OPINION OF ADVOCATE GENERAL GULMANN
delivered on 21 January 1992 *

Mr President,
Members of the Court,

Facts and legal background to the cases

These cases concern the validity of two decisions adopted by the Commission which turned down requests by the applicants, the Spanish companies Pesquerias de Bermeo SA and Naviera Laida SA, for incentive premiums in respect of two projects for exploratory fishing voyages in the South-West Atlantic Ocean.

I would like briefly to outline the relevant legislation.

Under Article 1 of Council Regulation (EEC) No 4028/86 [1] the Commission may grant Community financial aid for certain measures, the object of which is the restructuring of the fisheries sector; these measures include the reorientation of fishing activities by means of exploratory fishing voyages.

Title V of the regulation sets out the rules under which aid for exploratory fishing may be granted. Article 13 defines an exploratory fishing voyage as

'freedom to provide services... any fishing operation carried out for commercial purposes in a given area with a view to assessing the profitability of regular, long-term exploitation of the fishery resources in that area'.

Article 14 of the regulation sets out the conditions which projects for exploratory fishing voyages must satisfy in order to qualify for a so-called incentive premium. Of particular importance for the present cases is Article 14(2)(c), which provides that projects must relate to

'... fishing zones where, on the basis of an estimate of potential fishery resources, stable and profitable exploitation seems possible in the long-term',

along with Article 14(3), which provides that

'A project may comprise several successive voyages to the same fishing zone with a view to establishing the basis for the stable long-term exploitation of that zone.'

* Original language: Danish.
1 — OJ 1986 L 376, p. 7.

Finally, I should also mention Article 3(2) of Commission Regulation (EEC) No 1871/87 laying down detailed rules for implementing Council Regulation (EEC) No 4028/86 as regards schemes to encourage exploratory fishing, [2] under which

'To qualify for an incentive premium, voyages may not begin until after the date on which the application for aid is recorded as received by the Commission.'

According to Article 15 of Regulation No 4028/86, the incentive premium shall be equal to 20% of the eligible cost of the voyage and presupposes that the Member State concerned shall contribute between 10% and 20% of such cost.

Article 16(1) of Regulation No 4028/86 stipulates that projects shall be submitted to the Commission through the Member State concerned, once the favourable opinion of the latter has been obtained.

Article 16(3) provides that 'within two months of the submission of a project, the Commission shall decide whether to grant the premium referred to in Article 15.' This decision shall be notified to the beneficiaries and to the Member State concerned, while the other Member States shall be informed accordingly within the Standing Committee for the Fishing Industry.

2 — OJ 1987 L 180, p. 1.

The facts of the two cases before the Court may be summarized as follows:

On 13 December 1989 Pesquerias de Bermeo SA and Naviera Laida SA submitted applications to the General Secretariat for Sea Fisheries in Madrid. On 7 February 1990 the General Secretariat for Sea Fisheries informed them that it was prepared to award aid equivalent to PTA 43 931 600 or 20% of the eligible costs, provided that the Commission decided to grant the incentive premiums.

On 14 February 1990 the applicants submitted their applications to the Commission via the Spanish authorities. Naviera Laida SA began its fishing voyage on 15 February 1990 with the vessel 'Geminis' and on 22 February 1990 Pesquerias de Bermeo SA commenced its voyage with the vessel 'Ceres'.

On 24 April 1990, at a meeting of the Standing Committee for the Fishing Industry, the Commission made the following statement:

'... In order to assist Member States in their selection of exploratory fishing voyages to be submitted to the Commission, the Commission will, on the basis of experience gained from previous voyages, provide guidance as to the zones and species which in its view should no longer be considered.

During the course of the year further information may be provided.

Thus, as regards 1990, the Commission considers that, on the basis of previous voyages, it is no longer appropriate to pursue this type of measure in the zones of the South-West Atlantic Ocean where those voyages were conducted.'

The Commission has pointed out that the basis for that statement was the fact that it had, between 1987 and 1989 granted incentive premiums for a total of 42 exploratory fishing voyages, 25 of which were made in the South-West Atlantic Ocean and concerned the same fish species as those referred to in the applicants' projects.

