REPORT FOR THE HEARING
in Case C-25/91 *

I — Facts and procedure

(a) Legislative background

1. Article 1 of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7) provides that the Commission may grant Community financial aid for measures of various types taken by undertakings including the restructuring, renewal and modernization of the fishing fleet.

2. Article 3 of the same regulation provides that, at the latest by 30 April 1987, the Member States are to forward to the Commission a multi-annual guidance programme (for the period from 1 January 1987 to 31 December 1991) concerning, *inter alia*, their fishing fleets. It is explained in Article 2 of Regulation No 4028/86 that the programme consists of a set of objectives, together with a statement of the means necessary for attaining them, as a guide for the development of the fisheries sector in the overall long-term context.

3. The Spanish programme was approved by Commission Decision 88/149/EEC of 11 December 1987 on the multi-annual guidance programme for the fishing fleet (1987 to 1991) forwarded by Spain pursuant to Regulation (EEC) No 4028/86 (OJ 1987 L 70, p. 27), as amended by Commission Decision 90/108/EEC of 9 February 1990 (OJ 1990 L 66, p. 27).

4. Article 6 in Title II of Regulation No 4028/86 provides as follows:

'1. The Commission may grant Community financial aid subject towards ... private projects for material investments relating to the purchase or construction of new fishing vessels.

2. To qualify for aid, the projects referred to in paragraph 1 must:

(a) form part of a programme referred to in Article 2 ...

(b) ...

(c) ...'.

* Language of the case: Spanish.

5. Pursuant to Article 8(2) of Regulation No 4028/86,

'The aid provided for in Article 6 shall be granted on a priority basis to projects relating to the purchase or construction of vessels:

(a) on which the person with the majority holding acts as skipper and which replace vessels more than 15 years old;

(b) which are intended to replace vessels lost as a result of accident or wreck, irreparably damaged, broken-up or permanently withdrawn from fishing activities in the Community'.

6. Applications for Community financial aid in respect of the projects referred to in Article 6 of Regulation No 4028/86 are submitted through the Member State concerned, once the approval of the latter has been obtained, on the basis of the priorities of the multi-annual guidance programmes.

7. According to the provisions of Article 35 of Regulation No 4028/86:

'1. Having consulted the Committee, the Commission shall take decisions:

(a) twice yearly on applications relating to projects or measures referred to in Titles II, III and IV, the first decision being taken not later than 30 April and covering applications submitted not later than 31 October of the preceding year and the second decision being taken not later than 31 October and covering applications submitted not later than 31 March of the current year;

(b) ...

2. In 1987, notwithstanding paragraph 1, the Commission shall decide only once on applications relating to projects or measures referred to in Titles II, III and IV. The decision shall be taken not later than 31 December and shall cover applications submitted not later than 15 May 1987.

3. Decisions on aid shall be notified to the Member State concerned and to the beneficiaries of the projects referred to in Titles II, IV and VIII'.

8. Article 37(1) of Regulation No 4028/86 provides as follows:

'Aid applications in response to which no grant has been awarded for lack of funds shall be carried forward, once only, to the following budgetary year'.

9. Article 44 of Regulation No 4028/86 provides that throughout the period for which aid is granted by the Community, the authority or agency appointed for the purpose by the Member State is to send to the Commission on request all supporting documents

and all documents showing that the financial or other conditions imposed for each project are satisfied. Under Article 45 of Regulation No 4028/86, Member States are to take the necessary measures to ensure that the operations financed under that regulation are in fact carried out and that they are properly carried out.

(b) Facts

10. On 30 October 1987 the Commission received an application for Community aid from Pesqueras Echebastar SA, a company incorporated under Spanish law, of Bermeo (hereinafter 'Echebastar'), towards the construction of a fishing vessel. The Spanish authorities gave that project a priority rating of 3 (on a scale of 1 to 5) based on how suited it was to the Spanish multi-annual guidance programme approved by Commission Decision 88/149, cited above.

11. On 22 November 1989 the Commission informed Echebastar that the project in question had not been granted Community financial aid owing to: 'a lack of funds in the budget for financing projects in 1989'.

12. In a letter to the Commission of 30 November 1989, Echebastar, referring to Article 8 of Regulation No 4028/86, stated that it had withdrawn three vessels from fishing activities, namely the 'Beti-alai' of 989 GRT, as a result of wreck, the 'Goizaldi' of 266.87 GRT, also as a result of wreck, and the 'Beti Campo Libre' of 108.6 GRT, and that the project submitted concerned a tunny boat intended to replace the vessels withdrawn. Consequently, the project should have been given a high priority. Echebastar added that by virtue of Article 37(1) of Regulation No 4028/86, the rejection of its application entitled it to have the application carried forward to the first allocation of aid in the following budgetary year, which was due to take place before 30 April 1990.

13. On 12 February 1990, the Spanish authorities informed Echebastar, firstly, that the priority it claimed was based on rights in vessels which had not sunk entirely — rights, moreover, that had been transferred to it — and, secondly, that the project had been carried forward to the 1990 budgetary year and that it was possible that a response might be given to its application in one of the two decisions which could be taken.

14. In a letter of 15 May 1990 to the Commission, Echebastar, referring to Article 35 of Regulation No 4028/86, argued that 'the decision which the Commission must take cannot be further postponed, and it is now required to adopt a decision ... before 30 April' on the project, which had been submitted in 1989. Echebastar also expressly drew attention to the provisions of Article 35(3) and asked to be notified of the decision adopted on its project.

15. On 17 May 1990, the Commission replied to Echebastar stating, *inter alia*, that its project was under consideration and that 'a decision on that project will be taken not later than 31 October 1990, and you will be informed of its content as soon as possible'.

16. By a letter dated 20 September 1990, which the Commission received on

2 October 1990, Echebastar called upon the Commission to act, pursuant to Article 175 of the EEC Treaty, with a view to bringing an action against the Commission for failure to act on the ground that it did not take a decision on the application for financial aid and thereby infringed Article 35(1)(a) of Regulation No 4028/86.

17. When, at the end of November 1990, the Commission had at its disposal all the information supplied, *inter alia*, by the Kingdom of Spain, pursuant to Article 2 of Decision 88/149/EEC, it consulted the Standing Committee on the Fishing Industry, as it was required to do under Article 35 of Regulation No 4028/86, and adopted the decisions granting aid to the projects on 20 December 1990. In accordance with Article 35(3), those decisions were notified to the Member States concerned and to the recipients of the aid. A synoptical table showing the Community financial aid granted in the fisheries sector was published on 5 February 1991 in the Official Journal of the European Communities (OJ 1991 C 29, p. 2). With regard to the projects which fulfilled the conditions laid down by Regulation No 4028/86 but which were not accepted for aid because the funds provided in the budget had been used up, the Commission informed those concerned that that was the case. Thus by a letter dated 18 December 1990, received by Echebastar on 21 January 1991, the Commission referred to its letter of 17 May 1990 and informed Echebastar that '... your project was not granted the aid for the following reason: the appropriations provided in the budget for 1990 were insufficient'.

