REPORT FOR THE HEARING
delivered in Case 264/86 *

I — Facts and procedure

1. *Relevant legal provisions*

1.1. *The basic regulation and the general rules for its application*

Council Regulation No 3796/81 of 29 December 1981 on the common organization of the market in fishery products (Official Journal 1981, L 379, p. 1) which replaced Regulation No 100/76 (Official Journal 1976, L 20, p. 1) provides for the possibility of granting a compensatory allowance to producers of certain kinds of tuna intended for the canning industry.

Article 20 of Regulation No 3796/81 totally suspended the Common Customs Tariff duties applicable to certain fishing products; one of those products was tuna intended for the industrial manufacture of prepared and preserved fish. It is stated in the recitals in the preamble to the regulation that a fall in the import prices of those products may threaten the income level of Community producers and that consequently provision must be made for compensation to be granted to producers when necessary. However, it is in the Community interest that application of the Common Customs Tariff duties should be totally suspended; since Community production of tuna is inadequate, conditions of supply comparable to those ruling in non-member countries exporting tuna should be maintained for the food-processing industries using those products. Any disadvantages arising from that system for Community tuna producers could be offset by the payment of allowances.

Article 17 (1) of Regulation No 3796/81 provides that compensation is to be granted to Community producers of tuna in respect of tuna intended for the canning industry. Article 17 (5) provides that the Council is to adopt general rules for granting the compensation and is to fix the Community producer price for tuna intended for the canning industry. The producer price is to be fixed, according to Article 17 (4), on the basis of the average of prices recorded during a reference period on representative wholesale markets or in representative ports. Article 17 (6) provides that the detailed rules for the application of Article 17 are to be adopted in accordance with the procedure laid down in Article 33, that is to say by the Commission according to the management committee procedure.

The general rules referred to in Article 17 (5) were laid down in Council Regulation (EEC) No 1196/76 of 17 May 1976 laying down general rules for the granting of compensation to producers of tunny for the canning industry (Official Journal 1976, L 133, p. 1). That regulation is moreover based on the former basic regulation, Regulation No 100/76, referred to above. Regulation No 1196/76 provides, *inter alia*, that compensation is to be paid if, at the same time, the quarterly average price and the entry price for the Community market are

* Language of the Case: French.

less than 90% of the Community producer price. Article 4 provides that compensation is to be granted only if an examination reveals that the situation recorded on the Community market is the consequence of the price levels on the world market for tuna and that a drop in the price on the Community market has not been caused by an abnormal increase in the quantities produced. Article 5 provides that the amount of the compensation is to be limited to the difference between the Community producer price and the price actually obtained by the Community producer. However, the amount is not to exceed the difference between the Community producer price and the quarterly average price on the Community market.

Finally, Article 7 provides that the detailed rules for the application of the regulation and the maximum amount of the compensation are to be fixed by the Commission according to the management committee procedure.

1.2. *The contested regulations*

After the Commission had established that the conditions laid down by Regulation No 1196/76 for the grant of compensation were satisfied, it adopted the two contested regulations on the basis of Article 17 (6) of Regulation No 3796/81 and of Article 7 of Regulation No 1196/76. The two regulations in question are Regulation No 2469/86 laying down detailed rules for the granting of compensation to producers of tuna for the canning industry and Regulation No 2470/86 determining the maximum amount of the compensation for tuna supplied to the canning industry for the period from 1 January to 31 March 1986.

Article 2 (3) of Regulation No 2469/86 provides as follows:

'The maximum amount of the compensation shall be at the level which is necessary to ensure that the fall in prices on the Community market does not threaten the income which producers of tuna derive from sale of the quantities produced, be it on the Community market or on that of third countries.'

Article 1 of Regulation No 2470/86 lays down the maximum amount of compensation: ECU 170 per tonne in respect of whole yellowfin tuna (a type of white tuna) weighing more than 10 kg and ECU 185 per tonne in respect of whole yellowfin tuna weighing less than 10 kg.

2. *Procedure*

The French Republic's application was lodged at the Court Registry on 21 October 1986.

By an order dated 11 March 1987 the Court granted the Kingdom of Spain leave to intervene in support of the French Republic's conclusions.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

The Court nevertheless requested the Commission to reply in writing to three questions. The Commission did so within the time allowed.

