to the Commission in writing. The Commission replied within the period allowed.

37 The Court heard oral argument from the parties, together with their replies to questions put to them by the Court, at the hearing on 28 November 2002.

Forms of order sought

38 The applicant claims that the Court should:

— declare the application admissible;

— annul the contested decision;

— order whatever measure it deems appropriate in order for the Commission to comply with the obligations flowing from Article 233 EC and, in particular, to reconsider the matter;

— order the Commission to pay the costs.

39 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

Admissibility

40 Since the conditions for the admissibility of an application are a matter of public policy, the Court may examine them of its own motion, in accordance with Article 113 of the Rules of Procedure. It is therefore for the Court to review of its own motion the admissibility of the various heads of claim set out in the application.

41 In the present case, the Court observes that, by the third head of claim (see paragraph 38 above), the applicant requests that it issue directions to the Commission.

42 It is settled case-law that the Court of First Instance may not, in the exercise of its jurisdiction, issue directions to the Community institutions (Case C-5/93 P *DSM* v *Commission* [1999] ECR I-4695, paragraph 36; Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraph 83). In an action for annulment founded on Article 230 EC, the jurisdiction of the Community judicature is limited to reviewing the legality of the contested measure. If it annuls it, it is then for the administration concerned to adopt, in accordance with Article 233 EC, the necessary measures to comply with the judgment annulling that measure (Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 200, and *ADT Projekt* v *Commission*, cited above, paragraph 84).

43 The third head of claim must therefore be dismissed as inadmissible.

Substance

44 The applicant puts forward four pleas in law in support of its action. The first plea is founded on the limitation period. The second, third and fourth pleas, raised in the alternative, respectively allege breach of the principles of due care and of good administration, error of assessment and misinterpretation of Regulation No 4028/86 and breach of the principle of proportionality.

45 The Court considers it appropriate first to examine the third plea. The first, second and fourth pleas will then be examined successively.

Plea alleging error of assessment and misinterpretation of Regulation No 4028/86

46 In the context of that plea, the applicant claims that the contested decision, in so far as it discontinues the part of the aid relating to the *Pondal*, must be annulled on the ground that it is based on a factual error of assessment (first part of the plea) and on a misinterpretation of Regulation No 4028/86 (second part).

The first part of the plea

47 Under the first part of this plea, the applicant denies that it committed an irregularity as regards the sinking of the vessel *Pondal*.

48 First, it maintains that it never denied that the sinking occurred or attempted to hide it. On the contrary, it notified that fact on several occasions and provided all the necessary information both to the Commission and to the Spanish authorities. The Commission cannot claim that the applicant submitted false information by informing it that 20 July 1993 was the date of the sinking, since that date, on which the vessel was removed from the Angolan register, is as appropriate as the date of 13 January 1993, when the vessel physically disappeared, for the purpose of designating when it sank.

49 Second, the applicant states that the sinking of the *Pondal* was notified to the Commission in the joint enterprise's first periodic report on activity. There are several reasons for the absence of a reference to the sinking in the application for payment of the first instalment of the aid.

50 First, the documentation relating to that application was sent to the Spanish authorities in December 1992 and completed in January 1993. At that time, the applicant did not have precise details on the exact circumstances of the sinking, which were not known until 4 February 1993, and in order not to delay the beginning of the activities of the two other vessels, it chose to send its application for payment without waiting to learn those circumstances. Second, the vessel was not removed from the Angolan register until 20 July 1993, that is, following the presentation of the abovementioned application. Third, payment of the first instalment of the aid was subject to proof that the administrative steps relating to the creation of the joint enterprise and to the removal of the vessels from the Community register had been taken, and not to proof of the vessels' activities. Fourth, the two other vessels made it possible to continue the joint enterprise's activities while the applicant sought to replace the vessel which sank. In the light of those various factors, the fact that the sinking of the *Pondal* was notified to the Commission after the certificate of removal from the Angolan register was obtained, and not at the precise moment of its occurrence, is of no importance.

51 The Court observes that, according to the ninth recital in the preamble to the contested decision, the irregularity cited by the Commission as regards the *Pondal* lies in the fact that the applicant did not reveal the sinking of that vessel, which occurred on 13 January 1993, in its application of 10 May 1993 seeking payment of the first instalment of the aid and that, in the first periodic activity report accompanying the application for payment of the balance of the aid presented on 20 May 1994, it gave 20 July 1993 as the date when the vessel sank.

52 It is settled case-law that applicants for, and beneficiaries of, aid are subject to an obligation of information and good faith, which requires them to satisfy themselves that they are submitting to the Commission reliable information which is not liable to mislead it, without which the system of controls and evidence set up to determine whether the conditions for granting aid are fulfilled cannot function properly (Case T-216/96 *Conserve Italia* v *Commission* [1999] ECR II-3139, paragraph 71.) The Community judicature has pointed out the

importance of compliance with that obligation 'for the proper functioning of the system of controls set up to ensure proper use of Community funds' (Case C-500/99 P *Conserve Italia* v *Commission* [2002] ECR I-867, paragraph 100). In the absence of reliable information, aid could be granted to projects which do not fulfil the necessary conditions (Case T-216/96 *Conserve Italia* v *Commission*, cited above, paragraph 71).