(c) Procedure

18. Echebastar's application was received at the Court Registry on 25 January 1991.

19. 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.

20. By a decision of 13 May 1992, the Court decided to assign the case to the Second Chamber pursuant to Article 95(1) and (2) of the Rules of Procedure.

II — Forms of order sought by the parties

21. *Echebastar* claims that the Court should:

'(1) Declare admissible the application against the failure of the Commission of the European Communities to take a decision on the grant to Pesqueras Echebastar SA of the Community financial aid towards a project — project No ES/0493/90/02 (ex ES/0357/89/01) — relating to the construction of a tuna-freezing boat, requested pursuant to Council Regulation (EEC) No 4028/86 of 18 December 1986 since the procedure laid down in Article 175 of the EEC Treaty has been correctly followed and the requirements laid down by that article are met;

(2) Declare that the failure of the Commission of the European Communities to act was contrary to the EEC Treaty and constitutes an infringement of the Treaty, within the meaning of Articles 175 and 176, inasmuch as it contravenes Articles 6, 7, 8 and 35(1)(a) and Article

37(1) of Council Regulation No 4028/86 of 18 December 1986, is in breach of the general principles of Community law of legal certainty and protection of legitimate expectations, disregards the principle of the hierarchy of legal rules, entails errors of fact and of law and lacks an adequate legal basis, being vitiated by formal defects and misuse of powers;

(3) Declare that the Commission of the European Communities is under an obligation, as a necessary measure within the meaning of the first paragraph of Article 176 of the EEC Treaty, to grant immediately to Pesqueras Echebastar SA the Community financial aid of PTA 195 650 000 requested for the abovementioned construction project No ES/0493/90/02 (ex ES/0357/89/01);

(4) Declare, pursuant to the second paragraph of Article 176 in conjunction with Article 178 and the second paragraph of Article 215 of the EEC Treaty, that Pesqueras Echebastar SA is entitled to compensation for the damage it has suffered as a result of the failure of the Commission of the European Communities to act, in accordance with the general principles common to the laws of the Member States and of an amount sufficient to make good the detrimental effects of the failure to act in question;

(5) Order the Commission, the defendant, to pay the costs.'

At the reply stage, Echebastar claimed that the Court should, firstly:

'(1) Declare the present action against the Commission's failure to act and to adopt a decision well founded and admissible since the prior request provided for in Article 175(2) of the EEC Treaty was made within the prescribed time-limits, the Commission having failed to adopt the decision due by 30 April 1990, and since the Commission also exceeded the time-limit of 31 October 1990 without sending to the applicant within the time-limit of two months of the abovementioned formal request (2 October 1990) any communication, notification or other act defining its position.

(2) Declare that the Commission failed to adopt a decision, even after the expiry of the period of two months from 2 October 1990 and 2 December 1990 since the communication of 18 December 1990 is not a decision and does not define the Commission's position because it extends the waiting period and refers to a lack of funds which, according to information which the Commission itself supplied to the Council and the Parliament (Table No 3 of Annex IV to Annex 3), does not exist.

(3) Declare that the Commission has obviously exceeded the dates laid down in Article 35(1)(a) of Commission Regulation (EEC) No 4028/86, which are accompanied by the words "no later than", that is to say, the Commission can adopt the decisions in question before but not after those dates if it

does not wish to infringe those provisions.

(4) Declare that the Commission has neither applied nor recognized the specific and limited criteria of priority laid down by Article 8(2) of Council Regulation (EEC) No 4028/86 for the construction projects in Title II of the same regulation, thus creating manifest discrimination between producers, in infringement of Article 7 and the second subparagraph of Article 40(3) of the EEC Treaty, as it did in discriminating between the recipients of aid, who receive a formal decision, within the meaning of Article 189 of the Treaty, and those who have their projects deferred, who receive only a simple letter of information, which does not define the Commission's position.

(5) Declare that the Commission's failure to act is a breach of the EEC Treaty, according to Articles 175 and 176 thereof, in so far as it infringed Articles 6 to 8, 35(1)(a) and 35(3) of Council Regulation (EEC) No 4028/86 of 18 December 1986 since it did not comply with the general principles of Community law of non-discrimination, legal certainty and the protection of legitimate expectation, changed the hierarchy of rules of law, it committed errors of fact and of law and had insufficient legal justification, infringing essential procedural requirements and abusing its power.

(6) Consequently, declare, as a necessary measure within the meaning of the first paragraph of Article 176 of the EEC Treaty, that the Commission of the European Communities must grant immediately to Pesqueras Echebastar SA the Community financial aid of PTA 195 650 000 requested in the abovementioned construction project No ES/0493/90/02 (formerly Es/0375/89/01) on the ground that its failure to take a decision and its refusal to grant the aid for lack of funds were unlawful since the funds existed and were available to the Commission.

(7) Declare that, pursuant to the second paragraph of Article 176, in conjunction with Article 178 and the second paragraph of Article 215 of the EEC Treaty, Pesqueras Echebastar is entitled to compensation for the damage which was caused to it by the Commission's failure to take a decision, in accordance with the general principles common to the laws of the Member States and of an amount of PTA 42 064 750, which, without prejudice to the decision which the Court will make, Echebastar judge to be sufficient as interest to compensate the adverse effects of the failure to act at issue.

(8) Order the defendant to pay the costs.'

and, secondly, should allow Echebastar to prove that the project in question:

'was perfectly consistent with Spain's multi-annual organizational plans for the fishing sector and that the Commission had

sufficient budgetary allocations available in 1989 and 1990',

by:

'(1) the inclusion in the file on the case documents annexed to the application and the reply.

(2) the communication by the Commission of documents certifying the budget allocations lawfully made pursuant to Article 40(2) of Council Regulation (EEC) No 4028/86 of 18 December 1986 for the period from 1987 to 1981 and for each of the budgetary years during that period, indicating the amount granted, the grounds of priority, with their classification and their evaluation under Article 8(2) of Regulation No 4028/86, and the amounts left over at the end of each budgetary year.

(3) the indication by the Commission of the reasons which justified the grant of aid in 1990 to projects for the construction of vessels with a lower degree of priority and corresponding to withdrawals because of wreck less in percentage terms than those of our project'.

