JUDGMENT OF THE COURT
15 December 1987 *

In Case 237/86

Kingdom of the Netherlands, represented by A. Bos, Deputy Legal Adviser at the Ministry of Foreign Affairs, and G. M. Borchardt, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Robert C. Fischer, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision 86/443 of 1 July 1986 concerning the clearance of the accounts presented by the Kingdom of the Netherlands in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1982 (Official Journal, L 256, p. 29) is void in relation to fishery products,

THE COURT,

composed of: G. Bosco (President of Chamber), acting as President, J. C. Moitinho de Almeida (President of Chamber), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet and F. Schockweiler, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 5 May 1987,

* Language of the Case: Dutch.

after hearing the Opinion of the Advocate General delivered at the sitting on 16 September 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 9 September 1986 the Kingdom of the Netherlands brought an action before the Court under the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision 86/443 of 1 July 1986 on the clearance of the accounts presented by the Kingdom of the Netherlands in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section (hereinafter referred to as 'the Fund'), expenditure for 1982 (Official Journal 1986, L 256, p. 29), is void in so far as the Commission has failed to charge to the Fund the sum of HFL 13 317 224 in relation to export refunds in the fisheries sector.

2 The Netherlands Government submits that there is an infringement of the rules implementing the Treaty, namely Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) together with Council Regulations Nos 100/76 of 19 January 1976 on the common organization of the market in fishery products (Official Journal 1976, L 20, p. 1), 3796/81 of 29 December 1981 on the common organization of the markets in fishery products (Official Journal, L 379, p. 1) and Commission Regulation No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal, L 317, p. 1). The Netherlands Government also submits that the Commission is not entitled to penalize the Member States for lacunae in the Community rules and that the principles of legal security and certainty of legal rules have not been observed. It also objects that the Commission did not avail itself of all the means at its disposal to prevent catch quotas for fish in 1982 from being exceeded. Alternatively, it challenges the correctness of the financial adjustments made by the Commission.

3 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

4 In its first submission the Netherlands Government claims that Regulation No 729/70 allows Community financing to be refused only if there is disregard of the Community rules on financial management or on the market policy in the fisheries sector and that the Commission's proposals to fix the total allowable catches (TACs) of certain fish stocks for 1982 and allocate them among the Member States (quotas) cannot be regarded as Community rules within the meaning of Regulation No 729/70.

5 The Commission contends that Community fishery conservation measures constitute Community rules as part of the common organization of the agricultural markets within the meaning of Articles 2 and 3 of Regulation No 729/70; such measures were applicable in 1982 and any measure by a Member State which is incompatible with Community law must lead to Community finance being refused if the measure has involved the Fund in expenditure.

6 As the Court held today in its judgment in Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091 fishery conservation measures are part of the Community rules for the common organization of the agricultural markets within the meaning of Articles 2 and 3 of Regulation No 729/70, since according to Article 38 of the EEC Treaty agricultural products include fishery products, and refunds granted and intervention undertaken in breach of the Community conservation measures cannot in principle be financed out of the Fund.

7 It is accordingly necessary to consider whether in 1982 there were Community rules in relation to the conservation of the resources of the sea restricting catches and binding on the Kingdom of the Netherlands.

8 The essential point about the situation in 1982 is that the Council, which pursuant to Article 102 of the 1972 Act of Accession has since 1 January 1979 been solely

responsible for the adoption of conservation measures under the common fisheries policy, acting on a proposal from the Commission, adopted no such measures for 1982. It was not until Council Regulation No 172/83 of 25 January 1983 fixing for certain fish stocks and groups of fish stocks occurring in the Community's fishing zone total allowable catches for 1982, the share of those catches available to the Community, the allocation of that share between the Member States and the conditions under which the total allowable catches could be fished (Official Journal, L 24, p. 30) that the Council retroactively fixed for 1982 the TACs and national quotas.

9 From 1 January 1982 until 30 June 1982 fishing activities in Community waters were governed by interim decisions of the Council, namely Decisions 81/1052 of 29 December 1981 (Official Journal 1981, L 379, p. 52), 82/207 of 31 March 1982 (Official Journal 1982, L 99, p. 34), 82/271 of 29 April 1982 (Official Journal 1982, L 120, p. 29) and 82/346 of 31 May 1982 (Official Journal 1982, L 152, p. 12) requiring Member States to conduct their fishing activities in such a way as to take into account the TACs proposed by the Commission on 24 July 1981.

10 On 18 and 21 June 1982 the Commission submitted to the Council proposals for TACs and quotas for 1982 (Official Journal 1982, C 228, p. 14, and Official Journal 1982, C 233, p. 4) on which the Council was not able to reach agreement. On 29 June 1982, however, the Council adopted Decision 82/440 of 29 June 1982 (Official Journal 1982, L 190, p. 9), in which it was decided that from 1 July to 23 July 1982 Member States should take account of the TACs proposed by the Commission on 24 July 1981.