53 In that context, the consistent provision of correct information concerning the vessels transferred to a project of a joint enterprise assumes particular importance. It must be pointed out that, under the applicable legislation (see, in particular, Part A of Annex I to Regulation No 1956/91), the amount of aid allocated to the promoter of the project depends on the number of vessels transferred to the joint enterprise, their tonnage and their age. The information concerning the vessels assigned to the joint enterprise therefore constitutes the basic data for the project being subsidised, as confirmed in the present case by the details contained in the annex to the decision to grant assistance and in the annex to the amending decision of 12 May 1993 on the identity and technical characteristics of the three vessels concerned. Accordingly, it falls to the beneficiary of the aid to inform the Commission correctly of any development concerning the vessels assigned to the project, in particular their ability to contribute to the attainment of the objectives assigned to the project in exchange for the grant of aid — *inter alia* the objective, in accordance with the applicable legislation (see Article 21a of Regulation No 4028/86 and Part B of Annex I to Regulation No 1956/91), to exploit and, where appropriate, use the fishery resources of the waters of the third country concerned, giving primary consideration to the supply of the Community market.

54 In the present case, the applicant does not dispute that the application for payment of the first instalment of the aid, received by the Commission in May 1993, made no reference to the sinking of the vessel *Pondal*, which occurred on 13 January 1993.

55 As regards the applicant's argument that it learned of the exact circumstances of the sinking of the *Pondal* only after it had sent the Spanish authorities the documents relating to that application in December 1992 and January 1993, it should be pointed out that, accepting the applicant's claim that it had no precise information about that sinking until 4 February 1993, on that date the Commission had not yet paid the first instalment of the aid. It is clear from the documents in the case that the certificate of the definitive removal of the vessel *Pondal* from the Community register, necessary for payment of that first instalment in accordance with Article 5 of Regulation No 1956/91, was issued by the competent authorities on 25 March 1993 and that the accounting audit and eligibility control which must precede the submission of the application for payment in accordance with Part B of Annex II to Regulation No 1956/91 were carried out by the Spanish authorities on 30 April 1993 and 5 March 1993, respectively, so that it was only on 10 May 1993 that those authorities sent the Commission the application, which the Commission granted on 24 June 1993. The applicant was therefore able, and required under its duty of information and good faith, to notify the sinking of the *Pondal* before the Commission granted that application, since that circumstance affected an essential aspect of the grant of aid.

56 Even if, as the applicant maintains, the payment of the first instalment of the aid does not depend, under Article 5 of Regulation No 1956/91, on presentation of a report on the activities of the joint enterprise's vessels, and even if the two other vessels transferred to the joint enterprise would have been able to secure the activity of the enterprise while the applicant sought to replace the *Pondal*, there is no doubt that the disappearance of that vessel before the beginning of the triennial period of activity laid down in the legislation constituted a major change in the factors on the basis of which the decision to grant assistance was taken, which the applicant was required to notify to the competent authorities spontaneously and as soon as possible. However, it was only in the first periodic report on activity, sent to the competent authorities on 20 May 1994, that the applicant for the first time mentioned the sinking of the *Pondal*, which had occurred over 16 months earlier.

57 The applicant cannot justify the failure to mention the sinking of the *Pondal* in the documents relating to the application for payment of the first instalment of the aid by the fact that the *Pondal* was not removed from the Angolan register until 20 July 1993. It is the sinking which took place on 13 January 1993 and not the removal from the Angolan register which took place on 20 July 1993 which made the *Pondal* unfit to attain the objective assigned to the project, which was to exploit the fisheries resources of the Angolan fisheries zone in order to supply the Community market by priority. Once it was informed of the sinking, the applicant, which is bound by an obligation of information and good faith towards the Commission, should have immediately notified that circumstance, which concerned an essential element of the project, without waiting for the definitive removal of the wrecked ship from the Angolan register.

58 Next, it must be observed that, as stated in the ninth recital in the preamble to the contested decision, the applicant, in the first periodic report, which covered the activities of the joint enterprise from 20 April 1993 to 20 April 1994, referred to 20 July 1993 as the date on which the *Pondal* sank. That report contains the following passage: 'Our long-term objectives have had to be modified as the result of the sinking of the vessel *Pondal* on 20 July 1993.' As the Commission states in the contested decision, the applicant thus provided false information in its first periodic report on activity as regards the date of the sinking of the *Pondal* by placing it at the time the vessel was removed from the Angolan register.

59 In order to refute that charge, the applicant pleads equivalence, for the purposes of the information on the sinking of the *Pondal,* between the date 13 January 1993, when the vessel physically disappeared, and the date 20 July 1993, when the vessel was definitively removed from the Angolan register.

60 That argument must, however, be rejected. By stating in the first periodic report on activity that the *Pondal* sank on 20 July 1993, the applicant maintained the impression that the *Pondal* had carried out fishing activities on behalf of the joint enterprise from 20 April to 20 July 1993. It should be added that, as the

Commission rightly points out, the summary tables of fishing operations and catches annexed to the first periodic report on activity contained information concerning the catches which the *Pondal* is purported to have made in the Angolan fishery zone during the abovementioned period. Contrary to what the applicant contended at the hearing, there is no support for the claim that the information contained in those tables corresponds to the information which it received from the customs authorities for the period covered in the report but which concerned catches made on behalf of the joint enterprise prior to that period. In the light of the differing information contained in the first periodic report on activity and in the tables annexed thereto — information confirmed in the second periodic report on activity (see paragraph 19 above) — the Commission believed, as shown by its letter of 26 July 1999 addressed to the applicant and to the Spanish authorities, that the *Pondal* had carried out activities in Angolan waters for three months — which led it, in that letter, to envisage only a reduction *pro rata temporis* of the aid to that vessel — although that was not the case. The applicant therefore provided false information as regards that vessel, which misled the Commission. That being the case, it failed to fulfil its obligation to provide information and to act in good faith (see paragraphs 52 and 53 above).

