REPORT FOR THE HEARING
delivered in Case 237/86 *

I — Facts

1. Article 1 (2) (a) of 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) provides that the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'the Fund') shall finance refunds on exports to third countries.

Article 2 of the regulation provides that refunds on exports to third countries granted in accordance with the Community rules within the framework of the common organization of agricultural markets shall be financed by the Fund.

Article 5 (2) (b) provides that the Commission must clear the accounts of the authorities and bodies responsible for the payment of the relevant expenses before the end of the following year and on the basis of the annual accounts.

2. The main elements of a common fisheries policy were set out in 1970 by Regulation No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry (Official Journal, English Special Edition 1970 (III), p. 703) and Regulation No 2142/70 of the Council of 20 October 1970 on the common organization of the market in fishery products (Official Journal, English Special Edition 1970 (III), p, 707). Articles 100 to 102 of the Act of Accession of 1972 partly confirmed and partly amended them in relation to access to fish stocks. In particular Article 102 provided that from the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, was to determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

3. Regulations Nos 2141/70 and 2142/70 were replaced by Council Regulation No 100/76 of 19 January 1976 on the common organization of the market in fishery products (Official Journal, L 20, p. 1) and Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal, L 20, p. 19).

The last recital in the preamble to Regulation No 100/76 stated that the expenditure incurred by the Member States as a result of the obligations arising out of the application of the regulation was to fall on the Community in accordance with the provisions of Articles 2 and 3 of Regulation No 729/70.

Article 1 of Regulation No 101/76 provided that common rules should be laid down for fishing in maritime waters and specific measures should be adopted for appropriate action and the coordination of structural policies of Member States to promote harmonious and balanced development of the fishing industry and to encourage rational use of the biological resources of the sea and of inland waters.

Article 4 provided that where there was a risk of over-fishing of certain stocks in maritime waters of the Member States referred to in Article 2, the Council, acting in accordance with the procedure provided for in Article 43 (2) of the Treaty on a

* Language of the Case: Dutch.

proposal from the Commission, could adopt the necessary conservation measures. In particular, those measures could include restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear.

The general rules governing refunds for the products referred to in Regulation No 100/76 were laid down by Council Regulation No 110/76 of 19 January 1976 laying down general rules for granting export refunds on fishery products and criteria for fixing the amount of such refunds (Official Journal, L 20, p. 48).

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) also lays down detailed rules for the application of the system of export refunds provided for in Regulation No 100/76.

4. On 6 April 1976 the Council adopted Regulation No 811/76 temporarily authorizing certain systems of catch quotas in the fisheries sector (Official Journal, L 94, p. 1), in which it authorized Member States to limit catches of their fishing fleets in accordance with international undertakings contracted or to be contracted. The first recital to the regulation stated that 'the fishery resources of the sea would be considerably endangered if catches were not controlled; ... the rational development of the production of fishery products might be disturbed if no limit were placed on the size of landings'.

5. On 6 October 1976 the Commission sent the Council a proposal for a regulation establishing a Community system of conservation and management of fishery resources, on which the Council was not able to reach agreement, however, until 1983.

6. On 3 November 1976 the Council adopted what is known as the 'Hague Resolution'. In Annex VI thereto it was stated that pending the implementation of the Community measures then in preparation, the Member States would not take any unilateral measures in respect of the conservation of resources. It provided, however, that if no agreement was reached for 1977 within the international fisheries commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoided discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts. Before adopting such measures, the Member State concerned would seek the approval of the Commission, which had to be consulted at all stages of the procedures.

7. On 18 February 1977 the Council adopted Regulation No 350/77 laying down certain interim measures for the conservation and management of fishery resources (Official Journal, L 48, p. 28), applicable until 31 December 1977 at the latest.

8. At a meeting on 31 January 1978 the Council approved the Commission communication according to which, in the absence of a common system, national measures could only be taken in so far as they were strictly necessary for the conservation and management of fishery resources and were non-discriminatory and in conformity with the Treaty, and if the approval of the Commission had been sought beforehand (Official Journal, C 154, p. 5).

9. On 19 December 1978 the Council adopted interim measures applicable until the end of March 1979.

10. On 1 January 1979 the transitional period provided for in Article 102 of the 1972 Act of Accession expired. On that date power to take measures intended to conserve maritime resources was to be vested fully and definitively in the Community. Because it was not able to reach agreement on the Commission's proposals, the Council adopted fresh interim measures in 1979 and in March 1980.