II — Conclusions of the parties

The applicant claims that the Court should:

(1) Declare null and void Commission Regulation No 2469/86 of 31 July 1986

laying down detailed rules for the granting of compensation to producers of tuna for the canning industry;

(2) Declare null and void Commission Regulation No 2470/86 of 31 July 1986 determining the maximum amount of the compensation for tuna supplied to the canning industry for the period from 1 January to 31 March 1986.

The intervener claims that the Court should:

(1) Declare null and void Article 2 (3) of Commission Regulation No 2469/86 of 31 July 1986 laying down detailed rules for the granting of compensation to producers of tuna for the canning industry;

(2) Declare null and void the whole of Commission Regulation No 2470/86 of 31 July 1986 determining the maximum amount of the compensation for tuna supplied to the canning industry for the period from 1 January to 31 March 1986.

The defendant contends that the Court should:

(1) Dismiss the application as unfounded;

(2) Order the applicants to pay the costs.

III — Submissions and arguments of the parties

The French Republic and the Kingdom of Spain present their arguments within the framework of two submissions:

The Commission's lack of competence;

Infringement of Article 190 of the EEC Treaty.

1. *The Commission's lack of competence*

The French Government points out in the first place that Article 2 (3) of Regulation No 2469/86 imposes an additional restriction in comparison with the criteria laid down by the Council in Article 5 of Regulation No 1196/76 in relation to the fixing of compensation. It goes on to explain that the maximum amount of the compensation as laid down in Regulation No 2470/86 was calculated according to a complex formula set out in a technical memorandum drawn up by the Commission for the purposes of the activities of the Management Committee for Fishery Products and distributed in the course of one of the committee's meetings. The application of that formula substantially reduced the amount of the compensation. Consequently, producers received only a fraction of the compensation to which they were legitimately entitled. The French Government considers that by Article 2 (3) of Regulation No 2469/86 and by the method of calculation the Commission has set an upper limit for the compensation.

In that connection the French Government maintains that the Commission is not empowered to set an upper limit for the compensation. In its view it follows from Article 7 of Regulation No 1196/76 that the Commission's sole power is to establish the data necessary for the calculation of the

compensation. The criteria for determining the compensation have already been laid down by the Council in a clear and precise manner in Article 5 of the regulation. The upper limit established by the Commission does not constitute a 'detailed rule for the application' of the criteria laid down by the Council but an amendment of those criteria which is contrary to the principle of the hierarchy of legal rules.

The Commission emphasizes as a preliminary point that Article 17 of Regulation No 3796/81 expressly empowers it to adopt detailed rules for the application of that provision according to the management committee procedure.

The Commission contends in the first place that it follows from Regulation No 1196/76 that the granting of compensation is not an automatic process because it is solely for the Commission to effect the calculations referred to in the regulation. In reality the Commission has a margin of discretion because Articles 5 and 7 of the regulation provide, in the first place, that the compensation 'est limité à' ('shall not exceed' in the English-language version) the difference between the producer price and the price actually obtained and, secondly, that the Commission is to fix the 'maximum amount' of compensation. Had it simply been a case of referring to the double ceiling expressly laid down in Article 5 the provision would have provided, according to the usual rules of legislative drafting, that the amount of the compensation 'est égal à' (shall be equal to) the difference between the producer price and the price actually obtained.

The Commission goes on to point out that an interpretation of the rules laid down by the Council in the light of the general scheme and of the purpose of the provisions at issue leads to the same conclusion. In order to comply with the purpose of the compensation the amount must be limited to the net loss of income resulting from the fall in import prices in so far as the fall in prices is due to the suspension of Common Customs Tariff duties. An interpretation of the regulation to the effect that it lays down a fixed and foreseeable level of compensation would interfere with trade patterns: it could lead to over-compensation of losses of income and could therefore encourage producers to supply the Community and reduce their normal deliveries to non-member countries.

Finally, the Commission observes that the French Government does not put forward any argument to show that the method of fixing the maximum amount of compensation as laid down in the 'technical memorandum' is erroneous.