61 In those circumstances, it must be held that the Commission's finding in the contested decision of an irregularity as regards the sinking of the vessel *Pondal* is well founded.

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

The second part of the plea

63 In the context of the second part of the plea, the applicant claims that the reduction of the aid, in so far as it is justified by the failure to replace the wrecked

vessel by another vessel, lacks a legal basis. By contrast with Council Regulation (EC) No 2792/1999 of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector (OJ 1999 L 337, p. 10), in force at present, the legislation applicable at the time of the facts at issue did not lay down the obligation to carry out such a replacement.

64 However, it must be observed that in the contested decision the Commission does not criticise the failure to replace the *Pondal*. As pointed out in paragraph 51 above, its findings of an irregularity as regards that vessel refer to a failure by the applicant in its duty to provide information in good faith.

65 The second part of the plea must therefore be rejected.

66 In the light of the foregoing considerations, the plea alleging error of assessment and misinterpretation of Regulation No 4028/86 must be rejected in its entirety.

Plea based on the limitation period

67 Under this plea, the applicant claims that the contested decision must be annulled because, at the time when it was adopted, the facts which had furnished the reasons for the reduction of the aid had been time-barred.

68 It maintains that the principle of limitation, which is a general principle of criminal law in all the national legal orders, is also applicable in the administrative sphere. Moreover, in accordance with the case-law, the laying down of limitation periods is not a matter exclusively for the Commission but falls within the competence of the Community legislature (see, to that effect, Case 7/72 *Boehringer* v *Commission* [1972] ECR 1281, and Case C-10/88 *Italy* v *Commission* [1990] ECR I-1229, summary publication). The specific legislation (Regulations Nos 4028/86 and 1956/91) and general legislation (Regulation No 2988/95) applying in the present case contain differing provisions laying down limitation periods.

69 First, it follows from the first sentence of Article 44(1) of Regulation No 4028/86 (see paragraph 4 above) that the Commission's right to act to recover sums unduly paid is limited to the period for which the aid is granted by the Community, which expires when the third periodic report on the activity of the joint enterprise is presented. The facts must therefore be considered to have been time-barred following the examination of that report, which took two months, like the examination of State aid which has been notified (Case 120/73 *Lorenz* v *Bundesrepublik Deutschland and Another* [1973] ECR 1471). In the present case, the third periodic report on activity was presented on 3 July 1997, so that the facts at issue have been time-barred from 3 September 1997.

70 Second, it is clear from Article 7 of Regulation No 1956/91 (see paragraph 8 above) that the Commission may no longer request information from the national authorities concerned nor, accordingly, reduce or discontinue the aid after the expiry of a period of three years from the payment of the balance of that aid. It follows that in the light of that article the facts in the present case have been time-barred since 20 June 1997.

71 Third, Article 3 of Regulation No 2988/95 (see paragraph 10 above) lays down a limitation period for proceedings of four years as from the time when the irregularity was committed. Applied in the present case, that provision means

that the proceedings initiated by the Commission on 26 July 1999 as regards the irregularity allegedly linked to the sinking of the *Pondal* were time-barred, since at that date more than four years had passed since the sinking, which occurred on 13 January 1993. Moreover, the contested decision was adopted more than eight years after it occurred. Both the first and second periodic reports clearly described the sinking, so that the alleged irregularity on the part of the applicant as regards that vessel cannot be considered to be a continuous irregularity within the meaning of the abovementioned regulation.

72 As regards the joint enterprise's two other vessels, the applicant denies that the interruption of their activities in 1995 and 1996 and their transfer to another country without prior authorisation from the Commission are irregular. It claims that in practice the Commission authorises a change of country of activity when the structural objective of the project is retained. In addition, it intended to ensure the profitability of the vessels concerned by moving them out of Angolan waters and transferring them to a joint enterprise which was the beneficiary of Community financial aid. In any event, the proceedings brought by the Commission on 26 July 1999 were also time-barred under Article 3 of Regulation No 2988/95, since on that date more than four years had elapsed since the vessels had been removed from the Angolan register, in March 1995.

73 The applicant denies that the letter from the Spanish authorities of 26 February 1998 can be characterised as an interruption of limitation. It claims that the Spanish authorities cannot be considered a competent authority within the meaning of Article 3 of Regulation No 2988/95, since the only obligation of that authority is to collaborate with the Commission, the sole authority with the competence to suspend, reduce or discontinue a grant of aid. In any event, the abovementioned letter was not linked to a request by the Commission, but followed a request for information from the Court of Auditors while it was preparing its Report No 18/98 concerning Community measures to encourage the creation of joint enterprises in the fisheries sector (OJ 1998 C 393, p. 1; hereinafter 'the Court of Auditors report').

74 The Court points out that in order to fulfil its function of ensuring legal certainty, a limitation period must in principle be fixed in advance by the Community legislature (see, *inter alia*, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 19 and 20, and Case 48/69 *ICI* v *Commission* [1972] ECR 619, paragraphs 47 and 48; and Case T-26/89 *De Compte* v *Parliament* [1991] ECR II-781, paragraph 68, and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 67). Fixing the duration of and detailed rules for applying the limitation period falls within the competence of the Community legislature (*Chemiefarma* v *Commission*, cited above, paragraph 20). Moreover, as regards limitation, provisions of foreign legislation cannot be applied to the present case by analogy (*BFM and EFIM* v *Commission*, cited above, paragraph 68).

