

JUDGMENT OF THE COURT

10 July 2003 *

In Case C-472/00 P,

Commission of the European Communities, represented by V. Kreuzschitz and S. Meany, acting as Agents, and N. Khan, Barrister, with an address for service in Luxembourg,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber, Extended Composition) of 24 October 2000 in Case T-178/98 *Fresh Marine v Commission* [2000] ECR II-3331, seeking to have that judgment set aside,

* Language of the case: English.

the other party to the proceedings being:

Fresh Marine Company A/S, established in Trondheim (Norway), represented by J.-F. Bellis and B. Servais, avocats, with an address for service in Luxembourg,

applicant at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.-P. Puissechet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, V. Skouris, S. von Bahr, J.N. Cunha Rodrigues (Rapporteur) and A. Rosas, Judges,

Advocate General: C. Stix-Hackl,
Registrar: L. Hewlett, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 17 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 28 November 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 29 December 2000, the Commission of the European Communities brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 24 October 2000 in Case T-178/98 *Fresh Marine v Commission* [2000] ECR II-3331 ('the contested judgment'), by which the Commission was ordered to pay Fresh Marine Company A/S ('Fresh Marine'), established in Trondheim (Norway), the sum of NOK 431 000 in damages.

Legal background

2 As stated in Article 8(10) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1):

'A provisional duty may, after consultation, be imposed in accordance with Article 7 on the basis of the best information available, where there is reason to believe that an undertaking is being breached, or in case of breach or withdrawal of an undertaking where the investigation which led to the undertaking has not been concluded.'

- 3 Article 13(10) of Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community (OJ 1997 L 288, p. 1) provides:

‘A provisional duty may, after consultation, be imposed in accordance with Article 12 on the basis of the best information available, where there is reason to believe that an undertaking is being breached, or in case of breach or withdrawal of an undertaking where the investigation which led to the undertaking has not been concluded.’

Facts

- 4 The factual background to the dispute is set out at paragraphs 1 to 21 of the contested judgment as follows:

‘1 [Fresh Marine] is a company established in 1992 and incorporated under Norwegian law, which specialises in the sale of farmed Atlantic salmon.

- 2 Following complaints lodged in July 1996 by the Scottish Salmon Growers’ Association Ltd and the Shetland Salmon Farmers’ Association on behalf of their members, the Commission announced on 31 August 1996, by two

separate notices published in the *Official Journal of the European Communities*, the initiation of an anti-dumping and an anti-subsidy proceeding concerning imports of farmed Atlantic salmon originating in Norway (OJ 1996 C 53, pp. 18 and 20).

- 3 The Commission... found that it was necessary to impose definitive anti-dumping and countervailing measures...

- 4 On 17 June 1997, [Fresh Marine], having been informed of the Commission's findings, offered an undertaking pursuant to Article 8 of [Regulation No 384/96] and Article 10 of Council Regulation (EC) No 3284/94 of 22 December 1994 on protection against subsidised imports from countries not members of the European Community (OJ 1994 L 349, p. 22)....

- 5 By Decision 97/634/EC of 26 September 1997 accepting undertakings offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 267, p. 81), the Commission accepted the undertakings offered by a number of Norwegian exporters of farmed Atlantic salmon, including that of [Fresh Marine].... [Fresh Marine]'s undertaking entered into force on 1 July 1997.

- 6 On the same day, the Council adopted Regulation (EC) No 1890/97 of 26 September 1997 imposing a definitive anti-dumping duty on imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 267, p. 1) and Council Regulation (EC) No 1891/97 of 26 September 1997 imposing a definitive countervailing duty on imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 267, p. 19). Pursuant to Article 1(2) of

each of those two regulations, imports into the Community of farmed Atlantic salmon originating in Norway produced by [Fresh Marine] were exempt from those duties on account of the acceptance of its undertaking by the Commission.

- 7 On 22 October 1997, [Fresh Marine] sent the Commission a report on all its exports of farmed Atlantic salmon to the Community during the third quarter of 1997 (“the October 1997 report”).
- 8 On 16 December 1997, the Commission adopted, on the basis of Council Regulation No 384/96 and [Regulation No 2026/97], Regulation (EC) No 2529/97 of 16 December 1997 imposing provisional anti-dumping and countervailing duties on certain imports of farmed Atlantic salmon originating in Norway (OJ 1997 L 346, p. 63). That regulation imposed a provisional anti-dumping duty... and a provisional countervailing duty... on imports, into the Community, of farmed Atlantic salmon originating in Norway produced by [Fresh Marine]... The regulation entered into force on 18 December 1997....
- 9 By letter of 19 December 1997, the Commission informed [Fresh Marine] of the... facts... It stated that examination of the data disclosed in the October 1997 report had shown that [Fresh Marine] had exported farmed Atlantic salmon, gutted head-on, at an average price... lower than the minimum average price set in its undertaking of 17 June 1997, which led it to believe that it had not observed that undertaking....
- 10 By fax of 22 December 1997, [Fresh Marine] complained that the Commission had manipulated the October 1997 report by deleting a number of lines which were intended to cancel lines containing errors. Pointing out that it had ceased all exports to the Community since the entry into force of Regulation No 2529/97, and as a result was suffering considerable harm, it asked for the immediate lifting of the sanctions taken against it.