22. The *Commission* contends that the Court should:

'With regard to the *principal claim for relief*:

declare it *inadmissible* on the following grounds:

1. it called upon the Commission to act at the wrong time;

   the Commission adopted a position as soon as it was able to fulfil its obligation under the regulation, that is to say to ensure that applications conform to the guidance programme;

   even though the time-limit laid down in Article 35 was exceeded, it adopted a position before the expiry of the time-limit of two months from when it would have been called upon to act, if it had been so called upon at the right time;

   in the alternative, dismiss the application on the ground that it is devoid of purpose since the act whose adoption is sought was adopted and communicated to the applicant before the proceedings were instituted;

2. with regard to the *alternative claims*, declare them inadmissible and, in the alternative, unfounded;

3. order the applicant to pay the costs'.

In its rejoinder, the Commission also contends that the Court should:

'Declare inadmissible the new object, the new pleas in law and the new claims introduced in the reply and which concern the lawfulness of the Commission's definition of position or of the decisions on the granting of aid adopted in October and December 1990'.

With regard to adducing evidence, the Commission contends that the Court should declare: that the evidence requested is relevant only in an action for annulment and not in an action for failure to act; that the only appropriate information is that relating to the 1990 budgetary year.

III — Summary of the pleas in law and arguments of the parties

23. By its application, *Echebastar* firstly seeks a declaration, pursuant to Article 175 of the Treaty, that the Commission failed to adopt a decision and thus infringed the Treaty. Secondly, it requests the Court to declare that under Articles 6 to 8 and 35 of Regulation No 4028/86 it was entitled to Community financial aid towards its project for the construction of a tuna-freezer ship. Thirdly, Echebastar claims compensation under Articles 178 and 215 of the EEC Treaty for the damage caused by the Commission's failure to act.

The application for a declaration that the Commission failed to act

24. Echebastar claims by its letter of 20 September 1990 it called upon the Commission to act within the meaning of the second paragraph of Article 175 of the Treaty. That letter, which the Commission received on 2 October 1990, started the time-limit of two months laid down in the second paragraph of Article 175, and which expired on 2 December 1990. By that date, the Commission had still not adopted the decision that it was required, firstly, to adopt, pursuant to the clear and unconditional terms of Article 35(1)(a) of Regulation No 4028/86, and, secondly, to notify to Echebastar, pursuant to Article 35(3). Echebastar adds that the Commission's letter of 18 December 1990 cannot be considered to be a formal Commission decision because 'a reply to a call to act which neither denies nor confirms the alleged failure and gives no indication of the institution's views as to the measures which it is required to take, does not amount to a definition of position for the purposes of the second paragraph of Article 175 of the Treaty', as stated in the judgment of the Court in Case 13/83 (*Parliament* v *Council* [1985] ECR 1513). Moreover, the Commission's letter of 18 December 1990 was identical in content to three letters which Echebastar had already received. In Echebastar's opinion, the letter of 18 December 1990 is not a 'definition of position' within the meaning of Article 175 of the Treaty since it merely postpones the adoption of a decision on the project in question.

25. According to Echebastar, a distinction must be drawn between a 'subsidy' and 'Community financial aid'. It refers to the

second and third recitals in the preamble to Regulation No 4028/86:

'Whereas the continued improvement of the structural situation in the sector is indispensable for the development of a common fisheries policy and thus constitutes one means of achieving in this sector the aims of Article 39(1)(a), (b) and (d) of the Treaty; whereas, therefore, the structural measures to bring about such improvement must be based on a Community approach and on Community criteria;

Whereas experience has shown the value of bringing the various structural measures together within a single legislative framework applicable for a sufficiently long period for the establishment of a stable and durable policy; whereas, therefore, provision should also be made so that such measures can receive Community financial assistance within the framework of a multi-annual budget allocation'.

In its reply, Echebastar deduces from the above that the Council defined the 'improvement of the structural situation in the sector' as constituting, *inter alia*, one of the means for achieving in that sector the objectives of the common agricultural policy set out in Article 39 of the EEC Treaty. Accordingly, the 'Community financial aid' provided for by Regulation No 4028/86 is not a mere 'subsidy' but is actually aid of the type which Articles 42 and 43 of the EEC Treaty permit the Council to authorize for the protection of enterprises handicapped by structural conditions or within the framework of economic development programmes. Since, according to the first citation in the preamble to Regulation No 4028/86, the Council of the European Communities adopted that regulation 'having regard to the Treaty establishing the European Economic Community, and in particular Articles 42 and 43 thereof', the Commission cannot distort the structural and Community nature of the aid.

Consequently, the Commission's interpretation of the word 'may' * in Article 6(1) of Regulation No 4028/86 is unacceptable because, for one thing, in the light of Article 1 of Regulation No 4028/86, 'may' becomes mandatory and not optional. Although the Council conferred 'executive authority' on the Commission, the latter is required to grant the Community financial aid. Since Article 40(2) of Regulation No 4028/86 provided for total expenditure in respect of the implementation of the measures provided for in Regulation No 4028/86 of ECU 800 million for the period 1987 to 1991, the Commission must grant the Community aid when the measures referred to in Title II of the regulation fulfil the conditions laid down. Those conditions are the following: (a) the project must fulfil the conditions laid down in Articles 6(2) and 8(1); (b) the project must have been submitted to the Commission through the Member State concerned, once the approval of the latter has been obtained, on the basis of the priorities of the multi-annual guidance programmes; (c) the project must qualify for priority under Article 8(2); (d) the funding of ECU 800 million allocated for the five-year period — an average of ECU 160 million per year — must not have been used up.

26. On the basis of those considerations Echebastar adds, again in its reply, that it appears that in 1990 the Commission adopted only one decision in which it invested ECU 82 million. Since the resources

* Translator's note: 'may' corresponds to the words 'peut' and 'podrá' in the French and Spanish versions of Article 6(1) respectively.

are not unlimited, the Commission is required to prove that the money was spent on the measures in the Community programme, otherwise the financial provisions of Regulation No 4028/86 must be considered to have been infringed.

Accordingly, the Commission must prove that the funds awarded by the Community complied with Article 40 of Regulation No 4028/86, that the aid granted was granted to projects which clearly qualified for priority under Article 8(2) of the same regulation and that projects which did not qualify for priority or which were of a lower priority were deferred.

Echebastar also considers that, as Article 8(2) of Regulation No 4028/86 lays down the criteria for according priority, only applications which take priority are eligible for Community aid. If in each year all projects which take priority are accepted for aid, then it will be possible to accept other projects which have a lower priority for the purposes of Article 8(2). Therefore, in each of the two decisions it adopts yearly pursuant to Article 35(1), the Commission must state the reasons why each of the projects was given priority or rejected.