75 In that context, it is first appropriate to ascertain whether the legislative provisions cited by the applicant contain a limitation period and are applicable in the present case.

76 The first sentence of Article 44(1) of Regulation No 4028/86 imposes on the national authorities concerned the obligation to collaborate with the Commission, by requiring them, throughout the period for which aid is granted by the Community, to send to the Commission on request all supporting documents and all documents showing that the conditions for the grant of assistance have been satisfied. It does not involve the limitation of Commission actions as regards the suspension, reduction or discontinuance of aid.

77 Article 7 of Regulation No 1956/91 requires Member States to keep at the Commission's disposal, for a period of three years following the payment of the balance of the Community aid, all the documents, or certified copies thereof, used for calculation of the aid, together with the complete files on the applicants. It does not prescribe a limitation period for actions by the Commission concerning the suspension, reduction or discontinuance of aid.

78 Article 3(1) of Regulation No 2988/95 sets a limitation period for proceedings of 'four years as from the time when the irregularity referred to in Article 1(1) was committed'. The notion of irregularity, defined in Article 1(2), refers, for the purpose of applying that regulation, to 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure' (see paragraph 10 above).

79 In the absence of any indication to the contrary, the notion of irregularity defined in Article 3(1) of Regulation No 2988/95 by reference to the wider sense given to it under Article 1 of that regulation should be considered to cover both intentional irregularities or those caused by negligence, which could, in accordance with Article 5 of the regulation, result in an administrative penalty, and irregularities which justify merely the adoption of an administrative measure referred to in Article 4 of the regulation. Consequently, without its being necessary to rule on the question whether the reduction of the aid decided in the present case must, as the Commission contends, be considered an administrative measure within the meaning of Article 4 of Regulation No 2988/95 or, as the applicant claims, be considered an administrative penalty within the meaning of Article 5 of the regulation, it must be found that Article 3 of that regulation is applicable to the irregularities at issue in the present case.

80 In those circumstances, it is appropriate to examine the substance of the applicant's argument based on the time-barring of the facts by reason of Article 3(1) of Regulation No 2988/95.

81 First, as regards the sinking of the *Pondal*, it should be observed that the irregularity established, correctly, in the contested decision consists in the fact that the applicant at first concealed that sinking and subsequently communicated an incorrect date for it. The actions for which the applicant is criticised in relation

to the sinking of the *Pondal* must be considered to constitute a continuous irregularity within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, in that they were identical in substance — that is, an infringement by the applicant of its duty to provide information and act in good faith as regards that sinking. It must therefore be held, in accordance with that same provision, that as regards the irregularity concerning the *Pondal*, the limitation period began to run 'from the day on which the irregularity ceases'.

82 In that regard, although, admittedly, the applicant indicated the occurrence of the sinking of the *Pondal* in the first periodic report on the activity of the joint enterprise, sent to the Spanish authorities on 20 May 1994, it admitted at the hearing that it was only in its document of 5 October 1999, which contained its comments on the Commission's letter of 26 July 1999, that it first informed the Commission of the exact date of that sinking, namely 13 January 1993, and not 20 July 1993 as it had stated until then. In those circumstances, it must be held that the irregularity linked to the applicant's breach of its duty to provide information and to act in good faith as regards the sinking of the *Pondal* ended on 5 October 1999. The applicant cannot in those circumstances rely on the limitation period as regards the facts found in the contested decision concerning that vessel.

83 Second, as regards the vessels *Periloja* and *Sonia Rosal*, the fifth recital in the preamble to the contested decision makes clear that the irregularity claimed by the Commission arises from the fact that those two vessels were removed from the Angolan register in March 1995, no longer carried out activities in Angolan waters in 1995 and 1996 and were transferred to Cameroonian waters at an unspecified date without prior authorisation from the Commission.

84 In the context of the present plea, the applicant contends, in its argument addressing Article 3 of Regulation No 2988/95, that in practice the Commission generally authorises a change in third country when the structural objective of the

project is retained. Moreover, the applicant sought to ensure the profitability of the vessels concerned by moving them out of Angolan waters and transferring them to a joint enterprise known to the Commission, since it was also the beneficiary of Community financial aid (see paragraph 27 above).

85 Such arguments cannot, however, call in question the merits of the Commission's finding of irregularity. It must be observed that under Article 21a of Regulation No 4028/86, which defines a joint enterprise within the meaning of that regulation, the purpose of setting up such an enterprise consists in exploiting and where appropriate using, with primary consideration being given to the supply of the Community market, the fishery resources of waters falling within the sovereignty and/or jurisdiction of the third party concerned in the creation of the enterprise.

86 In the light of the observations set out in the preceding paragraph, it is undeniable that the exploitation, by vessels involved in the creation of a joint enterprise, of the fishery zone of the third country which is the country of origin of the partner of the Community shipowner involved in the project constitutes an essential element in carrying out that project. As the Commission has rightly pointed out in its pleadings, compliance with the fishery-zone requirement concerned is an indispensable condition for the proper management and stability of the international relations between the Community and non-member countries in the framework of the fisheries policy, a purpose made clear in both the 13th recital in the preamble to Regulation No 3944/90, amending Regulation No 4028/86, and in the third recital in the preamble to Regulation No 1956/91.