In its reply the French Government maintains that Article 2 (3) of Regulation No 2469/86 is not merely a 'detailed rule for the application' of the regulation but a general rule concerning the grant of compensation. The detailed rules for the application of that 'general rule' are to be found in Regulation No 2470/86 and for the most part in the 'technical memorandum' presented to the Management Committee for Fishery Products. The Government adds that if the Council had wished to establish such a system it would, without fail, have included in the provisions of Article 5 of Regulation No 1196/76 an additional restriction of the type provided for in Article 2 (3) of Regulation No 2469/86. Moreover, the French Government finds it difficult to see why the whole of the difference between the Community producer price and the price actually obtained should not be paid to the producer.

The Spanish Government points out that Article 2 (3) of Regulation No 2469/86 introduced a new factor which is incom-

patible with the method of calculation provided for by Article 5 of Regulation No 1196/76. Article 5 lays down the method of calculating the amount of compensation with exceptional clarity. The literal meaning of the expression 'le montant est limité à la différence' (the compensation shall not exceed the difference) (between the Community producer price and the price actually obtained by the producer) is identical to that of the expression 'le montant est égal à la différence' (the amount is equal to the difference). It follows from the precise criteria laid down by the Council that in reality the margin of discretion referred to by the Commission does not exist. Commission Regulation No 2469/86 which lays down detailed rules of application is therefore not in conformity with the Council regulation the implementation of which it is to ensure.

As regards Regulation No 2470/86, the Spanish Government maintains that the fact that Article 2 (3) of Regulation No 2469/86 is void means that all the provisions of Regulation No 2470/86 are also void. In order to fix the maximum amount of compensation Regulation No 2470/86 should have used a method of calculation other than the one defined in Article 5 of Regulation No 1196/76.

2. *Infringement of Article 190 of the EEC Treaty*

The French Government submits that no appropriate statement of reasons is given for the upper limit to compensation provided for in Regulation No 2469/86 or for the maximum amount fixed by Regulation No 2470/86. The upper limit constitutes, however, one of the essential and new elements of the system established by the Commission; consequently, it should have been the subject of a proper and substantial statement of reasons. Whilst it is true that the recitals in the preamble to Regulation No 2470/86 give some indication of the reasons which led the Commission to impose an upper limit, that statement of reasons is inadequate. In addition, the Commission cannot rely on any of the provisions adopted by the Council as justification for the failure to provide a statement of reasons on which the regulations applying them were based.

The Commission observes that, according to the decisions of the Court, it is sufficient for the statement of reasons to set forth in essence the objective pursued by the institution responsible for the contested measure. The statement of reasons is not required to specify the various matters of fact and law or to provide a specific statement of reasons for each of the technical choices. Moreover, in the case of a regulation laying down rules of application a statement of reasons referring to factors contained in the basic regulation is adequate. That is the technique adopted for the statement of reasons on which Article 2 (3) of Regulation No 2469/86, which is at the centre of this dispute, was based. In addition, the content of the provision itself indicates the purpose of the system adopted by it. As regards the statement of the reasons upon which Regulation No 2470/86 was based, the Commission takes the view that the eight recitals in the preamble to the regulation constitute an ample statement clearly showing the reasons for which the necessary conditions were satisfied and the conditions which must be taken into account in fixing the amount of compensation. The Commission adds that in this case the French authorities were aware of the method adopted for fixing the amount of compensation before the regulation entered into force.

The Commission also observes that even if the statement of the reasons upon which Regulation No 2469/86 is based is regarded as inadequate, the statement of reasons upon which Regulation No 2470/86 is based suffices for the former regulation as well. The two regulations relate to the same subject-matter, were adopted on the same day and according to the same procedure, and were published in the same issue of the Official Journal.

In its reply the French Government limits itself to observing that it fails to understand how a statement of reasons may be deduced from the operative part of a regulation and that the adequacy of a statement of reasons is not proportionate to its length.