11. On 30 May 1980 the Council adopted a declaration concerning the common fisheries policy (Official Journal, C 158, p. 2) in which it undertook to adopt a common overall fisheries policy by 1 January 1981 at the latest. In compliance with the Treaties and in conformity with the Resolution of 3 November 1976 (the Hague Agreement) the policy was to be based *inter alia* on rational and non-discriminatory Community measures for the management of resources, the conservation and reconstitution of stocks and fair distribution of catches.

Council Decision 80/601 of 16 June 1980 (Official Journal, L 160, p. 48) refers to that declaration and adopts fresh interim measures applicable until 31 July 1980.

Council Decision 80/993 of 28 October 1980, based on the Treaties, concerned fishery activities in waters under the sovereignty or jurisdiction of Member States and was adopted on a temporary basis pending the adoption of permanent Community measures (Official Journal, L 298, p. 38); it provided for the following interim measures, applicable until 20 December 1980:

'(1) Member States shall conduct their fishing activities in such a way as to take into account the total allowable catches (TACs) and the part of the TACs made available to third countries under agreements or arrangements made with them, as given in Regulation (EEC) No 754/80, and in the Commission's amended proposals of 12 September and 24 October 1980, and shall inform the Commission in accordance with Regulation (EEC) No 753/80. The catches taken in the interim period will be offset against the allocations eventually decided upon by the Council for 1980.

(2) As regards the technical measures for the conservation and surveillance of fishery resources in geographical areas not covered by Council Regulation (EEC) No 2527/80, Member States shall apply the same measures as they applied on 3 November 1976, and other measures taken in accordance with the procedures and criteria of Annex VI to the Council Resolution of 3 November 1976.'

At its meeting on 15 to 17 December 1980 the Council adopted a declaration in the minutes to the effect that the Member States would conduct their fishing activities in such a way that the catches made by their ships during the interim period would take into account the total allowable catches (TACs) submitted for 1981 by the Commission to the Council in its proposals of 18 November and 16 December 1980.

12. In the conservation of resources the Community had also to take into account its international obligations.

13. In 1981 the Commission repeatedly amended its TAC proposals and ultimately submitted to the Council on 24 July 1981:

a proposal for a regulation concerning, for certain fish stocks occurring in the Community fishing zone, the fixing of the total allowable catches for 1981 and the shares available to the Community (Official Journal, C 224, p. 2);

an amendment to the proposal for a Council regulation fixing the conditions governing fishing operations when taking the total allowable catches for 1981 (Official Journal, C 224, p. 10), the proposal submitted to the Council on 6 March 1981 (Official Journal, C 224, p. 7);

a proposal for a regulation concerning the distribution among the Member States of the total catch possibilities available to the Community in 1981 of stocks or groups of stocks occurring in the Community fishing zone (Official Journal, C 224, p. 11).

In a declaration submitted to the Council on 27 July 1981 (Official Journal, C 224, p. 1) the Commission set out the position resulting from the absence of agreement on its proposals to fix the TACs and quotas for 1981. The Commission recalled that it had certain rights and duties under Article 155 of the Treaty, as had been confirmed by the Court *inter alia* in its judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045. In view of the overriding public interest and as a precautionary measure, pending a final decision by the Council, the Commission therefore called upon all Member States in pursuance of their rights and duties to conduct their fishing activities in such a way as to ensure compliance with the Commission's proposals. The Commission also declared that it was determined to use all the means in its power to ensure the respect by Member States of those proposals, which it considered in the circumstances to be legally binding upon the Member States.

Late in December 1981 Council Regulation No 3796/81 of 29 December 1981 on the common organization of the market in fishery products was published (Official Journal, L 379, p. 1). It repealed Regulation No 100/76 and, according to Article 37, was applicable from 1 June 1982. Article 26 (2) of the regulation provides that intervention measures are to be financed in respect of products from a stock or group of stocks only up to the limit of any quantities allocated to the Member State in question from the total volume of allowable catches for the stock or group of stocks in question.

14. From 1 January 1982 to 31 March 1982 fishing in Community waters was again governed by an interim Council decision, Decision 81/1052 of 29 December 1981 (Official Journal, L 379, p. 52), which required the Member States to take account of the TACs proposed by the Commission on 24 July 1981. Subsequently the Council adopted other provisional measures for 1982.