27. According to Echebastar, it follows that those whose applications were not accepted for aid are entitled, firstly, to challenge the decisions before the Court and, secondly, to receive the information necessary for them to do so. Thus the Commission's letter to the persons whose applications were not accepted owing to lack of funds indicates both that the applications in question fulfilled the conditions laid down in Articles 6 to 8 of Regulation No 4028/86 and that they were not accepted only because there were no funds available.

However, Echebastar observes that the Commission failed to state that its application qualified for priority under Article 8 of Regulation No 4028/86 and that the ECU 800 million provided for under Article 40 of the same regulation had been entirely used up. The Commission does not escape its duty to justify the priorities it awarded simply because it carries forward the applications. If Echebastar's application fulfilled all the prescribed conditions both in 1989 and 1990, as the Commission acknowledged in writing, it contradicted itself when it claimed that in October 1990 it did not have available 'reliable and accurate data'.

28. Echebastar points out that Article 35 of Regulation No 4028/86 provides that decisions are to be notified, among others, to the 'beneficiaries of the projects'. That form of wording indicates that notification is to be made both to 'the recipients of aid' and to 'the beneficiaries of projects' which were not accepted for aid. The Commission's letter of 18 December 1990 is neither a resolution nor a decision and does not state any of the reasons on which it is based other than that the project fulfilled all the conditions laid down for the grant of aid but because of a lack of funds the application was carried forward to the following budgetary year. That letter did not allow Echebastar to bring an action before the Court on the basis of Article 173 firstly because it is not a decision addressed to Echebastar and secondly because, as the general announcement published in the Official Journal was so concise, there was no means of knowing the content and the statements of reasons of the decisions addressed to other persons.

29. Echebastar then states the reasons why the Commission's conduct is contrary to the Treaty.

30. Firstly, the Commission failed to adopt a decision within the time-limit laid down by the Council in Article 35(1)(a) of Regulation No 4028/86. Since Echebastar's application reached the Commission on 13 January 1988, the Commission ought to have adopted a decision before 31 October 1988, but failed to do so. Moreover, Echebastar has still not yet had a decision addressed to it. However, under Regulation No 4028/86, a person with a specific project 'for material investment relating to ... the construction' of a fishing vessel which fulfils the conditions laid down in Articles 6(2) and 8(1) of the regulation and who is a priority case within the meaning of Article 8(2), is actually entitled to be granted Community aid by the Commission from the funds provided for under Article 40(2) and to be granted it in the manner and on the dates prescribed by Article 35. Moreover, the Commission is under an obligation to notify 'decisions on financial aid' both to the Member States concerned and to the 'beneficiaries of the projects'.

31. Secondly, the Commission disregarded Article 37(1) of Regulation No 4028/86. The content of the Commission's letter of 22 November 1989 referred implicitly to the aforementioned Article 37(1), which gave rise on the part of the addressee of the letter to a legitimate expectation that its application would be considered in 1990, particularly as its project fulfilled all the conditions laid down and Article 40 of Regulation No 4028/86 provided that ECU 800 million were to be spent between 1987 and 1991. Since the Commission did not take a decision on Echebastar's project in the 1990 budgetary year, the Commission infringed Community law. Moreover, one of the decisions adopted in 1990, which granted financial aid to a competitor, did not comply with the principle of priority laid down in Regulation No 4028/86.

32. Echebastar claims next that the Commission ignored the existence of a hierarchy of legal rules. Since Regulation No 4028/86 was adopted by the Council, the Commission must respect that the superior rank of that regulation by expressly and officially adopting decisions within the time-limit which it lays down. Referring to the case-law of the Court (see the judgments in Case 39/72 *Commission* v *Italy* [1973] ECR 101; Case 43/75 *Defrenne* [1976] ECR 455; Case 128/78 *Commission* v *United Kingdom* [1979] ECR 419; Case C-10/88 *Italy* v *Commission* [1990] ECR I-1229), Echebastar argues that to accept the contrary would be to run the risk of elevating the infringement of the law into a rule of interpretation, something which the Court has rejected. Consequently, the Commission cannot be allowed to neglect to apply Regulation No 4028/86 by disregarding the time-limits it prescribes. Moreover, by imposing additional requirements for the grant of aid on applications which fulfil all the conditions and which have simply been carried forward to the next budgetary year, and by keeping Echebastar waiting indefinitely, the Commission has changed the text of Regulation No 4028/86. The Commission did not merely implement Articles 6 to 8 and 35 of the aforementioned regulation; it made changes in those articles, which is contrary to the principle of the hierarchy of legal rules.

33. In Echebastar's opinion, the failure to act of which the Commission is accused consists of a double error. The Commission committed an error of fact in that it considered that it could keep open indefinitely the time-limit laid down in Article 35(1)(a) of Regulation No 4028/86. Referring to the judgment in Joined Cases 106 and 107/63 (*Toepfer* v *Commission* [1963] ECR 405), Echebastar argues that the Commission must be held liable for the damage caused by the fact that it erroneously failed to adopt a decision within the prescribed time-limit. The Commission committed an error of law in so far as it considered that, notwithstanding Article 37(1) of Regulation No 4028/86 and the fact that on 22 November 1989 it had informed Echebastar in writing that its project could not be granted Community financial aid owing to 'a lack of funds in the budget for financing projects in 1989', it allowed the entire 1990 budgetary year to pass without adopting any decision on Echebastar's project, despite the fact that its letter of 17 May 1990 stated that *'a decision will be taken no later than 31 October 1990'*.

By acting as it did, the Commission infringed the principles of legitimate expectation and legal certainty, which are recognized by the case-law of the Court and which may be relied on in an action for failure to act because they form part of Community law (judgments in Case 112/77 *Toepfer* v *Commission* [1978] ECR 1019; Case 289/81 *Mavridis* v *Parliament* [1983] ECR 1731; and Joined Cases 205 to 214/82 *Deutsche Milchkontor* v *Germany* [1983] ECR 2663).

34. Echebastar also argues that the Commission's failure to act creates infringements of essential procedural requirements. Those infringements are: firstly, the failure to adopt the decisions required by Article 35(1)(a) of Regulation No 4028/86 in 1988, on 31 October 1990 and on 30 April 1991; secondly, the notification of the formal decisions only to the recipients of aid whereas the beneficiaries of projects carried forward received a mere letter for information purposes only, which could not be the object of an action; thirdly, the failure to apply the priorities laid down in Article 8(2) of Regulation No 4028/86; fourthly, the failure to notify the fact that the applications which were accepted for aid had a higher priority than those rejected; finally, failure to implement Article 40(2) of Regulation No 4028/86 in so far as the funds provided for in that provision were not allocated until used up each year.