In a letter of 25 April 1990, the Commission informed the applicants that, in the light of information previously received, there were no grounds for continuing to finance exploratory fishing voyages in the South-West Atlantic and that consequently it could not grant incentive premiums for exploratory voyages to that zone. According to the applicants, they did not receive this letter until 7 May 1990. After further correspondence between the parties, in which the applicants, *inter alia*, drew the Commission's attention to the fact that the fishing voyages were already long under way, the Commission, on 6 June 1990, adopted the decisions at issue in the present cases not to grant incentive premiums in respect of the projects submitted by the applicants.

The two decisions were thus adopted following the expiry of the period referred to in Article 16(3) of Regulation No 4028/86. This fact is not disputed by the Commission.

Of further relevance to the present cases is the fact that the Commission, on 7 November 1989, had decided to grant incentive premiums for two projects submitted by the applicants on 14 February 1989 and involving the same vessels, the same zones and the same fish species as the projects in respect of which the applicants applied for aid on 14 February 1990. The Commission had pointed out in its decisions of 7 November 1989 that all the conditions governing the grant of incentive premiums had been satisfied and that the projects were among those best suited to promoting the Community's interest within the common fisheries policy.

Forms of order sought by the parties

The *applicants* claim that the Court should:

(i) declare the applications admissible;

(ii) declare the Commission decisions to be void;

iii) order the defendant to accept that each of the applicants is entitled to receive PTA 43 931 600 in the form of an incentive premium;

(iv) order the defendant to compensate the applicants for the loss sustained by them as a result of the unlawful decisions, and;

(v) order the defendant to pay the costs.

The *defendant* contends that the Court should:

(i) dismiss the applications in so far as they seek the annulment of its decisions;

(ii) dismiss the applicants' request for a declaration that they are entitled to receive incentive premiums;

(iii) declare the claim for damages inadmissible or, in the alternative, dismiss that claim;

(iv) order the applicants to pay the costs.

From this point on I shall discuss the submissions made by the parties only in so far as is necessary to provide a basis for my own views on their conclusions. I would also refer to the Report for the Hearing for an account of the facts of the cases and the legal views expressed by the parties.

Do the applicants have capacity to bring the proceedings?

The Commission's decisions are addressed to the applicants. The applications may accordingly be treated as admissible: see the second paragraph of Article 173 of the EEC Treaty.

To what extent are the Commission's decisions invalid?

On the basis of two central facts, namely:

(i) that the Commission's decisions were adopted after the expiry of the two-month period laid down in Article 16(3) of Regulation No 4028/86, and;

(ii) that the Commission, following an interval of six months, adopted decisions to grant, or not to grant, incentive premiums for projects which were substantially identical,

the applicants set out a large number of grounds in support of their contention that the Commission decisions should be declared void.

I believe that the contentions raised by the applicants can best be examined in the light of the replies to the following three questions:

(a) Is the legal effect claimed by the applicants connected with the failure to comply with the period laid down in Article 16(3) of Regulation No 4028/86?

(b) Did the Commission infringe Regulation No 4028/86 in its finding that the appli-

cants did not satisfy the conditions for granting the incentive premium?

(c) Did the Commission's decisions breach the principles of legal certainty and legitimate expectation, as expressed in Community law?

(a) *Failure to comply with the period given for the adoption of a decision*

The applicants contend that the two-month period within which the Commission is required to take its decision is mandatory in the sense that, once that period has expired, the Commission may only adopt a decision which is favourable to the applicants. The applicants believe that the Commission's decisions are accordingly invalid in view of the fact that they reject the applications made.

Support for this contention is adduced from, *inter alia*, the fact that Article 3(2) of Regulation No 1871/87 can be interpreted as meaning that an exploratory voyage may begin immediately after the date on which the application for aid has been recorded as received by the Commission. According to the applicants, therefore, since an exploratory voyage will generally begin when the Commission has adopted its decision, only a negative decision is required to be adopted within the period, since otherwise any failure to comply with the period in such a case would detrimentally affect applicants.