- 11 In its letter of 5 January 1998, the Commission explained to [Fresh Marine] the reasons why it had decided to delete a number of lines from the October 1997 report containing quantities and values preceded by a minus sign, which, in the absence of explanations in the report, could not be offset against the corresponding invoices. It added that, if [Fresh Marine] sent it in good time a proper report showing that all sales transactions, net of credit notes, during the third quarter of 1997 were, on average, above the minimum price, the Commission would be prepared to reconsider its position. It again emphasised the provisional nature of the duties imposed by Regulation No 2529/97 and pointed out to [Fresh Marine] that it could have chosen to continue to export to the Community by providing the relevant customs authorities of the Member States concerned with an appropriate guarantee in regard to its “DDP” (“delivered duty paid”) sales.
- 12 On 6 January 1998, [Fresh Marine] sent to the Commission an amended version of the October 1997 report.
- ...
- 19 By letter of 30 January 1998, the Commission informed [Fresh Marine] that it now took the view that [Fresh Marine] had, during the third quarter of 1997, complied with the minimum export price fixed in its undertaking in respect of salmon, gutted head-on, and that, accordingly, there was no longer any reason to believe that the undertaking had been broken.
- 20 By letter of 2 February 1998 the Commission informed [Fresh Marine] that it intended to propose to the Council that it should not impose definitive duties and that, accordingly, the provisional duties imposed by Regulation

No 2529/97 ought not to be confirmed. It added that, under Article 10(2) of Regulation No 384/96, the amounts lodged as provisional duties were to be released in so far as there was no decision by the Council to collect all or part of them definitively.

21 On 23 March 1998, the Commission adopted Regulation (EC) No 651/98 amending Regulations Nos 1890/97, 1891/97 and 2529/97 and Decision 97/634 (OJ 1998 L 88, p. 31). Under Regulation No 651/98, the provisional anti-dumping and countervailing duties imposed by Regulation No 2529/97 were repealed so far as concerned imports of [Fresh Marine]'s products... Its undertaking was moreover reinstated with effect from 25 March 1998...'

The proceedings before the Court of First Instance and the contested judgment

- 5 On 27 October 1998, Fresh Marine brought an action before the Court of First Instance seeking an order requiring the Commission to make good the damage it had suffered following the adoption of the provisional measures prescribed by Regulation No 2529/97, totalling NOK 2 115 000.
- 6 The Commission claimed that the action should be dismissed as inadmissible or, in the alternative, as unfounded.
- 7 Having declared the action to be admissible, the Court of First Instance pointed out, at paragraph 54 of the contested judgment, that, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the alleged damage.

8 In that connection, the Court of First Instance found as follows:

‘Unlawfulness of the conduct alleged against the Commission

...

57 Although the measures of the Council and Commission in connection with a proceeding relating to the possible adoption of anti-dumping measures must in principle be regarded as constituting legislative action involving choices of economic policy, so that the Community can incur liability by virtue of such measures only if there has been a sufficiently serious breach of a superior rule of law for the protection of individuals ([Case T-167/94] *Nölle v Council and Commission* [[1995] ECR II-2589], paragraph 51), the special features of the present case must be pointed out. In the present case, the damage at issue arose from the allegedly unlawful conduct of the Commission when it examined the October 1997 report with the intention of checking whether [Fresh Marine] had complied during the third quarter of 1997 with the undertaking, the acceptance of which had brought to an end the anti-dumping and anti-subsidy investigation in regard to it. That allegedly unlawful conduct led the Commission to believe that [Fresh Marine] had broken its undertaking. It took place in the course of an administrative operation which specifically and exclusively concerned [Fresh Marine]. That operation did not involve any choices of economic policy and conferred on the Commission only very little or no discretion.

58 It is true that the alleged unlawfulness of the Commission’s conduct caused the alleged damage only when, and because, it was confirmed by the adoption of provisional measures against imports of [Fresh Marine]’s

products within the framework of Regulation No 2529/97. However, the Commission, in that regulation, did no more with regard to [Fresh Marine] than draw the appropriate provisional conclusions from its analysis of the abovementioned report, in particular from the level of the average price of exports charged by [Fresh Marine] during the period covered by that report (see the ninth recital in the preamble to Regulation No 2529/97).

59 Furthermore, the background to the cases giving rise to the judgments relied on by the Commission in its written submissions..., in which the Community judicature characterised the measures of the Council and the Commission in an anti-dumping proceeding as legislative acts involving choices of economic policy, was radically different from that of the present dispute. In those cases, unlike the present case, the applicants sought compensation for damage, the operative event for which was a choice of economic policy made by the Community authorities in the context of their legislative power.

60 Thus, in [Case C-122/86] *Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon and Others v Commission and Council* [[1989] ECR 3959], the applicants sought compensation for the damage which they claimed to have suffered as a result of the Council's decision to close an anti-dumping proceeding without adopting the regulation proposed by the Commission for the imposition of a definitive anti-dumping duty on the relevant imports. In *Nölle v Council and Commission*, cited... above, a Community importer sought compensation for damage allegedly suffered as a result of the adoption by the Council of a regulation introducing a definitive anti-dumping duty and definitively collecting the provisional anti-dumping duty, a regulation which had been declared invalid by the Court of Justice on grounds relating to the conditions under which the Community authorities had chosen the reference country when determining the normal value of the products at issue.