35. Moreover, the failure to act of which the Commission is accused also constitutes a misuse of power since the Commission remained silent on the matter of the two-month period laid down by Article 175(2) of the Treaty and thus refused to take a decision which it is required to take under Articles 35 and 37 of Regulation No 4028/86. When the Commission adopts a decision under Regulation No 4028/86, it has a non-discretionary power; it must adopt a decision twice yearly. In addition, the Commission has no discretion not only in the first stage, in which it considers 'whether the applications submitted fulfil the conditions laid down in the regulation', but also in the second stage of the procedure, since it must follow the instructions and rules set out in Article 7(1)(a), (b), (c) and (2) and in Article 8(2), which defines specific cases of priority.

Consequently, if the applications exceed the funds available, it is important that the rules on priority should be complied with. However, since Echebastar submitted its application, the Commission has had seven opportunities for adopting a decision on the application, but no decision has yet been taken. Those circumstances constitute an infringement of Article 6 to 8 and 35 of Regulation No 4028/86, which allows no delay.

Echebastar concludes this plea in law by claiming that, by laying down new criteria of assessment, which change the clear wording of Article 35(1)(a) of Regulation No 4028/86 so as to defer the grant of the Community financial aid indefinitely, the Commission commits a manifest misuse of power, within the meaning of the case-law of the Court, according to which a misuse is committed where an administrative authority has used its powers for a purpose other than that for which they were conferred on it (see the judgments in Case 817/79 *Bull* v *Commission* [1982] ECR 245 and in Case 69/83 *Lux* v *Court of Auditors* [1984] ECR 2447).

36. In its reply Echebastar adds that the failure to act of which the Commission is accused also infringes Article 40(3) of the Treaty. The fact that not all applicants for Community aid under Regulation No 4028/86 are treated equally, which the Commission admits inasmuch as it states that a formal decision within the meaning of Article 189 is addressed only to the recipients of aid, whereas the applicants whose projects have been rejected are notified of that fact by letter, the sending of which has the effect of carrying forward the grant of aid to the following budgetary year, constitutes discrimination in breach of the second subparagraph of Article 40(3). That discrimination denies justice to those whose applications for Community financial aid have been carried forward since all possibility of bringing an action before the Court is precluded. In support of that argument Echebastar cites the judgments in Case 61/77 (*Commission* v *Ireland* [1978] ECR 417), Case 88/77 (*Minister for Fisheries* v *Schonenberg* [1978] ECR 473), Case 238/78 (*Ireks-Arkady* v *Council and Commission* [1979] ECR 2955), Joined Cases 241, 242, 245 to 250/78 *DGV* v *Council and Commission* [1979] ECR 3017 and Joined Cases 261 and 262/78 *Interquell Stärke-Chemie* v *Council and Commission* [1979] ECR 3045.

Echebastar adds that the granting of subsidies to other projects, such as, for example, the Italian project No 0351/90/02, constitutes discrimination against projects such as its own.

37. The *Commission* contends, firstly, in substance, that Echebastar's admission that, before it brought its action, it had received the Commission's letter of 18 December 1990, informing it that a position had been adopted on its application, communicating that position and stating the reasons on which it was based, is sufficient grounds to dismiss the action for failure to act, which seeks essentially the communication to the applicant of the act already addressed to it (see the judgments in Joined Cases 5 to 11 and 13 to 15/62 *San Michele* v *High Authority* [1962] ECR 449 and Case 8/71 *Komponistenverband* v *Commission* [1971] ECR 705).

38. The Commission also contends that in its reply Echebastar changed the object of the original application. Echebastar

reinforced it with an application for the annulment of an unfavourable decision. Echebastar's reasoning consists in the assertion that, given the nature of its project and the funds available, the Commission was obliged to grant the aid in question. Since the Commission failed to grant the aid, the Court must require it to do so. Moreover, the arguments concerning the merits of the project in relation to the requirements laid down in the regulation or in relation to other projects, and on the question of whether or not funds were available to the Commission, are valid only in actions for annulment and not in actions for failure to act.

The Commission considers that Echebastar also made changes to its pleas in law in the reply. Thus, the reference to the merits of the project is the basis for pleas in law based on the infringement of Regulation No 4028/86 and the principle of non-discrimination. The lack of funds is the basis for the Commission's manifest error of assessment. Finally, the alleged infringements of essential procedural requirements are valid only against a formal decision of the Commission.

The new claims made by Echebastar for the first time in its reply make sense only in the context of an action for annulment.

Consequently, the Commission considers that the introduction in the reply of an object, pleas in law and additional claims which do not appear in the proceedings for failure to act instituted by the application, amounts in practice to bringing an action for annulment, which is inadmissible having regard to Articles 38 and 42 of the Rules of Procedure of the Court. The incoherency caused by the maintenance of the original action for failure to act is another reason why the new action for annulment is inadmissible.

39. The Commission then recalls the provisions of Regulation No 4028/86 and points out two features: firstly, the co-responsibility of the Member States for the restructuring and renewal of the fishing fleet and, secondly, the legal position of persons applying for Community financial aid towards projects relating to the purchase or the construction of new fishing vessels.

40. That alleged co-responsibility of the Member States can be inferred from Community legislation.

For example, under the Community system for the conservation and management of fishery resources introduced by Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1), the distribution among the Community's fishermen of the catch possibilities for stocks subject to TACs or to other quantitative restrictions is delegated to the Member States. The Member States must share out the quotas allocated among their own fishermen and monitor the fishing capacity of their own fleets.

The structural policy for the fisheries sector is implemented by means of measures of exhortation and encouragement and not through coercive measures. Since the circumstances surrounding fishing as an economic activity vary greatly from Member State to Member State, it is essential that efforts to

adjust the fleets should be adapted to the Member States. The Community legislature took that into account when it provided, in the basic measure of the structural policy for the fisheries sector, that that policy must be implemented within the framework of multi-annual guidance programmes specific to each Member State.

Those programmes, which are defined in Article 2 of Regulation No 4028/86, are considered by the Commission having regard to foreseeable developments in fishery resources and to the measures adopted under the common fisheries policy and guidelines for that policy. It is not sufficient for a programme to be approved; changes in the fishing fleet of each Member State must be monitored. Hence Article 5 of Regulation No 4028/86 requires the Member States to send to the Commission each year before 1 April a summary report on the state of progress of their programmes.