The applicants point out in this regard that the conduct of exploratory voyages involves special expenditure compared with ordinary fishing voyages, for example, the requirement that there should be approved scientific observers aboard or, should this be impossible, that a scientific institute should participate in the preparation of the voyage etc. (see Article 14(2)(d) of Regulation No 4028/86). It might also be added that the exploratory voyages must be of a certain duration and accordingly may not as a rule simply be discontinued if the results of catches should prove unsatisfactory (Article 14(2)(b) of the regulation).

Furthermore, the applicants take the view that the period must be considered in the context of the particular need for clarity and predictability, which are characteristics of the fisheries sector, in which it must be possible to plan fishing seasons and voyages in advance. [3]

The Commission has submitted that the purpose of the period is merely to indicate the time by which the Commission should generally present its decision. According to the Commission, the purpose of the period is to indicate the date from which proceedings

3 — The applicants refer in this connection to the Court's judgment in Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403. It was argued in that case, *inter alia*, that the United Kingdom had failed to fulfil its obligation to implement Regulation No 1779/77 by way of measures which had been laid down in law and published. The Court expressed itself in the following manner: '... This obligation to introduce implementing measures which are effective in law and with which those concerned may readily acquaint themselves is particularly necessary where sea fisheries are concerned, which must be planned and organized in advance; the requirement of legal clarity is indeed imperative in a sector in which any uncertainty may well lead to incidents and the application of particularly serious sanctions' (paragraph 46).

may be brought against the Commission on the ground of its failure to act. On the other hand, failure to comply with the period cannot have any effect on the content of the decisions themselves and, *a fortiori*, cannot render them invalid.

It is of course unfortunate that the Commission was unable to adopt the decisions in question before the expiry of the period laid down by the Council, and one is entitled to call in question the expediency of laying down such periods if failure to respect them attracts no legal consequences. I suppose it must be accepted that an action brought against the Commission for its failure to act within the area of law which concerns us here constitutes a legal remedy of limited effectiveness.

Considerations of this type, however, are of course insufficient to form a basis for the assumption that the Commission's failure to comply with the period has the effect in law which is claimed by the applicants.

I believe that the following considerations determine the view which must be taken with regard to the applicants' submissions.

Regulation No 4028/86 does not mention any legal consequences of a failure to comply with the period laid down in Article 16. This is significant because the general rule must be that such a failure cannot have the very far-reaching legal consequences claimed by the applicants, unless the Community legislature has expressly specified such consequences. This view is reinforced by the fact that there are cases where regulations expressly attach the legal consequences invoked by the applicants to failures to comply with a time period within which the Commission is required to adopt a decision. [4]

The question, however, is whether such legal consequences can be attached to failures to comply with time-limits in special and serious circumstances, even though such legal consequences are not expressly referred to, and whether such circumstances exist within the area in question in the present cases.

The Court had an opportunity to express its views on such a question in its judgment in Case 349/85 *Denmark* v *Commission* [1988] ECR 169. Article 5 of Regulation No 729/70 on the financing of the common agricultural policy prescribes that the Commission must clear accounts within a period of one year; the Commission had failed to comply with the period in question. The Court ruled as follows:

4 — Such a provision governing a time period was, for instance, the subject of the Court's judgment in Case 148/87 *Frydendahl Pedersen A/S* v *Commission* [1988] ECR 4993. That case concerned the validity of a decision adopted by the Commission and addressed to the Danish Government, in which the Commission stated that there were no grounds for the repayment of import duties paid by the applicant. Article 7 of Regulation No 1575/80 is worded as follows: 'If the Commission fails to take a decision within the period referred to in Article 5 or fails to notify a decision to the Member State in question within the period referred to in Article 6, the decision-making authority shall grant the application'. The Court went on to declare the decision adopted by the Commission to be void, by reference to the fact that it had not been adopted before the expiry of the prescribed period and that the Commission's attempt to circumvent the time-limit constituted a misuse of procedure.

'... No penalty is imposed for failure to comply with that time-limit, which may therefore be regarded, having regard to the nature of the decision on the clearance of the accounts, the essential purpose of which is to ensure that expenditure incurred by the national authorities is in accordance with the Community rules, as a merely formal limit, save where the interests of a Member State are affected.' [5] (Paragraph 19 of the judgment).