The Spanish Government contends that Regulation No 2470/86 fixes the amount of compensation without explaining the factors taken into account in arriving at the figures. The Government considers that in this case the conclusion arrived at is appreciably different from the conclusion which would have been arrived at by using the factors provided for by the Council regulations. In that connection it produces the following figures: the compensation provided for by the Council would have been ECU 315 per tonne, instead of ECU 170, in respect of yellowfin tuna weighing more than 10 kg, and ECU 344, instead of ECU 185, in respect of yellowfin tuna weighing less than 10 kg. In those circumstances the statement of reasons upon which the regulation was based should set out the method adopted in a clear and complete manner.

IV — Replies to the questions put by the Court

1. *The questions*

By a letter dated 6 July 1987 the Commission was requested to reply to the following questions:

'(1) The Commission's defence seems to imply that in laying down the detailed rules for the application of the compensation and in fixing the amount of that compensation the Commission could not base the rules merely on the application of the criteria laid down by Council Regulation No 1196/76. The Commission is requested to explain why a method of calculation based solely on those criteria would have led to "over-compensation" of the losses of income. It is also requested to develop its argument that there was a risk that such a method of calculation would prejudice the functioning of the system of compensation, having regard, in particular, to Article 4 of Council Regulation No 1196/76.

(2) The Commission is also requested to indicate whether factual elements, which had arisen when it drew up Regulations Nos 2469/86 and 2470/86, led it not to include the actual method of calculating the compensation in the recitals in the preamble to Regulations Nos 2469/86 or 2470/86 or both (even though that method was submitted to the management committee).'

2. *Summary of the Commission's replies*

1. With regard to the first part of the first question, the Commission repeats that the purpose of the compensation in question is to enable the income level of tuna producers in the Community to be maintained, which income may be threatened by the system of duty-free imports where the world price of tuna falls. Producers' income is determined in essence by two factors: the price of tuna and the quantity produced. Both those factors are also referred to in Council Regulation No 1196/76: Article 4 relates to quantities (compensation may not be granted if the fall in prices on the Community market has been caused by an abnormal increase in the quantities produced); Articles 3 and 5 relate to the conditions for the grant of compensation as regards the level of the entry price and of the Community price.

According to the Commission it was therefore necessary to fix the amount of

compensation taking into account those two factors: price and quantity. A method of calculation based solely on prices would have led to 'over-compensation' of losses of income.

Calculation of the amount of compensation solely on a price basis (Community producer price less quarterly average price) would have resulted in the following levels for the first quarter of 1986:

ECU 315 per tonne in respect of yellowfin tuna weighing more than 10 kg;

ECU 344 per tonne in respect of yellowfin tuna weighing less than 10 kg.

The total amount of compensation which would have had to be paid to French producers would have been ECU 3 243 806.

Nevertheless, it is necessary to take account of actual income losses in particular because, during the first quarter of 1986, tuna production increased.

Total income of tuna producers (the price of products landed multiplied by the quantities marketed) was ECU 25 259 926 during the first quarter of 1986. Average total income during the first quarter of 1983, 1984 and of 1985 (the reference period) was ECU 27 010 551. The difference, that is to say the actual fall in total income, was only ECU 1 750 625.

It follows from those figures that if the compensation had been based solely on prices tuna producers would have received additional income of ECU 1 493 181 (3 243 806 less 1 750 625) in comparison with the income earned during the reference period.

For those reasons it was necessary to amend the calculation of the amount of compensation.

2. With regard to the second part of the first question, the Commission explains that if the detailed rules for granting compensation went further than maintaining producers' income, the effect of the compensation would be to encourage increased production on the Community market. Such an increase would be contrary to the criteria laid down in Article 4 of Regulation No 1196/76.

The Commission adds that the period following the first quarter of 1986 was marked by such an increase in the quantities landed in the Community that the fall in prices was wholly compensated. In those circumstances the Commission considered that there was no need to grant compensation.

3. The Commission replies to the second question that it cannot put forward any factual element or any other particular factor which led it not to include the actual method of calculating the compensation in the recitals to Regulations Nos 2469/86 or 2470/86 or both.

The Commission takes the view that it acted in the same manner as it generally acts where it has to determine a method of calculation, fix the amount of Community aid or subsidy, or the like. The legislative technique adopted consists of stating in the recitals the factors taken into account in arriving at the amount contained in the operative part. By way of example it refers to a number of regulations concerning agriculture.

T. Koopmans
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