87 For that reason, Regulation No 1956/91 requires precise information to be submitted to the Commission when an aid application is made, when payment of the first instalment and the balance of the aid granted are applied for and in the periodic reports on the activity of the joint enterprise concerning the fishing zones of the vessels involved in the project (Annexes I to IV to the Regulation). For the same reason, in Part B of Annex I to Regulation No 1956/91, the Commission

specifically reminds applicants for Community financial aid that the granting of such aid is subject to the condition, *inter alia*, that the joint enterprise should be intended to engage in the exploitation and, where applicable, value-added processing of fishery resources in the waters of the third country concerned (see paragraph 9 above).

88 In the present case, the applicant does not dispute the correctness of the Commission's claims set out in the fifth recital in the preamble to the contested decision (see paragraph 83 above), which show that the *Periloja* and *Sonia Rosal* did not exploit Angolan waters over a period of three years, contrary to the requirement laid down by the decision to grant assistance, in conjunction with the applicable legislation.

89 In those circumstances, the finding of irregularity as regards the vessels *Periloja* and *Sonia Rosal* set out in the contested decision must be held to be justified.

90 It is at present appropriate to ascertain whether, as the applicant claims, the facts constituting the irregularity relating to the *Periloja* and *Sonia Rosal* were time-barred at the time when the Commission initiated proceedings.

91 The alleged facts as regards the *Periloja* and *Sonia Rosal* must be considered to constitute a continuous irregularity within the meaning of the second subparagraph of Article 3(1) of Regulation No 2988/95, since they continued until 20 May 1996, the date which, according to the third periodic report on the activity of the joint enterprise, marks the end of the compulsory triennial period of activity for that enterprise and on which the irregularity definitively took the form claimed in the contested decision, namely the failure by those two vessels to engage in activities in Angolan waters for 15 of the 36 months making up the abovementioned period. In those circumstances, the limitation period of four years must, in accordance with the same provision of Regulation No 2988/95, be considered as having run 'from the day on which the irregularity ceases' — in this case, 20 May 1996.

92 By virtue of the third subparagraph of Article 3(1) of Regulation No 2988/95 the limitation period is interrupted by any act of the competent authority notified to the person in question, relating to investigation or legal proceedings concerning the irregularity.

93 In the present case, on 26 July 1999 the Commission sent the applicant a letter informing it of the commencement of a reduction procedure linked to irregularities concerning, *inter alia*, the activity of the vessels *Periloja* and *Sonia Rosal*. It is clear from Article 44(1) of Regulation No 4028/86 (see paragraph 4 above) that the Commission is the competent authority, within the meaning of the provision referred to in the preceding paragraph, to reduce the aid granted on the basis of that regulation. Moreover, the letter of 26 July 1999 must, as the applicant itself states (see paragraphs 71 and 72 above), be considered to refer to proceedings concerning the abovementioned irregularities. In those circumstances, it must be considered as an act interrupting the limitation period within the meaning of the third subparagraph of Article 3(1) of Regulation No 2988/95.

94 Accordingly, even if, on the basis of a literal reading of the first subparagraph of Article 3(1) of Regulation No 2988/95, the limitation period of four years laid down in that provision is considered to run, in respect of a continuous irregularity, from the day on which that irregularity ceased even when the competent authority does not learn of that irregularity until later, as in the present case, the sending of the letter of 26 July 1999, which took place before the expiry of the period of four years, which began on 20 May 1996, interrupted that period and caused a new period of four years to run as from 26 July 1999. It follows that, at the time when the contested decision was adopted, the facts constituting the irregularity as regards the *Periloja* and *Sonia Rosal* were not time-barred.

95 In the light of the foregoing considerations, the plea relating to the limitation period must be rejected.

Plea alleging breach of the principles of due care and of good administration

96 Under this plea, the applicant claims that the contested decision must be annulled on the ground that it is in breach of the duty to act within a reasonable time, which falls under the general duty of due care and good administration. The Commission failed to act during a long period, although it had available to it all the necessary information. In those circumstances, the adoption of the contested decision constitutes a breach of the principles of the protection of legitimate expectations and of legal certainty.

97 The applicant claims that the Court has consistently held that there is a general principle of Community law, based on the need for legal certainty and good administration, by virtue of which the authorities must exercise their powers within a specified period, in order to protect the legitimate expectations of citizens (Case 45/69 *Boehringer Mannheim* v *Commission* [1970] ECR 769, paragraph 6; Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749; Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005 and the Opinion of Advocate General Mischo in that judgment, ECR 1014; Case 223/85 *RSV* v *Commission* [1987] ECR 4617; Joined Cases T-551/93 and T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247). The Commission did not act with the due care required and failed to have regard to the requirements of legal certainty and good administration in ordering the repayment of financial aid after such an excessively long time.

98 In the present case, the Commission decided to take action for the partial recovery of the aid after the publication of the Court of Auditors report, which criticised both the management of the project and the Commission's inaction in the matter. However, the information sent by the Spanish authorities to the Court of Auditors for the drafting of that report had previously been communicated to the Commission.

99 By failing to initiate proceedings until five years after the payment of the balance of the aid, the Commission failed to act within a reasonable period. It cannot in its defence rely on the conduct of the applicant or of the Spanish authorities. The applicant constantly cooperated, by spontaneously notifying the occurrence of the facts at issue and by providing the documentation requested by the national authorities, although the Commission took no initiative and requested no additional information from anyone.