I believe that the inference to be drawn from this is that the legal consequences of a provision relating to a time period, the wording of which indicates that it does not attract a sanction, must be determined in the light of the nature and objective of the decision to be adopted within the period in question, and that serious attention may be paid in certain circumstances to an addressee whose interests have been detrimentally affected.

With regard to the purpose behind the Commission's decisions to grant incentive premiums, the preamble to Regulation No 4028/86 provides as follows:

'... whereas, moreover, since the Community has a deficit in fish products, it must endeavour to find new sources of supply, in particular by increasing its fishing possibilities and by extending its activities in the aquaculture sector; ...

...

Whereas it is also necessary to maintain, or even improve, fishing possibilities outside the waters covered by the Community legislation on fishing; whereas this objective may be achieved by direct Community aid for exploratory fishing projects or temporary joint ventures;'.

The purpose of exploratory voyages is therefore to extend the Community's fishing possibilities and thereby its sources of supply. It is for the purpose of attaining that objective that the Commission is required to adopt decisions to grant incentive premiums. Incentive premiums are not intended as financial aid for hard pressed areas of the fisheries sector, and no assessment is made of the needs of the recipient when a decision is taken to grant an incentive premium. Incentive premiums — as the name suggests — have as their sole purpose to encourage recipients to undertake certain activities in the Community's interest.

I do not believe it possible to derive from such an objective any argument which would support the application to the period in question of the legal effects claimed by the applicants.

As I have already mentioned, the applicants contend that special attention must be paid to applicants for aid in respect of exploratory

5 — See the similar judgments of the Court in Cases C-259/87, C-334/87 and C-335/87 *Greece* v *Commission* [1990] I-2845, 2849 and 2875.

voyages, in so far as exploratory voyages, with all the associated expenditure, may be commenced prior to the expiry of the period given for the Commission to take its decision; this is expressly provided for in Article 3(2) of Regulation No 1871/87.

This argument must be rejected. Article 3(2) is formulated in negative terms, in the sense that the purpose of the provision is to prevent aid being granted in respect of exploratory voyages which begin before the application has been recorded as received by the Commission. In other words, the provision does not lay down a general system under which voyages may begin before the Commission has adopted its decision.

Any applicant for aid who begins his voyage before the Commission has taken its decision is operating on his own account and at his own risk. It cannot be disputed that the Commission may reject the application for aid before the expiry of the two-month period, even though the fishing voyage has already begun. There does not appear to be any compelling basis for the view that the applicants' legal position should radically improve once the two-month period has expired. The applicants must have been well aware that they were running a risk in beginning the voyages before the Commission had adopted its decisions.

The applicants began their exploratory voyages immediately after submitting their applications for aid, i. e. almost two months before the adoption of any decision could be expected. Only some three weeks after the expiry of the period the applicants received notification from the Commission to the effect that projects of this type would no longer qualify for aid (the Commission's letter is dated 25 April 1990, that is to say, ten days after the expiry of the two-month period, although it is claimed that the letter was not received until 7 May 1990). In other words, the position of the applicants would not have differed to any great extent if the Commission's decision had been adopted within the period and accordingly been unchallengeable.

There are, accordingly, no special and significant circumstances with regard to the period at issue such as to justify, in the absence of express provisions, the very extensive legal effects claimed by the applicants being attributed to the failure to respect the period laid down in the regulation. I therefore take the view that the failure to comply with that period cannot *per se* result in the invalidity of the decisions.

(b) *Did the Commission infringe Regulation No 4028/86 in its finding that the applicants did not satisfy the conditions for granting the incentive premium?*

The applicants contend that the Commission's decisions are substantially invalid, inasmuch as their applications satisfied the conditions governing the grant of incentive premiums. Their central argument in this regard is that the Commission, after having granted aid in 1989, could not in 1990 —

only 6 months after the first positive decisions — reach the opposite result with regard to applications concerning fishing voyages which in all major respects corresponded to those undertaken in 1989.

I have no doubt that the Commission, in adopting its decisions, acted within the parameters of the discretion which it requires when administering the aid scheme.