In a proposal submitted to the Council on 21 June 1982 the Commission proposed that the Netherlands be allocated a quota of 21 000 tonnes for mackerel in 1982. During the Council meeting of 29 June 1982 the Commission proposed that the Dutch mackerel quota be fixed at 35 000 tonnes, which was a compromise figure.

At the Council meeting of 21 July 1982 the Commission submitted a declaration (Official Journal, C 199, p. 21) in which it noted the failure of the Council to reach agreement on the fixing of 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 declared that those rights and duties flowed from the Treaty, namely Article 5 (the duty of cooperation among the Member States) and Article 155 (the Commission's right and duty of supervision). In conclusion, the Commission 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.

15. On 25 January 1983 the Council adopted Regulation No 170/83 of 25 January 1983 setting up a Community regime for the conservation and management of fishery resources (Official Journal, L 24, p. 1). Pursuant to that regulation the Council adopted Regulation No 172/83 of the same date 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). The regulation allows a mackerel quota for the Netherlands of 35 000 tonnes.

16. By 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, expenditure for 1982 (Official Journal, L 256, p. 29), the Commission refused to finance export refunds in the fisheries sector to the amount of HFL 13 317 224 on the ground that any fish caught in excess of the quota was not eligible for Community financing.

17. The Commission notified that decision to the Permanent Representation of the Netherlands on 7 July 1986.

II — Written procedure and conclusions of the parties

1. The application of the Kingdom of the Netherlands was lodged at the Court Registry on 9 September 1986.

2. 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.

3. The *Kingdom of the Netherlands,* the applicant, claims that the Court should:

Declare void Commission Decision 86/443 of 1 July 1986 in so far as it rejects for Community financing the accounts presented by the Kingdom of the Netherlands for 1982 for export refunds in the fishing sector amounting to HFL 13 317 224;

Order the defendant to pay the costs.

4. The *Commission*, the defendant, contends that the Court should:

Dismiss the application as unfounded;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The application lodged by the Kingdom of the Netherlands under the first paragraph of Article 173 of the EEC Treaty relies on the submission that the rules governing the application of the Treaty have been breached, in particular Regulation No 729/70 in conjunction with Regulations Nos 100/76, 3796/81, 110/76 and 2730/79.

The Kingdom of the Netherlands submits both principal arguments and an alternative argument.

A — *Principal arguments*

1. The *Kingdom of the Netherlands* concedes that in 1982 the Commission was entitled to require Member States to adopt conservation measures in accordance with its proposals.

(a) However, the applicant denies that conservation measures and market policy should follow the same path. The relevant regulations have entirely different purposes. Conservation is based principally on biological considerations whereas market policy is governed by different provisions, such as the market organization rules and the financial rules. The applicant submits that Regulation No 729/70 permits Community financing to be refused only where the Community rules regarding financial management or market policy have been breached. The total allowable catches and quotas proposed by the Commission for 1982 should not be regarded as Community rules within the meaning of Article 2 (1) of Regulation No 729/70. The decisive criterion for eligibility for financing is observance of the specific requirements imposed by the market organization; the applicant relies in that respect on paragraph 8 of the judgment of the Court of 7 February 1979 in Case 11/76 *Netherlands* v *Commission* [1979] ECR 245. The Commission should not enlarge that criterion to embrace observance of other criteria of Community law entirely separate from the functioning of the market. By doing so the Commission enables the financial penalty provided for in Regulation No 729/70 to be imposed arbitrarily for any breach of Community law which, in its opinion, has occurred.

The applicant points out that neither Article 23 of Regulation No 100/76 nor Article 25 of Regulation No 3796/81, which came into force on 1 June 1982, contained a provision to the effect that no refund would be paid for fish caught in excess of the quota, unlike Article 26 (2) of Regulation No 3796/81 which imposes such a restriction in the case of intervention payments.

The basic regulation governing refunds, Commission Regulation No 2730/79, likewise contains no condition that fish to be exported must have been caught within the authorized quotas. The same is true of the regulation specifically governing refunds for fishery products, Regulation No 110/76.

The Kingdom of the Netherlands submits that in view of that the condition relied upon by the Commission constitutes an additional condition which the Commission is not entitled to impose. Even if it were entitled to, it certainly has no power to take such action years after the refunds have actually been paid.