100 The applicant notified the sinking of the *Pondal* in the first periodic activity report and, in the second and third periodic reports, described the difficulties it encountered in replacing that vessel. That information was again communicated to the Spanish authorities, at the latter's request, in March 1998. The Commission cannot take refuge behind the fact that it was given two different dates in respect of the abovementioned sinking since, as from 20 May 1994, the date when the first periodic report on activity was presented, its services were informed of that sinking. Although it knew of the sinking as from that date, the Commission paid the whole amount of the aid and did not, for over five years, take any action or request any additional information as regards that sinking.

101 The facts concerning the transfer of the two other vessels outside of Angolan waters and the dissolution of the joint enterprise were set out in the third periodic activity report and in a letter which the applicant spontaneously sent to the Spanish authorities in order to obtain authorisation for a change of third country. The Spanish authorities forwarded that application by the applicant to the Commission, but the latter never expressed an opinion in that regard.

102 The Court points out that it is a general principle of Community law that the Commission must act within a reasonable time in its administrative proceedings (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 56).

103 The present case is marked by periods during which the Commission failed to act. Thus, some nine months passed during which the Commission cannot be shown to have taken any steps in relation to the Spanish authorities or the applicant — between September 1997 (when the Commission received the third periodic report on activity, which stated that the last landings of fish from Angola took place in March 1995; that, given the problems related to the conduct of the Angolan partner, the Community partners had decided to sell their shares in the joint enterprise to the Angolan partner and to buy back the vessels transferred to the project; and that, after that repurchase, the vessels had been transferred to a Nigerian port where they underwent repairs until 1996) and 26 June 1998, the date of the letter in which the Commission, in the light of the information in the periodic report, asked the Spanish authorities for details concerning the implementation of the project.

104 More than a year then passed during which the Commission did not act, from 2 July 1998 — when the Commission received from the Spanish authorities the applicant's letter of 6 March 1998 containing clarifications on the state of the project and mentioning that the joint enterprise's vessels had left Angolan waters during the first quarter of 1995 and documents indicating that the Community shipowners had transferred their shares in the joint enterprise to the Angolan partner as from 3 February 1995 — and the 26 July 1999 — when the Commission informed the Spanish authorities and the applicant that it had decided to initiate a procedure to reduce the aid.

105 None the less, infringement of the principle of a reasonable time period, if established, does not justify automatic annulment of the contested decision (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 122, and Case T-197/00 *Onidi* v *Commission* [2000] ECR-SC I-A-69 and II-325, paragraph 96).

106 The applicant claims that the adoption of the contested decision after long periods of inaction by the Commission operated to the detriment of its legitimate expectations.

107 However, it is settled case-law that the principle of the protection of legitimate expectations may not be relied upon by an undertaking which has committed a manifest infringement of the rules in force (Case 67/84 *Sideradria* v *Commission* [1985] ECR 3983, paragraph 21; *Industrias Pesqueras Campos and Others* v *Commission*, cited in paragraph 97 above, paragraph 76; and Case T-126/97 *Sonasa* v *Commission* [1999] ECR II-2793, paragraph 34). If it does not comply with an essential condition to which the grant of aid was subject, the recipient cannot rely on the principle of the protection of legitimate expectations with a view to preventing the Commission from reducing the amount of the aid initially granted (see, to that effect, Case T-142/97 *Branco* v *Commission* [1998] ECR II-3567, paragraphs 97 and 105 to 107).

108 In the present case, it is established that the applicant concealed from the Commission both the sinking of the *Pondal* and the exact date of that sinking, although the obligation that applicants for and beneficiaries of aid are to provide information and act in good faith is inherent in the system of aid established for fisheries and is essential to its proper functioning. Nor did the applicant comply with the essential condition for the grant of the aid that it exploit Angolan waters for a period of three years, since the two other vessels of the joint enterprise left those waters after only 21 months of fishing activities.

109 It is appropriate to add that the Commission never provided the applicant — nor does the applicant claim it did so — with any precise assurance that it would waive a reduction of the aid in the present case. On the contrary, it was clear from the Commission's letter of 26 July 1999 that it intended to reduce the aid. In that regard, the present case is fundamentally different from the case which gave rise

to the judgment in *RSV* v *Commission,* cited by the applicant (see paragraph 97 above), where the Court of Justice acknowledged the existence of a legitimate expectation on the part of the beneficiary of illegal State aid because of the excessive length of the procedure between the Commission and the Member State concerned.

110 In those circumstances, the applicant cannot validly maintain that the passage of allegedly substantial periods of time betwen two actions by the Commission operated to the detriment of its legitimate expectation that the aid which it had been granted was definitively acquired.

111 Nor can the applicant allege a breach of the principle of legal certainty. According to case-law, while it is important to ensure compliance with requirements of legal certainty which protect private interests, those requirements must be balanced against requirements of the protection of public interests, and precedence must be accorded to the latter when the maintenance of irregularities would be likely to infringe the principle of equal treatment (see, in particular, Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 53, at pages 86 to 88, and Case 14/61 *Hoogovens* v *High Authority* [1962] ECR 253, at pages 269 to 275; *Industrias Pesqueras Campos and Others* v *Commission*, cited in paragraph 97 above, paragraph 76). Consequently, even if the passage of time during which the Commission takes no steps in relation to an undertaking may be capable of infringing the principle of legal certainty, the importance of the time criterion must be qualified in the light of the case (*Industrias Pesqueras Campos and Others* v *Commission*, paragraph 119).