- 61 In conclusion, mere infringement of Community law will be sufficient, in the present case, to lead to the non-contractual liability of the Community (see [Case C-352/98 P] *Bergaderm and Goupil v Commission* [[2000] ECR I-5291], paragraph 44). In particular, a finding of an error which, in analogous circumstances, an administrative authority exercising ordinary care and diligence would not have committed will support the conclusion that the conduct of the Community institution was unlawful in such a way as to render the Community liable under Article 215 of the [EC] Treaty [now Article 288 EC].
- 62 It is therefore necessary to examine whether the Commission, when monitoring compliance by [Fresh Marine] with its undertaking on the basis of the October 1997 report, committed an error which an administrative authority exercising ordinary care and diligence would not have committed in the same circumstances.
- ...
- 75 At first sight, on reading [the] final entries in the October 1997 report, it was possible to adopt the view that [Fresh Marine] had observed its undertaking during the period covered by that report....
- 76 Even if it is accepted that the terms of [Fresh Marine]'s undertaking did not provide for the possibility of including negative values in the quarterly sales reports, the Commission could not, when faced with a report which, at first glance, suggested that [Fresh Marine] had complied with its undertaking, take it upon itself, as it did in the present case..., unilaterally to change the content of that report by deleting lines containing negative values and replacing the final entries... with its own calculations, carried out on the basis of the report thus amended, of the average export price charged by [Fresh

Marine] during the period in question, without explaining to it the reasons prompting it to ignore those final entries and without checking with it whether the changes so made affected the reliability of the information provided in order to monitor compliance with the undertaking. Having decided not to accept the first impression given by the October 1997 report, which was favourable to [Fresh Marine], the Commission was bound to exercise due care in interpreting correctly the data provided in that report, on which it intended to base its finding as to whether or not [Fresh Marine]'s conduct amounted to compliance with the undertaking during the period in question.

77 It cannot, in that connection, rely on the provisions of Article 8(10) of Regulation No 384/96 or Article 13(10) of Regulation No 2026/97.

78 Those provisions aim to enable the Commission, where there are grounds for believing on the basis of the best information available to it that an undertaking which it has initially accepted in the context of an anti-dumping or anti-subsidy proceeding has been breached, to take in good time any necessary provisional measures in order to protect the interests of the Community industry, without prejudice to a subsequent examination of the merits in order to check whether the undertaking in question has in fact been breached.

79 However, in the present case, the Court holds that the October 1997 report, in particular its final entries, suggested that [Fresh Marine] had complied with its undertaking...

80 It was after it had amended that report on its own initiative, without taking the precaution of asking [Fresh Marine] what possible impact its unilateral

action might have on the reliability of the information which [Fresh Marine] had provided, that the Commission concluded that there had been an apparent breach of the undertaking by [Fresh Marine]. The data contained in the October 1997 report, amended in that way, evidently cannot therefore be considered the best information, within the meaning of the provisions referred to in paragraph 77 above, available to the Commission at the time on which to base its conclusion as to whether [Fresh Marine] had complied with its undertaking.

...

82 It must therefore be held that, when analysing the October 1997 report, the Commission committed an error which would not have been committed in similar circumstances by an administrative authority exercising ordinary care and diligence.

...

84 However, it must be pointed out that [Fresh Marine]'s conduct is not blameless either....

...

89 In view of the complexity of its October 1997 report, the lack of obvious links between the erroneous lines and those containing negative values and the ambiguity of those values, [Fresh Marine], without being prompted,

should have sent to the Commission, with the report, the explanations necessary in order to understand that report. By sending the October 1997 report without any comment to that effect, [Fresh Marine] was guilty of negligence which, as the letter which the Commission sent it on 5 January 1998 shows..., confused the Commission's officials....

...

91 ... the Court holds that [Fresh Marine] and the Commission were equally at fault during the investigation as to whether [Fresh Marine] had complied with its undertaking during the third quarter of 1997 and at the end of which the Commission found that there had been an apparent breach of the undertaking making it necessary to take provisional measures against imports of [Fresh Marine]'s products in the framework of Regulation No 2529/97. For its part, [Fresh Marine], by failing of its own accord to append to its October 1997 report the explanations required for the correct understanding of the negative values appearing in it, showed such negligence as would never have been committed by a trader exercising ordinary care and diligence. Even taking into consideration such irregular conduct on the part of [Fresh Marine] and the confusion which such conduct may have caused when the report was read, the Court holds that the Commission's reaction, in unilaterally amending that report even though it suggested, *prima facie*, that [Fresh Marine] had complied with its undertaking during the period in question, was disproportionate and therefore unlawful, and could not be excused in any circumstances.

92 If the damage alleged by [Fresh Marine] is proved, even in part, and if it is apparent that a causal link exists between that damage and the events leading to the imposition of provisional measures on imports of its products, the question which must now be considered, it will be appropriate, when determining the Commission's obligation to make reparation, to take

account of the fact that each party bears half of the responsibility for those events.

The alleged damage and the causal link between it and the wrongful conduct of the Commission

...

106 So far as concerns, first, loss of profit between 18 December 1997 and 25 March 1998, it must be observed that the figures given by the Commission for exports of farmed Atlantic salmon by [Fresh Marine] to the Community between July 1997 and September 1998 show that [Fresh Marine] wholly suspended its exports during the period from approximately mid-December 1997 to the end of March 1998....

...

109 In light of those circumstances, it is necessary to assess the amount of the loss of profit suffered by [Fresh Marine] as a result of the suspension of its exports to the Community between 18 December 1997 and 25 March 1998. That loss of profit must be considered to equate to the profit which it would have made if it had continued to export to the Community during that period.

...

115 The loss of profit suffered by [Fresh Marine] will therefore be fixed at NOK 292 000 in respect of the period between 18 December 1997 and 31 January 1998, NOK 135 000 in respect of February 1998 and NOK 150 000 in respect of the period from 1 to 25 March 1998.

...

117 It is necessary now to determine whether there is a causal link between the loss or damage to [Fresh Marine]'s business... and the wrongful conduct of the Commission, confirmed by Regulation No 2529/97...

118 There is a causal link for the purposes of the second paragraph of Article 215 of the Treaty where there is a direct causal nexus between the fault committed by the institution concerned and the injury pleaded, the burden of proof of which rests on the applicant (Case T-149/96 *Coldiretti and Others v Council and Commission* [1998] ECR II-3841, paragraph 101, and the cited case-law). The Community cannot be held liable for any damage other than that which is a sufficiently direct consequence of the misconduct of the institution concerned (see, in particular, Joined Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others v Council* [1979] ECR 3091, paragraph 21; Case T-168/94 *Blackspur and Others v Council and Commission* [1995] ECR II-2627, paragraph 52, and [Case T-13/96] *TEAM v Commission* [[1998] ECR II-4073], paragraph 68).