The Commission emphasizes in that regard that the Community grants financial aid towards projects relating to the purchase or construction of new fishing vessels on the condition that the Member States keep to the annual estimates. In the case of Spain, the multi-annual guidance programme was approved by Commission Decision 88/149, in which the Commission considered that, particularly for the tuna fleet operating on 1 January 1987 (to which may be added the boat which the applicant's project concerns), a certain increase was permissible before the end of 1991.

Community aid towards projects relating to the restructuring and renewal of the fishing fleet can be granted only if the applications for financial aid form part of the multi-annual guidance programme of the State concerned and fulfil the objectives laid down in that programme. It follows that the adoption of Commission decisions on the projects submitted depends on the conduct of the Member States beforehand. If the Member States meet their annual targets, the Commission is able to consider applications for subsidies for the construction of new vessels.

However, the Member States' role is not simply to implement the programme; they also participate in the processing of each of the individual applications for Community financial aid. The relationship between the Community and the individual applicants is in fact a three-way relationship between the Community, the Member State and the individual applicants.

The task of the Member States is, firstly, to subject the individual applications to a preliminary consideration in order to determine whether they are consistent with the multi-annual guidance programme. In addition, the Member States carry out an appraisal inasmuch as they attribute a priority rating to the projects. That priority rating is taken into consideration by the Commission when it places all the projects submitted in order of preference.

The Member States also participate in the following stage, that is to say the granting of the Community aid, which the Commission awards after consulting the Standing

Committee on the Fishing Industry. In that final stage, the Member States are advised, in the forum of the Committee, of the criteria of priority applied. Thus, Echebastar received a letter from the Spanish authorities in February 1990 in which they outlined the reasons why its project had not been accorded priority over others in the 1989 decision.

41. The legal position of applicants for Community subsidies for the construction of new fishing vessels is such that they have no right to aid, and if their applications are not accepted mere communication of that fact constitutes valid notification.

Thus the Commission points out that Article 6(1) of Regulation No 4028/86 provides that the Commission 'may grant Community financial aid ...', which does not mean that structural measures have an automatic right to aid, but only that an application will be examined under the same conditions as the other applications submitted, that it will be accorded the priority due to it and that it will be granted provided that there are sufficient funds available, those funds being limited. The following procedure is adopted: in the initial stage, when the applications are checked, the Commission exercises a non-discretionary power; that is to say, if an application fulfils the conditions laid down in the applicable legislation, the Commission must accept it; otherwise it must reject the application. Each project is therefore considered individually and is not compared with other competing projects. The second stage is a comparative examination of all the applications in order to determine which are most deserving of Community financial aid. Community financial aid towards structural measures is not unlimited and must not exceed the total allocation of ECU 800 million for the period 1987 to 1991 provided for in Article 40 of Regulation No 4028/86, the maximum amount of that sum available in each budgetary year being decided by the budgetary authority. Thus the difficulty facing the Commission that the amount available in the annual budget is much less than the amount necessary to accept all the applications which fulfil the conditions laid down by the regulation.

The Commission contends that a formal Commission decision within the meaning of Article 189 of the Treaty must be adopted only in respect of projects which are co-financed by the Community. Such a decision is addressed both to the Member State concerned and to the recipients. Applicants whose projects have not been accepted for aid are notified through two different channels. Firstly, the Commission publishes an information bulletin in the 'C' series of the Official Journal of the European Communities stating the number of applications received and the number accepted for aid, the latter being broken down by Member State and type of investment. Secondly, the Commission communicates that information to everyone whose applications meet the conditions laid down in the regulation but cannot be accepted because of lack of funds. That information was sent to the applicant by a letter of 18 December 1990.

The fact that the information in question is communicated twice has two consequences: firstly, Article 37(1) of Regulation

No 4028/86; secondly, since lack of funds is the only reason for rejecting the application, the project may receive national aid. However, the fact that a project is automatically carried forward does not entitle it to take priority over new applications, but only to be considered in the next budgetary year, concurrently with any new applications which may be submitted for that budgetary year. Furthermore, the fact that an application is carried forward does not mean that it must be considered as part of the first series of decisions which are taken no later than 30 April since it may be considered at any time during the next budgetary year.

In short, the Commission contends that the nature of the system under consideration is not such as to confer entitlement to aid on applications which meet the conditions for acceptance. The Commission adds that the letters which it sends to those concerned notifying them that it was not possible to accept their applications only because of a lack of funds, is sufficient to enable them to challenge the decision to give priority to the applications accepted for aid, since such an action should permit the Court to determine whether, when the Commission chose the projects accepted for aid, it complied with the criteria of priority laid down in the regulation and with the general principles prohibiting discrimination, arbitrariness and the misuse of power.

42. The Commission then contends that it cannot be held responsible for the delay in the decision on Echebastar's application. It states that in order for it to have been able to adopt a decision by 30 April 1988, it would have had to have been in a position to consider whether Echebastar's project was compatible with the multi-annual guidance programme, pursuant to Article 6(2)(a) of Regulation No 4028/86. However, according to the Commission, in April 1988 Spain had not yet forwarded to it the information required by Article 2 of Decision 88/149. Thus the Commission was forced to temporarily suspend the decisions on the grant of aid for projects relating to the construction of new fishing vessels. At the seventy-ninth meeting of the Standing Committee on the Fishing Industry, held on 20 April 1988, the Commission informed the Member States that the projects on which it was due to adopt a decision no later than 31 March 1988 would be considered in the second decision to be adopted no later than 31 October 1988, provided that it received the information in good time. However, since the majority of the Member States failed to forward the information in good time, in October 1988 the Commission was again prevented from adopting a decision on the projects relating to the construction of new fishing vessels. Consequently, it decided to extend for a further budgetary year the validity of the construction projects considered in 1988 on which it had not been able to adopt a decision.

Thus the first possible opportunity for considering Echebastar's project did not arise until 1989, when it was carried forward owing to lack of funds. The Commission should have been able to adopt a decision in April 1990, but the information supplied by the majority of the Member States was incomplete or contradictory, so the Commission again deferred the granting of new aid until the October decision. In October 1990, the information for Spain was still incomplete or contradictory. The information which arrived in November 1990 subsequently enabled the draft decisions to be

submitted to the Standing Committee on the Fishing Industry at its meeting of 11 December 1990 and the corresponding favourable decisions to be adopted on 20 December. Those decisions were notified to the Member State concerned and to the recipients, and the overall result of the decisions was published in Official Journal No C 29 of 5 February 1991. The applicants whose projects relating to the construction of new vessels fulfilled the conditions laid down by Regulation No 4028/86 but had not been accepted for aid because of a lack of funds, of which Echebastar was one, were advised of their position by a letter of 18 December 1990, which the applicant acknowledges having received.