The applicant points out that the difference between intervention measures and the rules governing refunds is evident in the tenor of the relevant rules. An exporter must be able to buy fish anywhere on the European market and export it with the benefit of export refunds if he fulfils all the conditions for obtaining such a refund. He even has a right of action in the national courts to obtain payment of the refunds.

(b) The applicant points out that there is a contradiction in the Commission's argument. Although it is strictly true that the relationship between the Member States and the undertakings is irrelevant to the procedure for clearing accounts at the Fund, that relationship cannot be entirely ignored in applying the substantive Community rules because the Member States must pay the refunds on the basis of the Community rules. The Commission's approach passes all the difficult problems from the Commission to the Member States and exposes them to unreasonable financial risk in view of the fact that accounts are cleared four years after the event.

Since Member States merely have the power to execute Community policy and cannot act independently, it is inadmissible, the Kingdom of the Netherlands maintains, to make the Member States bear the consequences of lacunae in the Community rules. The legal conditions for paying export refunds must govern the way in which the Fund's accounts are cleared as between the Commission and the Member States.

The applicant submits that the Commission's view would be difficult to apply in practice. The Community rules governing market policy say nothing about the introduction of checks to ensure observance of the condition regarding quotas. The Commission conceded that, to a certain extent, in Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, when it stated that it was less easy to determine whether the fish in question had been caught illegally in excess of quotas in the case of refunds than in the case of intervention payments, and that that was the reason for the restriction contained in Article 26 (2) of Regulation No 3796/81 on intervention measures. The Kingdom of the Netherlands considers that if the legislature did not wish to resolve the question of fish caught in excess of quotas in the case of payment of export refunds because it was not possible to check whether or not the fish had been caught within the quota, that argument must apply *a fortiori* against too rigid an approach in the case of Member States when it appeared that in fact mackerel had been exported in excess of the quota.

The applicant adds that the Commission gives no indication of how such checks on refunds could be arranged. The applicant's opinion is that such a system would be impossible to introduce in practice.

(c) The applicant complains that the Commission did not use all the means at its disposal to prevent quotas from being exceeded. It submits that the Commission could have reduced or suspended refunds, as it did in 1984. The Commission could also have informed the Member States earlier of its view regarding ineligibility for financing. The Commission cannot take refuge behind the argument that it could not rely on the monthly declarations because they were only provisional, whilst at the same time arguing that the applicants did not take into account other provisional information.

The applicant adds that if the Commission considered that the Kingdom of the Netherlands was not fulfilling its obligations towards the Community it ought to have taken the steps provided for in connection

with the appropriate procedure under Article 169 of the EEC Treaty. It was not entitled to first ignore, with full knowledge of the facts, a measure which it considered to be unlawful, only to attach to it subsequently financial consequences, thereby depriving the Member State, moreover, of the procedural guarantees afforded by Article 169 of the Treaty.

The applicant maintains that the Commission did not inform it of its views until its letter of 13 December 1982 in connection with the clearance of the accounts for the year 1980/81. It is also apparent from the replies given by the Commission in Chapter VI of the Annual Report of the European Court of Auditors on the 1983 financial year (Official Journal 1984, C 348, p. 207), that the Commission only adopted that view relatively late in the day.

2. The *Commission* rejects the applicant's arguments.

(a) As regards the application of Regulation No 729/70 and the broad interpretation thereof, it relies essentially on the argument it adduced in Case 326/85. It submits that it must also refuse to finance additional expenditure caused by an infringement of Community rules other than the 'financial' rules, even if the refunds were paid in accordance with those rules. According to the Commission, the question is not whether or not it may impose a financial penalty for infringement, but whether it must fulfil its obligation to refuse Community financing where there has been an infringement when and in so far as that infringement has resulted in additional expenditure in the form of refunds. The Commission contends that it is obvious that fish caught in excess of quotas may just as well represent an infringement resulting in additional expenditure in the form of refunds.

The Commission points out that it did not say that no refunds must be paid for fish caught in excess of quotas; it merely said that refunds granted in respect of such fish were not eligible for Community financing through the Fund.

The Commission refers to its analysis of Article 26 (2) of Regulation No 3796/81 in Case 326/85 and states that the question must be resolved on the basis of Regulation No 729/70.