119 In the present case,... the period during which [Fresh Marine] suspended its exports to the Community coincides with that during which the provisional measures imposed by Regulation No 2529/97 applied to imports of its

products. That must be interpreted as evidence of the existence of a causal link between the irregularities, in particular those committed by the Commission, giving rise to the imposition of provisional measures, on the one hand, and the loss of profit, on the other.

120 It is, indeed, undeniable that, were it not for such irregularities and the provisional measures which followed them, [Fresh Marine] would have continued its exports to the Community in compliance with its undertaking. It would thus have suffered no loss of profit on the Community market. The misconduct of the Commission, when analysing the October 1997 report, and which was confirmed by Regulation No 2529/97, is therefore causally linked, within the meaning of the case-law referred to in paragraph 118 above, with the loss or damage to [Fresh Marine]'s business.

121 ... In that regard, it is necessary to ascertain whether, as the case-law requires, [Fresh Marine] showed reasonable diligence in limiting the extent of the damage which it claims to have suffered, a matter which the Commission disputes (see, Joined Cases C-104/89 and C-37/90 *Mulder and Others v Council and Commission* [1992] ECR I-3061, paragraph 33; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 85; and Case C-284/98 P *Parliament v Bieber* [2000] ECR I-1527, paragraph 57).

122 The Commission's argument is that, in view of the fact that the duties imposed by Regulation No 2529/97 were provisional, [Fresh Marine] could, by providing a modest amount for the setting-up of a bank guarantee, have continued to export to the Community at unchanged prices.

...

124 However, even supposing that [Fresh Marine], which has not disputed the Commission's statements regarding the cost of such a bank guarantee, had obtained one, the Court holds that it would have run an unusual commercial risk, beyond the level of risk inherent in any commercial enterprise, by exporting to the Community during the period when Regulation No 2529/97 was applicable to imports of its products. If, once that bank guarantee had been issued, it had, as the Commission suggests, decided to export to the Community at unchanged prices without passing on to its Community customers the amount of the provisional duties through the prices it charged, it would have run the risk of having to bear on its own the burden of those duties should they ever have been collected definitively. Since it was not able to tell at that time whether that would eventually be the case, it therefore had no option but to increase its export prices by the amount of those provisional duties. Having regard in particular to competition from Community companies selling salmon and from the numerous Norwegian exporters which had been able to continue to sell on the Community market within the terms of their undertakings during the period in question, [Fresh Marine] could reasonably have taken the view that there was no chance of finding an outlet for its products on that market during that period.

125 In view of those circumstances, the absence of any attempt by [Fresh Marine] to export its products to the Community during the period in question cannot be regarded as a failure to fulfil the obligation, laid down in the case-law referred to in paragraph 121 above, to show reasonable diligence in mitigating the extent of the damage which it claims to have suffered.

...

131 ... the Court holds, on reading the letters of 30 January and 2 February 1998..., that the Commission did not take the necessary and appropriate measures which the party causing the damage must take where damage, such

as that at issue here, is ongoing (see, to that effect, *Parliament v Bieber*, cited in paragraph 121 above, paragraph 57) in order to limit the extent of the damage to which its misconduct, when it was verifying compliance by [Fresh Marine] with its undertaking, had contributed.

132 It is clear from the case-file that, following the explanations provided by [Fresh Marine] at the beginning of January 1998... and the investigation carried out at its premises at the end of that month..., the Commission had become convinced, at least as from 30 January 1998, as attested by its letter of that date, that [Fresh Marine] had complied with its undertaking in the course of the third quarter of 1997. However, the Commission, which, in its own words... and as is shown moreover by the fact that it adopted Regulation No 651/98, was alone entitled in the present case to lift the provisional measures imposed on imports of [Fresh Marine]'s products by Regulation No 2529/97, for no obvious reason delayed until 25 March 1998 before giving [Fresh Marine], by means of Regulation No 651/98, the formal legal reassurance which it could have given at the end of January 1998. Although it could have realised during the abovementioned investigation at the [Fresh Marine]'s premises that [Fresh Marine] was suffering considerable commercial loss as a result of the application of those provisional measures..., by its letter of 2 February 1998 it unjustifiably perpetuated the doubts as to the final outcome regarding the provisional duties imposed by Regulation No 2529/97. It thus dissuaded [Fresh Marine] from resuming commercial activities on the Community market.

...

134 For having thus failed to take the necessary measures as soon as the irregularities giving rise to the imposition of provisional measures on imports of [Fresh Marine]'s products were definitively rectified, the Commission must

be held solely responsible for [Fresh Marine]'s loss of profit, at least as from the end of January 1998.

135 It must therefore be held that, although, as is apparent from the grounds set out in paragraphs 73 to 92 above, [Fresh Marine] contributed to the same extent as the Commission in causing loss or damage to its business, continuation of that loss after the end of January 1998 is, on the other hand, exclusively due to a failure by the Commission to exercise due care; even though the explanations which it had obtained from [Fresh Marine] had definitely made it possible to correct their respective prior errors and removed any reason to continue to believe that the undertaking had been breached, the Commission delayed, for no apparent reason, in regularising [Fresh Marine]'s situation by withdrawing the provisional measures originally imposed against it.

136 It follows that the Commission must be held to be liable for one half of the loss of profit suffered by [Fresh Marine] between 18 December 1997 and 31 January 1998 and for all the loss caused to [Fresh Marine] from 1 February to 25 March 1998...