43. The Commission also considers that, firstly, it was not required to adopt a formal decision within the meaning of Article 189 of the Treaty *vis-à-vis* applicants who did not receive aid, and, secondly, that the definition of position of 18 December 1990 sent to Echebastar is sufficient to render the action for failure to act devoid of purpose.

44. In the Commission's opinion, the legislation on financial aid towards projects relating to the purchase or construction of new fishing vessels does not require it to adopt a formal decision addressed individually to an applicant who has not received aid, and the letter it sends is the measure most appropriate to the legal position of the applicant and is sufficient to protect that position.

In that regard, the Commission points out, firstly, that Article 175 is based on the hypothesis that one of the two institutions has been duly called upon to act and has failed to address to the person concerned an act 'to which it is legally entitled under the rules of Community law'. However, it follows from the legal position of an applicant for Community financial aid towards the construction of a fishing vessel that the provisions of Regulation No 4028/86 relating to possible subsidies for the construction of new fishing vessels do not confer on applicants a right to be granted a subsidy simply because they fulfil the conditions laid down in the regulation. Once the Commission has processed the applications under consideration in the two stages described above, a list is produced in which the projects appear in order of preference, and the Commission merely adopts favourable decisions on the projects included on the list until the relevant funds made available in the budget have been used up. The favourable decisions to grant Community aid must be decisions within the strict meaning of Article 189 of the Treaty because they create a special administrative relationship between the Commission and the addressees of the decisions since they confer benefits and impose specific obligations. As regards the projects which fulfil the conditions laid down for entitlement to financial aid but which are rejected on the ground that there are not sufficient funds available to finance all the projects submitted, the Commission contends that it cannot adopt an unfavourable decision on them since they are refused financial aid not for reasons of merit but for lack of funds. Those whose application have been rejected for lack of funds must be informed of the result by means of a letter. Taken together with the notification of the outcome of the decision in the 'C' series of the Official Journal, such a letter is sufficient to enable an action to be brought before the Court of Justice. Moreover, those concerned

can apply to their national Governments for further details concerning the decisions adopted.

45. The Commission considers that the letter sent to Echebastar on 18 December 1990 on the subject of the project at issue also constitutes a sufficient definition of position for the purposes of the second paragraph of Article 175 of the EEC Treaty to preclude an action for failure to act. That letter, in conjunction with the notice published in the Official Journal and with the explanations and the detailed list of projects provided by the national authorities, permits the Court to determine whether the decision to grant Community aid as on a priority basis to other projects is compatible with the Treaty, having regard to the prohibitions against discrimination, arbitrary decisions and the misuse of power.

Even if the Court declared the present action for failure to act well founded, enforcement of the judgment could only consist in the applicant's being informed that his application had been rejected in favour of other more deserving applications, which is, in substance, the import of the letter of 18 December 1990.

The Commission contends that, in any event, the pleas in law based, firstly, on the inadequacy of that letter and, secondly, on the inadequacy of the reasons and information which it contains, are unfounded. That is proved lengthy arguments advanced by Echebastar against the decision not to grant the subsidy requested.

46. The Commission states that compliance with the time-limit laid down in Article 35(1)(a) of Regulation No 4028/86 is a subsidiary obligation in relation to its primary obligation to ensure that the decisions it takes on projects are based on reliable information. Since the only information available to the Commission in October 1990 was incomplete, it could not adopt decisions on new construction projects because they might not have been consistent with the multi-annual guidance programme. In any event, it defined its position within two months of being called upon to act, pursuant to Article 175 of the EEC Treaty. The Commission adds that the pleas in law based on the postponement of its decision from 1988 to 1989 and subsequently to April 1991 are inadmissible in an action which concerns the situation in the 1990 budgetary year.

47. Moreover, the request for it to act of 20 September 1990 is vitiated and the action is therefore inadmissible.

In that regard, the Commission reviews the case-law of the Court (judgment in Case 17/57 *Steenkolenmijnen* v *High Authority* [1959] ECR 1) from which infers it that the date on which the institution is called on to act is the starting point for the time-limits within which the applicant must bring an action and the institution must reply. It is therefore essential that the institution be called upon to act after the legally-prescribed time-limit for the adoption of a decision has expired, because that time-limit would be meaningless if it could be curtailed at the whim of an individual.

In the present case, the request that the Commission should act was received on

2 October 1990, that is to say before 31 October 1991, the date on which the time-limit laid down in Article 35(1) of Regulation No 4028/86 for the Commission to adopt a decision on the applications expired. When Article 37 of Regulation No 4028/86 provides that applications not accepted for lack of funds are to be carried forward 'to the following budgetary year', it means that a decision can be adopted on those applications either in the first or the second half of the year. The Commission therefore contends that the applicant's prior request that it should act is not valid because it was made too early. If the applicant had called upon the Commission to act on or after 31 October, the Commission would have had two months within which to reply, that is to say at least until 31 December, by which time the decision had been adopted and notified to the applicant.

48. With regard to the infringement of the principle of the hierarchy of legal rules, the Commission states that it defined its position and communicated it to the applicant on 18 December, in other words one and a half months after the time-limit had expired, but within two months of the date on which the request that it should act ought to have been submitted, if it had been submitted at the right time and not prematurely, and, in any event, before the present action was brought. Furthermore, that short delay resulted from the fact that the rule which required it to ensure that applications were consistent with the objectives of the multi-annual guidance programme took precedence over the rule which required it to process the files within a certain time-limit.

49. With regard to the alleged error of fact, the Commission merely replies that it does not harbour a conviction such as that ascribed to it by Echebastar, which is entirely contrary to the wording of Article 35 of Regulation No 4028/86.

50. As regards the error of law, the Commission observes that the letter of 17 May 1990, which merely retracts the time-limit laid down in Regulation No 4028/86 — which the Commission can meet only if it has the necessary data available beforehand — is not such as to give rise to an additional expectation on the part of the applicant beyond that produced by the fixing of the time-limit in the regulation, and that that argument is consequently assimilated by the argument relating to the question whether or not the time-limit in question was infringed.

51. The plea in law concerning the misuse of power merges with the allegation that the time-limit was infringed. Therefore the Commission refers to the observations it made on that matter.