112 In the present case, since the existence of serious irregularities as regards the applicable legislation and the responsibility of the applicant, as a beneficiary of Community financial aid, to provide information and to act in good faith has been established, the principle of legal certainty, even assuming that it had been affected by the periods of inaction on the part of the Commission, must in any event give way to the overriding requirement to protect the Community's financial interests.

113 Furthermore, to maintain the entirety of the aid despite such irregularities would serve to encourage fraud and would undermine the equality of treatment for fishery-aid beneficiaries (*Industrias Pesqueras Campos and Others* v *Commission*, paragraph 120), since it would indicate that the applicant was receiving the treatment reserved for aid beneficiaries which scrupulously comply with their obligations although it had not done so.

114 In the light of the foregoing considerations, the plea alleging breach of the principles of due care and of good administration must be rejected.

Plea alleging breach of the principle of proportionality

115 Under this plea, the applicant claims that the contested decision, inasmuch as it reduces the part of the aid allocated to the vessels *Periloja* and *Sonia Rosal*, must be annulled on the ground that the measure is disproportionate in relation to the alleged irregularity. It puts forward five elements in support of its claim.

116 First, it maintains that the Commission failed to take account of the fact that the departure of the *Periloja* and *Sonia Rosal* from Angola, their removal from the Angolan register in March 1995 and their transfer to another joint enterprise in its possession occurred as the result of bad relations with the Angolan partner and were motivated by its desire to ensure the continuity of its activities, the economic viability of its vessels and the priority supply of the Community market. Following their repurchase by the Community shipowner and their removal from the Angolan register, the abovementioned vessels were immobilised for almost two years in Nigeria, where they underwent repairs. That shipowner then had them registered in Cameroon and obtained the necessary fishing licences, so that at present they were operating in Cameroonian waters under a joint enterprise

approved by the Commission. The applicant preferred to wait for an approval from the local authorities before applying for authorisation to change third country. Once it had obtained that approval, the applicant submitted its application, proposing to the Commission that it would present a periodic report detailing the activities of those vessels in Cameroon after the period of Community assistance had ended, in order to compensate for the prior temporary suspension of their activities. However, the Commission never ruled on that application.

117 Second, the applicant claims that the method for calculating the reduction *pro rata temporis* applied in the present case is also contrary to the principle of proportionality. The Commission reduced the aid relating to the two vessels concerned to the level of the premium for a definitive transfer to a third country, although the structural purpose of the joint enterprise, namely the pursuit by those two vessels of activities with a view to the priority supply of the Community market, was continually ensured.

118 Third, the applicant claims that the Commission failed to consider the circumstances mentioned in paragraph 116 above, although they reflect an absence of fraudulent intent and serious negligence on its part. Moreover, the Commission did not take account of the good faith shown by the applicant, which constantly cooperated with the Commission services by providing them with the necessary information and informing them of the activities of the vessels even after the period of Community assistance ended.

119 Fourth, the applicant alleges that the Commission failed to take into account the support shown by the Spanish authorities for its application to change third country.

120 Fifth, the applicant maintains that the contested decision, which requires it to reimburse a large part of the aid which was granted it almost 10 years earlier, has

serious negative effects on its situation although the only complaint which can be made against it arises from the failure to comply with a purely administrative formality, namely the need to obtain prior authorisation from the Commission for a change of third country.

121 As a preliminary point, the Court observes that this plea is directed against the contested decision only in so far as it reduces the aid granted to the vessels *Periloja* and *Sonia Rosal*. The plea does not refer to the Commission's decision in so far as it terminates the aid granted to the *Pondal*.

122 That point having been clarified, the Court recalls that it is settled case-law that the principle of proportionality, enshrined in the third paragraph of Article 5 EC, requires that the measures adopted by Community institutions must not exceed what is appropriate and necessary for attaining the objective pursued (see, in particular, the judgment of the Court of Justice in Case 15/83 *Denkavit Nederland* [1984] ECR 2171, paragraph 25, and the judgment of the Court of First Instance in Case T-260/94 *Air Inter* v *Commission* [1997] ECR II-997, paragraph 144).

123 It should be added that, where the evaluation of a complex situation is involved, which is the case with respect to fisheries policy, the Community institutions enjoy a wide measure of discretion (Case C-179/95 *Spain* v *Council* [1999] ECR I-6475, paragraph 29, and Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 44). In reviewing the legality of the exercise of such discretion, the Court must confine itself to examining whether that exercise discloses manifest error or constitutes misuse of powers or a clear disregard of the limits of its discretion on the part of that institution (see, to that effect, Joined Cases C-296/93 and C-307/93 *France and Ireland* v *Commission* [1996] ECR I-795, paragraph 31).

124 It should be pointed out that, under the first indent of Article 44(1) of Regulation No 4028/86, the Commission may decide to reduce the aid 'if the project is not carried out as specified'. In the present case, it is established that, without prior authorisation by the Commission and before the end of the three-year period of activity required of the joint enterprise, the two vessels definitively left Angolan waters, which they were meant to be exploiting in accordance with the decision to grant assistance, so that the project was not carried out as specified. The Commission was therefore justified in reducing the aid relating to those two vessels.