137 In conclusion, the Commission will be ordered to pay to [Fresh Marine], first, one half of NOK 292 000 in respect of [Fresh Marine]'s loss of profit between 18 December 1997 and 31 January 1998 and, second, NOK 285 000 (NOK 135 000 + NOK 150 000) as compensation for the damage caused to [Fresh Marine] from 1 February to 25 March 1998, that is a total amount of NOK 431 000. The remainder of the application will be dismissed.⁷

Forms of order sought before the Court of Justice

9 The Commission claims that the Court should:

- set aside the contested judgment;

- in giving final judgment itself, dismiss Fresh Marine's application at first instance and order it to pay the costs;

- in the alternative, refer the case back to the Court of First Instance.

10 Fresh Marine contends that the Court should:

- dismiss the Commission's appeal in its entirety;

- set aside the contested judgment in that it held that Fresh Marine bore half of the responsibility for the events that caused the damage;

- accordingly, order the Commission to pay Fresh Marine damages of NOK 577 000;

- order the Commission to bear the costs incurred by Fresh Marine both at first instance and on appeal;

- order the Commission to pay interest at the annual rate of 8% from the date of the contested judgment on the sum of NOK 577 000 and on the costs of Fresh Marine to be paid by the Commission.

The main appeal

The first and second grounds of appeal, relating to the cause of the damage and to the seriousness of the breach of Community law

Arguments of the parties

- ¹¹ By its first two grounds of appeal, which it is appropriate to examine together, the Commission submits that the Court of First Instance erred in law by holding, first, at paragraph 57 of the contested judgment, that the damage pleaded by Fresh Marine arose from the allegedly unlawful conduct of the Commission when examining the October 1997 report and, second, at paragraphs 59 and 60 of the contested judgment, that the judgments of the Community judicature cited by the

Commission in the proceedings at first instance, in which anti-dumping measures are characterised as legislative acts involving choices of economic policy, concerned cases with a 'radically different' background and by concluding therefore, at paragraph 61 of the contested judgment, that mere infringement of Community law was sufficient, in the present case, to lead to liability of the Community under Article 215 of the Treaty.

- 12 According to the Commission, the administrative act of analysing the October 1997 report could not, in itself, have been the cause of any damage suffered by Fresh Marine since it was only on the entry into force of Regulation No 2529/97 that the undertaking from which its exports had benefited was withdrawn and that anti-dumping and countervailing duties were imposed. It is well established that an action for damages can be brought under Article 215 of the Treaty only where the loss is 'actual and certain' (see Joined Cases 67/75 to 85/75 *Lesieur Cotelle and Others v Commission* [1976] ECR 391). The Commission submits that any loss suffered by Fresh Marine could have become actual and certain only on adoption of Regulation No 2529/97.
- 13 Moreover, it is clear from the wording of Article 8(10) of Regulation No 384/96 that, with respect to the imposition of provisional duties, the Commission has a wide discretion in determining the circumstances in which it has reason to believe that an undertaking has been breached. That point was not addressed by the Court of First Instance since it found, at paragraph 57 of the contested judgment, that the analysis of the October 1997 report 'did not involve any choices of economic policy and conferred on the Commission only very little or no discretion'. The contested judgment is therefore inconsistent with the Court of First Instance's own case-law (see Case T-489/93 *Unifruit Hellas v Commission* [1994] ECR II-1201 and Case T-51/96 *Miwon v Council* [2000] ECR II-1841).
- 14 According to the Commission, the decisive question is whether the act adopted by it was the result of an exercise of discretion since, under Community law, a loss flowing from such an act leads to liability only if the act satisfies the criterion laid

down in Case 5/71 *Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975, namely a sufficiently serious breach of a superior rule of law for the protection of individuals.

- 15 Fresh Marine contends that the damage was clearly caused by the unlawful conduct of the Commission when examining the October 1997 report. The adoption of Regulation No 2529/97 merely triggered the damage. Its adoption was the logical and inevitable consequence of the act of maladministration committed by the Commission when it unilaterally altered the October 1997 report without taking the precaution of asking Fresh Marine what impact that alteration might have on the reliability of the information provided by it. The fact that the loss became actual following the adoption of Regulation No 2529/97 does not imply *per se* that the adoption caused the damage to Fresh Marine.
- 16 Fresh Marine also submits that, from the point of view of exporters, a regulation imposing anti-dumping measures has all the characteristics of a decision affecting them individually. Regulation No 2529/97 is therefore not a legislative act but, on the contrary, an administrative act adopted in the course of an administrative procedure which specifically and exclusively concerned particular exporters. The fact that the Commission imposed a provisional duty on Fresh Marine is merely the logical consequence of the erroneous finding that it had failed to comply with its undertaking. As the Court of First Instance found at paragraph 58 of the contested judgment, the Commission, in adopting Regulation No 2529/97, did no more than draw provisional conclusions from its analysis of the October 1997 report.

Findings of the Court

- 17 In order for the Community to incur liability under the second paragraph of Article 215 of the Treaty, a number of conditions, including the existence of a

causal link between the conduct alleged against the institution concerned and the damage complained of, must be satisfied (see, *inter alia*, Case 4/69 *Lütticke v Commission* [1971] ECR 325, paragraph 10).