(b) The Commission submits that when a Member State fails to ensure that the quota allocated to it has not been exceeded, and if the fish caught in excess of the quota is offered for export together with a refund, the Member State has negligently incurred additional expenditure. In accordance with Regulation No 729/70 and the case-law of the Court of Justice, such additional expenditure resulting from a breach of the Treaty cannot be financed by the Fund.

The Commission points out that as regards export refunds the Community constitutes a common market, so that it is not relevant for the purposes of granting a refund which Member State was the exporting Member State. With that system it is not easy to introduce a general condition providing that it must be established that the fish offered for export has not been caught in excess of the quota of a particular Member State. For the same reason, it is not open to the applicant to complain that the Commission did not suspend or reduce the refunds on learning that the Dutch mackerel quota had been exceeded. There can be no question of abolishing or suspending refunds for all the Community every time that the quota for a particular kind of fish is exceeded in one or other of the Member States. On the other hand, the Commission maintains that the

Member State whose quota has been exceeded can, and must, take steps to confiscate the fish caught in excess of the quota by its fishermen and to prevent its arrival on the market by imposing penalties or other appropriate measures so that at the very least it does not disrupt the functioning of the refund system and affect the expenditure connected therewith. The Commission is of the opinion that Member States are probably able, if they manage their quotas appropriately, to confiscate and remove at least some of the unlawful catches taken by their own fishermen. The Commission, relying on its argument in Case 326/85, considers that it took the difficulties of the Member States in the matter into account when calculating the relevant quantities.

The absence in the refund system of rules enabling Member States to ascertain whether the fish offered on the market was caught in excess of the quota allocated to a particular Member State is not, therefore, a gap in the Community legislation.

(c) The Commission asserts that the monthly declarations provide no information on that point, not only because they are provisional, but also because they contain only general figures concerning payments made, with no indication of the period when the fish was exported, nor of the TAC or quota area within which they were caught, nor of the time when the fish was caught.

As regards the relationship between the procedure under Article 169 of the Treaty and the procedure for clearing the accounts of the Fund, the Commission relies on the arguments it adduced in Case 326/85.

In addition, it submits that the Netherlands authorities ought to have known themselves as early as 1982 that permitting quotas to be exceeded, or not preventing them from being exceeded, was incompatible with their Community obligations and therefore illicit, and that such illicit conduct or negligence would give rise to additional and unjustifiable expenditure in the form of refunds. The fact that the Commission did not inform them of the financial consequences of such illicit conduct until the end of 1983, that is to say, when it was considering the accounts presented for 1980 and 1981, cannot alter that position. It was natural for definitive decisions not to be taken until the accounts were cleared.

B — *The alternative argument*

1. In the alternative, the *Kingdom of the Netherlands* challenges the amount disallowed by the Commission. The Commission was informed that according to the shipowners' authorities, 40 501 tonnes of mackerel came from zones not subject to quotas in 1981, but it took absolutely no account of those catches. The applicant is particularly incensed by that attitude in view of the reply given by the Commission on 17 February 1984 to Parliamentary Question No 1526/83 (Official Journal 1984, C 89, p. 10) in which it admitted that in 1982 large quantities of mackerel were caught in non-Community waters where some of the mackerel stock had been for a number of months.

2. The *Commission* replies that the Summary Report for 1982 indicates that the administrative machinery in the Netherlands for logging and checking national catch figures was regarded as insufficient, and that therefore it had been necessary to adjust the figures which had been provided for mackerel catches. It also points out that approximately 50% of the total mackerel catches had been logged as false mackerel, as in any case the logging of mackerel by catch zone was not judged to be reliable.

Explanations concerning the manner in which the sums disallowed had been calculated had also been supplied to the Netherlands in a letter from the Commission dated 14 January 1986.

In view of those facts and in view of the fact that they show that the catch figures supplied were not reliable, and in the absence of a reliable system for logging the origin of the fish caught, it was thus reasonable for the Commission not to have relied upon catch figures which were impossible to check, supplied by the shipowners concerned for zones which were not subject to quotas. In any event, only 24 680 tonnes were attributable to the figures supplied by the shipowners.

As regards the reply given to Written Question No 1526/83, the Commission points out that it concerns mackerel catches in general, and not only those of Community fishermen; it gives no indication of the share of the Netherlands in catches from non-Community waters.

In the absence of further proof the alternative argument cannot be upheld.

F. Schockweiler
Judge-Rapporteur

OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA

(see Case 325/85, p. 5055)