125 It should also be pointed out that the Commission took account of the fact that the aid granted to the applicant, in particular for the *Periloja* and *Sonia Rosal*, comprised two elements: 'first, an amount equivalent to that of the premium for the definitive transfer to a third country and, second, an amount proportional to the period of activity during which the vessel concerned has operated in Angolan waters with reference to the regulatory period of 36 months, calculated by months due and a deduction from the amount corresponding to the premium for the definitive transfer' (11th recital in the preamble to the contested decision). The Commission, as the applicant does not deny, applied the reduction only to the part of the aid related to the period when the vessels were active in Angolan waters, without calling in question the amount allocated for the definitive transfer of those vessels to a third country.

126 The applicant does not dispute the information set out in the contested decision (13th recital) that the two vessels concerned were active in Angolan waters for only 21 months. The same recital also makes clear that, contrary to the applicant's assertion, the aid allocated to those two vessels was not reduced to the level of the premium for a definitive transfer but was reduced as regards the part linked to the period those vessels were active, amounting to 15/36ths (2 × EUR 57 260), that is, on the basis of the length of time during which those vessels were

not active in Angolan waters, with reference to the period of 36 months prescribed by regulation. That reduction *pro rata temporis* therefore seems wholly proportionate in the light of the infringement found.

127 Even accepting the argument put forward by the applicant that the two vessels in question continued to supply the Community market as a priority following their departure from Angolan waters in 1995 — which may be doubted since, according to the applicant, those vessels were immobilised for almost two years in Nigeria in order to undergo repairs — it is nevertheless the case that, as pointed out in paragraphs 85 to 87 above, the condition relating to exploiting the waters of the third country referred to in the decision to grant assistance, in this case Angolan waters, is of fundamental importance for the management of the Community fisheries policy and relations with third countries. Failure to respect it therefore amounts to a failure to comply with an essential condition for the grant of aid and consequently justifies the *pro rata temporis* reduction decided in the present case.

128 To that must be added the fact that the applicant, as the Commission has pointed out in its pleadings, failed in its duty to provide information and to act in good faith. In the second periodic annual report, dated 19 June 1995, which covered the period of activity by the joint enterprise from 20 May 1994 to 20 May 1995, the applicant, although it had sworn to the reliability of the information contained in that report, made no mention of the suspension of the activities of the two vessels at issue in Angolan waters, of their removal from the Angolan registry and of the sale of its shares in the joint enterprise, which occurred during that period. It was not until 31 January 1997, namely almost two years after the facts at issue occurred, that it for the first time informed the Spanish authorities of the management difficulties experienced by the joint enterprise related to the demands made by the Angolan partner and of the transfer of the two vessels to a joint enterprise established in Cameroon and requested a change of third country and authorisation to present the third periodic report on activity on the basis of the new framework for the activities of those vessels. It was only in the third periodic report on activity, sent to the Commission in September 1997, that it clearly indicated that the final landings of fish from Angola took place in March

1995, that in the light of the difficulties relating to the conduct of the Angolan partner the Community partners had decided to sell their shares in the joint enterprise to that partner and to repurchase the vessels transferred to the project and that, after repurchasing the vessels, the applicant had transferred them to a port in Nigeria where they underwent repairs until 1996.

129 It must therefore be concluded that for some two years the applicant concealed from the Commission its failure to comply with an essential condition for the grant of assistance.

130 From the preceding analysis (paragraphs 124 to 129), it is clear that, contrary to what the applicant claims, the irregularities involving the vessels *Periloja* and *Sonia Rosal* lay not merely in its failure to comply with a supposed administrative formality relating to the need for prior authorisation from the Commission for a change of third country. A basic condition for the grant of aid, that is to say, the exploitation by the two vessels at issue of Angolan fishery resources for a period of three years, was not satisfied. Moreover, during some two years, the applicant concealed the fact that those vessels had left Angolan waters. Such actions constitute serious infringements of the obligations which are essential for the functioning of the Community financial aid system in the fisheries sector. The applicant's arguments concerning the particular circumstances which led to the vessels being transferred to a different third country, its good faith in the matter and the favourable opinion expressed at the time by the Spanish authorities as regards the change of third country do not obviate the reality and seriousness of the infringements observed with respect to the activities of the vessels *Periloja* and *Sonia Rosal*.

131 It is clear from examination of this plea that the applicant has not demonstrated that the reduction decided by the Commission in the present case as regards the aid relating to the vessels *Periloja* and *Sonia Rosal* was disproportionate in the light of the infringements complained of and of the objective of the legislation at issue.

132 It should be added that, as regards Community financial assistance, the Commission is entitled, when faced with an infringement of an obligation of fundamental importance — such as, in the present case, the obligation for the joint enterprise to carry out its fishing activities in Angolan waters during the period laid down and the obligation to provide information to the Commission in good faith concerning the situation and activities of the vessels transferred to that enterprise — to decide to discontinue aid without being in breach of the principle of proportionality (see, to that effect, Case C-104/94 *Cereol Italia* [1995] ECR I-2983, paragraph 24). The Community judicature has held that only the possibility that an irregularity may be penalised not by reduction of the aid by an amount corresponding to that irregularity but by complete cancellation of the aid can produce the deterrent effect required to ensure the proper management of the structural funds in question (Case C-500/99 P *Conserve Italia* v *Commission*, cited in paragraph 52 above, paragraph 101).

133 In the light of the foregoing considerations, the alleged infringement of the principle of proportionality has not been proved and the present plea must be rejected.

134 The application must therefore be dismissed.

Costs

135 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the applicant has been unsuccessful and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Lenaerts Azizi Jaeger

Delivered in open court in Luxembourg on 13 March 2003.

H. Jung
Registrar

K. Lenaerts
President