- 18 The Court of First Instance observed, at paragraph 119 of the contested judgment, that the period during which Fresh Marine suspended its exports to the Community coincided with that during which the provisional measures imposed by Regulation No 2529/97 applied to imports of its products. It also found, at paragraph 120 of the contested judgment, that it was undeniable that, were it not for the irregularities committed by the Commission and the provisional measures which followed them, Fresh Marine would have continued to export to the Community in compliance with its undertaking.
- 19 Moreover, at paragraph 58 of the contested judgment, the Court of First Instance, after having found that the alleged unlawfulness of the Commission's conduct caused the damage alleged only when, and because, it was confirmed by the adoption of provisional measures against imports of Fresh Marine's products within the framework of Regulation No 2529/97, ruled that, in that regulation, the Commission had done no more with regard to Fresh Marine than draw the appropriate provisional conclusions from its analysis of the October 1997 report, in particular from the level of the average export price charged by Fresh Marine during the period covered by the report.
- 20 Even if the latter finding is correct, the fact remains that it is only because Regulation No 2529/97 was adopted by the college of Commissioners that provisional duties were imposed and that Fresh Marine found it necessary to cease its exports to the Community.
- 21 It is therefore undisputed that it was only after the entry into force of Regulation No 2529/97 that the loss suffered by Fresh Marine became actual and certain.

- 22 At paragraph 57 of the contested judgment, the Court of First Instance held, however, that the damage at issue arose from the allegedly unlawful conduct of the Commission when it examined the October 1997 report.
- 23 Even if that finding is vitiated by an error of law, such an error will remain irrelevant provided the Court of First Instance correctly assessed the conditions under which the Community may incur non-contractual liability.
- 24 In that regard, the system of rules which the Court of Justice has worked out in relation to the non-contractual liability of the Community takes into account, *inter alia*, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question (see *Brasserie du Pêcheur and Factortame*, cited above, paragraph 43; *Bergaderm and Goupil*, cited above, paragraph 40; and Case C-312/00 P *Commission v Camar and Tico* [2002] ECR I-11355, paragraph 52).
- 25 According to settled case-law, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the author of the act and the damage sustained by the injured parties (see *Brasserie du Pêcheur and Factortame*, paragraph 51, *Bergaderm and Goupil*, paragraphs 41 and 42, and *Commission v Camar and Tico*, paragraph 53).
- 26 As regards the second condition, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where

that institution has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (see, *inter alia*, *Bergaderm and Goupil*, paragraphs 43 and 44, and *Commission v Camar and Tico*, paragraph 54).

- 27 Therefore, the determining factor in deciding whether there has been such an infringement is not the general or individual nature of the act in question but the discretion available to the institution concerned (see, to that effect, *Bergaderm and Goupil*, paragraph 46, and *Commission v Camar and Tico*, paragraph 55).
- 28 Since the provisional anti-dumping and countervailing duties were imposed on the basis of Article 8(10) of Regulation No 384/96 and Article 13(10) of Regulation No 2026/97 respectively, the limits to which the Commission's discretion was subject in this case must be determined.
- 29 The provisions referred to in the preceding paragraph, while granting the Commission the power to impose provisional anti-dumping and countervailing duties, require at the same time that there be reason to believe that the undertaking has been breached and that the decision imposing such duties be taken on the basis of the best information available.
- 30 In the present case, the Commission, when adopting Regulation No 2529/97, which imposed provisional duties on Fresh Marine's imports, relied solely on the analysis of a report which, as the Court of First Instance found at paragraphs 79 and 80 of the contested judgment, gave reason to believe that that company had complied with its undertaking not to make sales on the Community market below

a minimum average price, but which the Commission had amended on its own initiative, without taking the precaution of asking Fresh Marine what impact its unilateral action might have on the reliability of the information which Fresh Marine had provided to it.

- 31 It follows that the Commission clearly did not comply with its obligation to impose provisional duties only where there is reason to believe that the undertaking has been breached. In the circumstances of the present case, such conduct must be regarded as a sufficiently serious breach of a rule of Community law satisfying one of the conditions for the incurring of non-contractual liability by the Community (see, *inter alia*, *Bergaderm and Goupil*, paragraphs 42 to 44, and *Commission v Camar and Tico*, paragraphs 53 and 54).
- 32 Accordingly, the first two grounds of appeal must be rejected.

The third ground of appeal, relating to the Commission's actions in assessing the October 1997 report

Arguments of the parties

- 33 The Commission complains that the Court of First Instance erred in law in finding that the October 1997 report suggested that Fresh Marine had complied with its undertaking and in holding, therefore, that the Commission's reaction in amending that report had been disproportionate and that it had committed an error which it would have avoided if it had exercised ordinary care and diligence.

34 The Commission submits, first, that if the Court of First Instance had properly understood the nature of the final entries in the October 1997 report, it would not have described it, at paragraph 79 of the contested judgment, as a document suggesting that Fresh Marine had complied with its undertaking.

35 Second, according to the Commission, the Court of First Instance did not evaluate its conduct within the context of Article 8(10) of Regulation No 384/96. Since that provision lays down a test to be applied by the Commission in these circumstances, it is submitted that, by failing to have regard to that test, the Court of First Instance erred in law. In the Commission's view, it was essential that the Court of First Instance determine which party was to bear the burden of proof as to Fresh Marine's compliance with its undertaking before deciding whether or not the October 1997 report contained the best information available.

36 Fresh Marine contends that the Commission's argument concerning the Court of First Instance's alleged misunderstanding of the final entries in the October 1997 report is inadmissible since appeals are limited to points of law and thus exclude points of fact.

37 Finally, Fresh Marine submits that the discretion conferred on the Commission by Article 8(3) of Regulation No 384/96 with respect to the decision whether or not to accept an undertaking cannot be stretched to allow it to manipulate unilaterally a monitoring report and to conclude, on that basis, that an exporter has apparently breached its undertaking.

Findings of the Court

38 It need only be stated that, even if the third ground of appeal is admissible, it is of no consequence.

- 39 The Court has held, at paragraph 31 of the present judgment, that, in imposing provisional anti-dumping and countervailing duties, the Commission committed a sufficiently serious breach of Community law for non-contractual liability to be incurred by the Community.
- 40 Accordingly, it is irrelevant whether or not the Court of First Instance's assessment of the Commission's actions when analysing the October 1997 report is vitiated by an error.
- 41 Consequently, the third ground of appeal must be rejected.