The Commission, in its decisions of 6 June 1990, justified its refusal in the following terms:

'... Whereas Community fishermen are aware of the marine potential of this zone; the results of the exploitation of that zone are also known and an exploratory fishing voyage with a view to evaluating the profitability of regular long-term exploitation of the fishery resources in that area is not justified;

Whereas consequently that exploratory fishing voyage does not fulfil the conditions laid down for Community financial aid, in particular the conditions laid down in Article 14(2)(c) of Regulation (EEC) No 4028/86.'

Article 14(2)(c) of Regulation No 4028/86 stipulates that projects relating to exploratory fishing voyages must 'relate to fishing zones where, on the basis of an estimate of potential fishery resources, stable and profitable exploitation seems possible in the long term'. As we have seen, the Commission, in its decision not to grant aid, pointed to the fact that this condition had not been satisfied. The parties disagree on the extent to which it is correct to say that this condition was not satisfied. However, it also becomes clear from the Commission's submissions that the refusal was based primarily on the fact that the zone in question had already been adequately explored. As has already been mentioned, the Commission pointed out that a total of 42 projects were carried out over the period 1987-1989, and that 25 of these related to exploratory voyages in the South-West Atlantic and involved the same fish species.

In a zone which has been adequately explored, a fishing voyage cannot satisfy the basic condition under the regulation for it to be an 'exploratory fishing voyage', namely that it is undertaken 'with a view to assessing the profitability of regular, long-term exploitation of the fishery resources in that area.' Since Article 14 empowers the Commission only to 'grant Community financial aid to projects for exploratory fishing voyages', the Commission cannot grant such aid in respect of areas which it believes have already been adequately explored.

The fact that the Commission will, at a particular point, be required to refuse aid to projects which are identical in every respect to projects previously supported follows logically from the fact that the voyages in question are exploratory in nature.

The applicants further contend that it follows from Article 14(3) of the regulation that, 'with a view to establishing the basis for the stable long-term exploitation' of a zone, incentive premiums may have to be granted to several exploratory voyages in succession. The applicants take the view that the Commission's decisions are in conflict with this provision on the ground that they refuse the applicants their requests for incentive premiums in respect of further projects relating to exploratory fishing in the same zone.

This view must be rejected. In the first place, the provision, according to its express wording, does not deal with the question of granting incentive premiums to several projects in succession but rather allows a specific project to comprise several exploratory voyages; there is, however, no mention of this in the present cases. Secondly, Article 14(3) uses the word 'may', rather than 'must'; it is accordingly left to the Commission to determine how far it serves its purpose to allow a project to comprise several voyages.

The applicants do not appear to have adduced any further facts which would justify the view that the Commission exceeded the bounds of its discretion.

The applicants contended in their submissions that there was misuse of power in the present cases. However, I believe that the applicants have failed to produce any evidence to substantiate such a contention. The arguments which they have presented in this regard are, in my view, of more relevance to the question whether there has been an infringement of the principle of legitimate expectation, and it is for that reason that I will deal with them below.

(c) *The principles of legal certainty and legitimate expectation*

The Commission has pointed out that a number of the applicants' submissions were only explicitly dealt with in their replies. This is in particular the case with regard to the submissions that the Commission, through its decisions, breached the principles of legal certainty and legitimate expectation.

It is a moot point whether such submissions must be rejected pursuant to Article 42(2) of the Rules of Procedure on the ground that they were raised out of time.

It would appear from the case-law of the Court (see, *inter alia*, the Court's judgments in Joined Cases Nos 19/60, 21/60, 2/61 and 3/61 *Société Fives Lille Cail et al.* v *High Authority of the European Coal and Steel Community* [1961] ECR 281 and in Case 108/81 *Amylum* v *Council* [1982] ECR 3107) that an issue is new if it has not been directly or indirectly mentioned in the application.

It is my view that the applicants did indirectly refer in their applications to the principles mentioned, inasmuch as they therein criticize the Commission for having changed the criteria following the expiry of the period given for the purposes of adopting a decision. Thus, the applicants submit in their applications that 'the error in law is due ... to the fact that the Commission takes the view that ... it may rely on criteria adopted after the expiry date of the period in question' [6],

6 — Application in Case C-258/90, at page 18 of the French translation.

that 'on the expiry of the period ... the Commission, on the basis of new criteria which it had adopted on 6 June 1990, wished to amend the essential characteristics of the fishing season in question, owing to a serious lack of foresight ...' [7], and that 'the Commission's attitude was to inform [the applicant] ... after a period of more than four months ... that it had changed its mind and in particular that it would not be granting the aid, even though the exploratory voyage had already begun ...'. [7]

There is therefore insufficient cause to declare the issues in question to be inadmissible.