11 At the Council meeting of 21 July 1982 the Commission submitted a declaration to the Council (Official Journal 1982, C 199, p. 21) in which it noted the failure of the Council to reach agreement on the fixing of the TACs and quotas. In order to enable the Community to discharge its responsibilities with regard to conservation from the date of the declaration until 30 September 1982, the Commission reminded the Member States that they not only had the right to adopt the necessary measures, subject to their approval by the Commission, but also the duty to take them in the collective interest, that being a duty which the Commission could require them to perform. The Commission also declared that with a view to ensuring that the activities of the entire fishing fleet of the Member States were as orderly and stable as possible it would, in carrying out its duties and particularly

when approving national conservation measures, act on the basis of the proposals which it had submitted to the Council.

12 Subsequently the Council adopted for 1982 other provisional measures, namely Decisions 82/498 of 21 July 1982 (Official Journal 1982, L 216, p. 40), 82/650 of 20 September 1982 (Official Journal 1982, L 274, p. 33), 82/739 of 26 October 1982 (Official Journal 1982, L 312, p. 17) and 82/802 of 29 November 1982 (Official Journal 1982, L 339, p. 57). In those decisions the Council, bearing in mind the Community's exclusive competence in the matter and the obligations on the Member States as defined by the Court of Justice, decided that from 24 July 1982 until 31 December 1982 'the Member States shall conduct their fishing activities in accordance with the usual seasonal cycles, taking into account the TACs proposed by the Commission on 21 June 1982, as [subsequently] amended'.

13 At the Council meeting on 21 December 1982 the Commission submitted a fresh declaration in which it requested in particular that the Member States submit to it as soon as possible the national conservation measures which they contemplated adopting. The Commission also declared that it was determined to use all the means in its power to ensure that the Member States honoured their obligations.

14 On 25 January 1983 the Council adopted, as a supplement to Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976, L 20, p. 19) Regulation No 170/83 establishing a Community system for the conservation and management of fishery resources (Official Journal 1983, L 24, p. 1). It was on the basis of Article 11 thereof that the Council adopted on the same day the aforesaid Regulation No 172/83.

15 For the purpose of considering the situation in 1982 it is necessary to recall that the Court held in its judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045 that, where the Council had failed to act, Article 5 of the Treaty required Member States to facilitate the Community's accomplishment of its task and to refrain from any measures likely to jeopardize the achievement of the aims of the Treaty; Article 5 imposed on Member States special duties of action and abstension where the Commission, in order to meet urgent conservation needs, had submitted to the Council proposals which, although they were not adopted by the Council, represented a basis for concerted

Community action. The Court also declared that this was a field reserved to the powers of the Community, within which Member States might henceforth act only as trustees of the common interest; Member States could not, therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which might be required by the situation except as part of a process of collaboration with the Commission. Member States had a duty not to lay down national conservation measures incompatible with the objections, reservations or conditions which might be formulated by the Commission.

16 The Court thus accepted that where the Council had failed to adopt the conservation measures necessary to protect fish stocks such measures, designed to answer urgent needs, might be agreed upon by means of a process of cooperation between the Member States and the Commission in order to enable the Community to meet its responsibilities.

17 It is common ground that no such process of cooperation was initiated in 1982 between the Kingdom of the Netherlands and the Commission since the Kingdom of the Netherlands did not respond to the Commission's invitation to adopt the measures needed to ensure compliance with its proposals. In those circumstances, and without its being necessary to rule on the legal consequences of that lack of cooperation on the part of a Member State, it must be found that the proposals unilaterally made by the Commission in relation to the fishing quotas to be allocated to the Kingdom of the Netherlands cannot, as the Court held in its judgment of today in Case 326/85 *Kingdom of the Netherlands* v *Commission* (cited above), be regarded as Community rules within the meaning of Articles 2 and 3 of Regulation No 729/70, disregard of which could justify the Commission's refusal to charge to the Fund the refunds at issue.

18 It is still necessary to consider whether the contested decision of the Commission may be justified by Regulation No 172/83 which entered into force on 27 January 1983 and determined retroactively the fishing quotas for 1982.

19 In that respect it is necessary to point out that, as the Court has repeatedly held, Community legislation must be certain and its application foreseeable by those

subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them.

20 In the present case, when the refunds at issue were granted the Kingdom of the Netherlands was not in a position either to know or to foresee with certainty the rules which were adopted only after the financial year had come to an end. In those circumstances the Commission cannot rely on disregard of the quotas retroactively fixed in 1983 by Regulation No 172/83 in order to refuse to charge to the Fund the refunds which are the subject of the action.

21 Commission Decision 86/443 of 1 July 1986 must accordingly be declared void as claimed in the application and there is no need to consider the applicant's other submissions.

Costs

22 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs. As the Commission has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that Commission Decision 86/443/EEC of 1 July 1986 on the clearance of the accounts presented by the Kingdom of the Netherlands in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1982, is void in so far as the Commission

has failed to charge to the Fund the sum of HFL 13 317 224 in relation to export refunds in the fisheries sector;

(2) Orders the Commission to pay the costs.

Bosco Moitinho de Almeida Koopmans Everling

Bahlmann Galmot Kakouris Joliet Schockweiler

Delivered in open court in Luxembourg on 15 December 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President