The fourth ground of appeal, relating to the diligence shown by Fresh Marine in mitigating the loss

Arguments of the parties

- 42 The Commission submits that the Court of First Instance erred in law in finding that, despite its not providing a bank guarantee to cover the payment of the provisional duties imposed by Regulation No 2529/97 and to continue to export to the Community, Fresh Marine was not in breach of its duty to mitigate the loss suffered.
- 43 The Commission observes that the Court of First Instance justified that finding by stating, at paragraph 124 of the contested judgment, that, if Fresh Marine had

continued to export, it would have run the risk of having to bear on its own the burden of those duties should they ever have been collected definitively. In the Commission's view, that reasoning is contradicted by the other findings made by the Court of First Instance. If, as the Court of First Instance held, the conduct giving rise to the Commission's liability was the unilateral amendment of the October 1997 report even though the report suggested that Fresh Marine had complied with its undertaking, the contested judgment does not explain how the Court of First Instance was therefore able to find that there was a risk of the provisional duty being collected definitively in such circumstances.

- 44 Fresh Marine contends that this ground of appeal is inadmissible on the ground that it relates solely to a point of fact. In any event, if it were so obvious, in the present case, that the provisional duties imposed by Regulation No 2529/97 would not be collected definitively, the Commission should explain why it considered it necessary to impose them in the first place. The Commission's reasoning is likewise flawed in that it fails to take into account the fact that it is for the Council and not the Commission to decide to collect provisional duties definitively.

Findings of the Court

- 45 Under Article 225 EC and Article 58 of the Statute of the Court of Justice, an appeal lies on a point of law only. It follows that, save where the clear sense of the evidence has been distorted, the Court has no jurisdiction to review the assessment of the facts made by the Court of First Instance (see, *inter alia*, Joined Cases C-280/99 P, C-281/99 P and C-282/99 P *Moccia Irme and Others v Commission* [2001] ECR I-4717, paragraph 78, and Case C-104/00 P *DKV v OHIM* [2002] ECR I-7561, paragraph 22).

- 46 The Commission's arguments seek to call into question the Court of First Instance's assessment of the facts in the light of which it held that Fresh Marine had not breached its duty to show the necessary diligence in mitigating the extent of its loss.
- 47 In the present case, the Court of First Instance made a number of findings of fact at paragraph 124 of the contested judgment. It pointed out, in the first place, that if, having provided a bank guarantee, Fresh Marine had decided to export to the Community at unchanged prices without passing on to its Community customers the amount of the provisional duties through the prices it charged, it would have run the risk of having to bear on its own the burden of those duties should they ever have been collected definitively. Since it was not able to tell at that time whether that would eventually be the case, Fresh Marine would have had no option, according to the Court of First Instance, but to increase its export prices by the amount of those provisional duties. However, the Court of First Instance further held that having regard, in particular, to competition from Community companies selling salmon and from the numerous Norwegian exporters which had been able to continue to sell on the Community market within the terms of their undertakings during the period in question, it was reasonable for Fresh Marine to take the view that there was no chance of finding an outlet for its products on that market during that period. The Court of First Instance concluded accordingly that Fresh Marine would have run an unusual commercial risk going beyond the level of risk inherent in the pursuit of any economic activity if it had continued to export to the Community over the period during which Regulation No 2529/97 applied to imports of its products.
- 48 It is clear that the Commission has failed to demonstrate how those findings constitute a distortion of the sense of the evidence submitted to the Court of First Instance.
- 49 Consequently, the fourth ground of appeal must be rejected as inadmissible.

The fifth ground of appeal, relating to infringement of the rights of the defence

Arguments of the parties

- 50 At paragraph 132 of the contested judgment, the Court of First Instance, after having found that the Commission had become convinced, at least from 30 January 1998, that Fresh Marine had complied with its undertaking, held that the Commission had, for no obvious reason, delayed until 25 March 1998 before giving Fresh Marine, by means of Regulation No 651/98, the formal legal reassurance which it could have given it at the end of January 1998.
- 51 By its fifth ground of appeal, the Commission submits that the Court of First Instance infringed its rights of defence by failing to give it an opportunity to explain the alleged delay in adopting Regulation No 651/98.
- 52 Fresh Marine submits that the Commission has misinterpreted the contested judgment. Contrary to what it claims, the Court of First Instance did not hold, at paragraphs 132 and 134 of the contested judgment, that the Commission should have adopted and published Regulation No 651/98 after it had decided that the undertaking should be reinstated, but reproached it for not having provided Fresh Marine at the end of January 1998 with a formal legal reassurance that its undertaking would be reinstated. Such a reassurance did not have to take the form of a Commission regulation, and a letter stating clearly that the provisional duties would not be collected would have been sufficient. Instead of doing so, the Commission, by its letter of 2 February 1998, unjustifiably perpetuated the doubts as to the collection of the provisional duties.

Findings of the Court

- 53 As is clear from paragraph 132 of the contested judgment, the Court of First Instance found that, although the Commission alone was competent to lift the provisional measures imposed on imports of Fresh Marine's products by Regulation No 2529/97 and although it had become convinced, at least from 30 January 1998, that that company had complied with its undertaking, it unjustifiably perpetuated, by its letter of 2 February 1998, the doubts as to the final outcome of the provisional duties imposed by that regulation, thus dissuading Fresh Marine from resuming its commercial activity on the Community market.
- 54 The Commission has made no submissions in these appeal proceedings which might call into question either the Court of First Instance's findings or the validity of its reasoning.
- 55 Both during the written procedure and at the hearing before the Court, the Commission submitted merely that, if the Court of First Instance had given it an opportunity to explain the procedural requirements for adopting Regulation No 651/98, it would not have found, as it did, that there had been an unjustifiable delay on the basis of the unfounded principle that, once it had been decided at a purely administrative stage to reinstate Fresh Marine's undertaking, the Commission should have adopted Regulation No 651/98 on the same day.
- 56 The fifth ground of appeal must therefore be rejected as unfounded.