So far as I can make out, the principle of legitimate expectation has been argued from two separate perspectives.

On the one hand, the argument is that the Commission provided aid in November 1989 for an essentially identical project and expressed in this regard a positive attitude towards subsequent projects of the same type; moreover, the applicants did not receive a negative decision within the period. The applicants contend that this raised a legitimate expectation that the aid would in fact be granted.

It ought to be noted in this regard that the Court has ruled in its case-law that traders are unable to claim that they have a legitimate expectation that an existing situation which is capable of being altered by the institutions of the Community in the exercise of their power of appraisal will be maintained. [8] I do not believe that the fact that the Commission expressed itself at a particular time in favour of a specific type of exploratory voyage should be allowed to restrict the Commission's scope for altering on objective grounds its view as to the type of projects which best serve the Community's interests.

On the other hand, the applicants also claim that the principle of legitimate expectation was infringed in so far as the period had expired before the Commission, at a meeting of the Standing Committee for the Fishing Industry, expressed its view that previous projects of the type in question had been assessed and that it had come to the conclusion that it would no longer be appropriate to grant aid in respect of such projects. By letting this view apply also to the projects notified by the applicants, in respect of which the period for a decision had already expired, the applicants believe that the Commission conferred retroactive effect on criteria which it had altered.

I would first of all point out in this regard that there is, in my opinion, nothing in the

7 — Application in Case C-258/90, at page 21 of the French translation.

8 — See, *inter alia*, the Court's judgment in Joined Cases 424 and 425/85 *Coöperatieve Melkproducentenbedrijven Noord-Nederland BA* ('Frico') *and Others* v *Voedselvoorzienings In-en Verkoopbureau* [1987] ECR 2755, paragraph 33, where the Court ruled that 'if it found that large private stocks of butter were accumulating in Member States with low interest rates, the Commission was entitled to assess the situation in a different way than several months before. It is established case-law ... that traders are unable to claim that they have a legitimate expectation that an existing situation which is capable of being altered by the institutions of the Community in the exercise of their power of appraisal will be maintained. A reduction of the interest rate taken into account for the reimbursement of the cost of financing storage was thus a possibility that a prudent trader should have taken into consideration ...'.

cases before the Court which would suggest that the Commission actually altered the criteria for assessing projects relating to exploratory fishing voyages. The fact of the matter is that the Commission applied the same criteria to reach a different result because the factual circumstances, that is to say, the volume of information already collected, had changed in the interim period. As has been discussed in connection with the reply to question (b), it is clear that the Commission must, on the basis of the applicable criteria in the regulation, be in a position at any given time to change its views on the usefulness of subsequent exploratory voyages in a particular zone.

I would also point out that the Commission cannot be precluded from changing its views in such a way as to affect applications already received. There is no basis for imposing a requirement that the Commission should officially indicate in advance how it intends to exercise its discretion.

With regard otherwise to the principle of legal certainty, the applicants make various general claims in their submissions to the effect that Community law must be clear, predictable and based on rules, the application of which it is possible to predict. I do not believe that the principle of legal certainty, as it has been dealt with in the applicant's arguments, is of any separate significance in the present cases compared to their arguments based on the principle of legitimate expectation.

The applicants' remaining claims

The applicants claim that the Commission is obliged to recognize their entitlement to receive incentive premiums.

This claim must be dismissed, since the Court has no jurisdiction to determine such a request for recognition.

Finally, the applicants submitted a claim for compensation. Since I do not regard the decisions adopted as being contrary to law, this point must accordingly be decided in favour of the Commission.

Conclusion

I would accordingly suggest that the Court should dismiss the applicants' claim to recognition of their right to receive incentive premiums, dismiss the remaining submissions of the applicants and order them to bear the costs of the proceedings.