57 It follows from all the above findings that the main appeal must be dismissed.

The cross-appeal

Arguments of the parties

58 Fresh Marine submits that the Court of First Instance erred in law in holding, at paragraphs 91 and 92 of the contested judgment, that it bore half of the responsibility for the damage suffered by it between 18 December 1997 and 31 January 1998 because it failed to append to the October 1997 report explanations of the negative entries appearing in that report.

59 The absence of such explanations did not, in Fresh Marine's submission, cause the damage which it suffered as a result of the Commission's conduct. Fresh Marine takes the view that the Commission was obliged under Article 18(4) of Regulation No 384/96 to inform it of its intention to delete the negative entries from the October 1997 report before imposing provisional duties. Had the Commission complied with that provision, no damage would have been suffered by Fresh Marine as it would have immediately explained the meaning of the negative entries to the Commission. The Court of First Instance thus erred in law in failing to draw the appropriate conclusions from the Commission's failure to comply with its obligation under Article 18(4) of Regulation No 384/96 to inform Fresh Marine of the amendments which it intended to make to the report.

60 Fresh Marine also claims that the Court should order the Commission to pay it interest, from the date of the contested judgment, on the sums which are to be paid to it.

- 61 The Commission contends that Fresh Marine has misinterpreted the contested judgment in claiming that, according to that judgment, Article 18(4) of Regulation No 384/96 is applicable to the present case. Given that no reference is made to that provision either in the pleadings submitted to the Court of First Instance or in the contested judgment, the cross-appeal must be declared inadmissible because it is based on a plea not raised before the Court of First Instance.
- 62 Alternatively, the Commission submits that Article 18(4) of Regulation No 384/96 is inapplicable to the circumstances of the present case. It is intended to govern situations where a party provides an unsatisfactory response to a questionnaire during an investigation and the Commission intends to reject the evidence supplied and rely on the best evidence available. In the present case, the Commission did not reject the October 1997 report.
- 63 Furthermore, the Court of First Instance's finding that Fresh Marine contributed to the damage through its own negligence is not contradictory. The Court of First Instance having, at paragraphs 84 to 89 of the contested judgment, contradicted Fresh Marine's contention that the October 1997 report was clear, it is established that Fresh Marine was negligent in failing to attach any explanation to that report.
- 64 Finally, the Commission contends that the claim for interest is inadmissible because Fresh Marine does not rely on any error in law on the part of the Court of First Instance. Alternatively, the Commission submits that such a claim is admissible only in relation to an award of damages which the Court might uphold, to the exclusion of any award of costs.

Findings of the Court

- 65 Since Fresh Marine complains that the Court of First Instance erred in law in its assessment that Fresh Marine was partly responsible for its loss, the cross-appeal is admissible.
- 66 As regards the substance, the Court of First Instance's reasoning, at paragraphs 91 and 92 of the contested judgment, is not contradictory. Having found that the Commission's reaction in unilaterally amending the October 1997 report was unlawful and that Fresh Marine's submission to the Commission of a report which did not contain the explanations necessary to understand it correctly was negligent, the Court of First Instance rightly held that, when determining the Commission's obligation to make reparation, account should be taken of the fact that each party bears half of the responsibility for the events.
- 67 With respect to infringement by the Commission of Article 18(4) of Regulation No 384/96 and any error in law which the Court of First Instance may have committed in failing to draw the appropriate conclusions from such an infringement, it should be pointed out that Article 18(4) deals with failure to cooperate where evidence or information provided by traders is rejected by the Commission. Consequently, since Article 18(4) of Regulation No 384/96 concerns other aspects of the anti-dumping procedure, it is inapplicable to the facts of the present case.

68 The claim for payment of interest is inadmissible on two grounds. First, it does not satisfy the requirements of Article 112(1)(c) of the Rules of Procedure of the Court of Justice because it does not refer to the provisions or principles of Community law alleged to have been infringed by the Court of First Instance. Second, it must be regarded as a new claim which cannot be presented for the first time in an appeal (see, to that effect, Case C-282/98 P *Enso Española v Commission* [2000] ECR I-9817, paragraph 62). Before the Court of First Instance, Fresh Marine claimed only that the Commission should be ordered to make good the damage it suffered and to pay the costs.

69 It follows from the above that the cross-appeal must be dismissed in its entirety.

Costs

70 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 69(2) of those Rules, which apply to appeal proceedings by virtue of Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Fresh Marine has asked for the Commission to be ordered to pay the costs and the latter has been unsuccessful in its grounds of appeal, the Commission must be ordered to pay the costs relating to the main appeal. On the other hand, since the Commission has asked for Fresh Marine to be ordered to pay the costs of the cross-appeal and the latter has been unsuccessful in its grounds of appeal, Fresh Marine must be ordered to pay the costs relating to the cross-appeal.

On those grounds,

THE COURT

hereby:

1. Dismisses the main appeal and the cross-appeal;
2. Orders the Commission of the European Communities to pay the costs relating to the main appeal;
3. Orders Fresh Marine Company A/S to pay the costs relating to the cross-appeal.

Rodríguez Iglesias	Puissochet	Schintgen	
Timmermans	Gulmann	Edward	La Pergola
Skouris	von Bahr	Cunha Rodrigues	Rosas

Delivered in open court in Luxembourg on 10 July 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President