52. The Commission reiterates that, in an action for failure to act, pleas in law which seek to prove the unlawfulness of the decision not to grant the aid applied for are inadmissible. Nevertheless, it contends, firstly, that the fact that an application fulfils the requirements laid down in Regulation No 4028/86 means only that it is eligible to be compared with the other projects and does not guarantee that it will be accepted for aid. Secondly, there are not sufficient funds available. Consequently the amount of those funds need only be compared with the total amount of the applications relating to the construction of new vessels throughout the Community for it to be clear that the imbalance between the applications and the funds available dictates that the applications must be prioritized according to their merits.

Before giving a project priority, the Commission considers that it must ensure that the Member State has complied with all the objectives laid down annually in each programme and that a project relating to the construction of a new vessel is part of the approved programme. Those two conditions are necessary, but they are not sufficient either for the Commission to authorize the grant of national aid or for the project in question to be eligible for Community aid. In order for Community aid to be granted, it is also essential that the project be one of those which best fulfil the criteria of priority laid down by Article 8(2). Of those criteria, the ones which are in practice the most appropriate for prioritizing the projects are those in Article 8(2)(b). Thus, in order to comply strictly with the concept of replacement, the Commission requires first of all that the owner of a vessel lost unintentionally should be the beneficiary of the project and that the total capacity and potential of vessels lost unintentionally should correspond to those of newly built vessels.

When those criteria are applied to the project at issue, it is revealed that one of the three vessels whose definitive loss as a result of wreck gave rise to the application for a subsidy, namely the Giozaldi, did not belong to the applicant and another, the Beti Campo Libre, had not been lost as a result of wreck but had been exported to Senegal. Those two facts meant that the applicant's project was accorded a lower priority than a good many other projects submitted by Spanish shipowners. Thus in the order of priority adopted for the decision of April 1989, the project was placed 251st and only the first 34 received financial aid. For the decision of October 1989, the project was placed 246th and only the first 48 received financial aid, while for the December 1990 decision it was placed 324th and only the first 46 project received financial aid.

The Commission adds that Echebastar's project was not discriminated against in favour of other Spanish projects. As regards taking into consideration the priority accorded to each project by the Member States, the Commission's role is to ensure, as far as possible, that the structural policy priorities decided on by the Member State with regard to the composition and the size of its fishing fleet are to a certain extent consistent with those of the Community policy. In accordance with its own criteria, and on the basis of the multi-annual guidance programme, Spain accorded the project in question a priority rating of 3 on a descending scale of 1 to 5. But in the first decision of 1989, out of the 34 Spanish projects which received a Community subsidy, 31 had a priority rating of 1, 2 had a priority rating of 2, and 1 had a priority rating of 3. All those projects involved rates of withdrawal, in terms of engine power and tonnage, of more than 100%, which was not the case for Echebastar's project. In the second series of 1989 decisions, 48 Spanish projects received financial aid, 36 of which had a priority rating of 1, 7 had a priority rating of 2, and 5 had a priority rating of 3. All the projects with a priority rating of 3 had a withdrawal rate which was higher than that of the project at issue. Finally, in the 1990 decision, 46 Spanish projects were subsidized, all of which had a priority rating of 1, except for 2 with a priority rating of 2, and all of which

had rates of withdrawal, in terms of engine power and tonnage, of more than 100%.

Nor was Echebastar's project discriminated against in favour of projects submitted by operators in other Member States. The Commission observes that, since the framework of reference established by the multi-annual guidance programme varies according to the fishing capacity, the catch possibilities and the socio-economic situation in the fisheries sector in each of the Member States, and since the first condition to be fulfilled by each project is that it should be part of the multi-annual guidance programme for the Member State of establishment, it is inevitable that the criteria of priority laid down by the Community regulation must be applied in the context of the project submitted by each of the Member States and not in the overall context of all the projects submitted by all the States, and that the application of those Community criteria must result in lists of projects placed in order of priority for each of the Member States and not in a single list for all the projects submitted by all the operators in the Community.

Of course, if the projects submitted are placed in order of priority in lists corresponding to each Member State and not in a general list, in order to be able to distribute the funds made available in the budget for the construction of new vessels to the projects of each Member State, the Commission must carry out a preliminary distribution, which it does in accordance with strictly objective criteria such as, essentially, the capacity of the fleet in terms of tonnage and engine power, and the number of persons employed in the sector. The total amount allocated to the projects submitted by a Member State is then granted according to the order of priority of the projects until that amount is used up.

With regard to the Italian project No 0351/90/02, the Commission states that that project fulfils all the criteria and conditions laid down in the regulation and that Italy fully complied with the objectives of its multi-annual guidance programme for 1990. The Commission also had to take account of the general situation of tuna fishing in Italy, where there is a very large processing industry which obtains its raw materials almost exclusively abroad. The construction of a tunny ship — the project in question — could therefore contribute to some extent to reducing the heavy dependence of the Italian processing industry on foreign supplies, particularly as the there was no ocean-going tunny ship in the Italian fleet with the same characteristics. Those were the reasons that prompted the Italian Government to accord to the project the highest priority for receiving Community financial aid.

53. The Commission considers that the arguments relating to the alleged infringements of essential procedural requirements are inadmissible in an action for failure to act. The Commission nevertheless responds to those arguments advanced in the reply by insisting that the letter of 18 December 1990 sent to Echebastar is sufficient a definition of position to render the allegation of a failure to act unfounded, and that it informs

the applicant that his application was not accepted for aid because the available Community financial aid had been granted to projects which were more deserving than its own, so that it was possible for it to bring an action before the Court against the decision to grant aid to other projects. The Commission also points out that if the applicant had been uncertain of the legal status of the letter which was sent to it by the Commission and of the remedies available for obtaining judicial review of the Commission's actions, it could have safeguarded its rights by bringing an action before the Court to establish whether or not the letter sent to him was actionable. In any event, the applicant knew of the decisions taken on other applications directly affecting his own because it had been informed of them by the Commission's letter or by the notice published in the Official Journal of 2 February 1991. Consequently, it could have contacted the national or Community authorities, within a reasonable period, to request both the list of approved projects and the corresponding decisions in order to compare the merits of its project with those of the projects which had obtained a subsidy.

The claims for relief in the form of a declaration that Echebastar was entitled to financial aid for the project relating to the construction of a fishing vessel

54. Referring to Article 176 of the Treaty, *Echebastar* maintains that the Commission has a duty to adopt the measures necessary to make good the breach of Community law, in compliance with the judgment that the Court will deliver. Those measures could only consist in the granting to the applicant of the aid requested, namely 10% of the total cost, or PTA 195 650 000.

It is clear from the Commission's letter of 22 November 1989 that the only formal obstacle to the granting of the aid was the lack of funds in the 1989 budgetary year. Consequently, Echebastar's application for financial aid should have been carried forward to the 1990 budgetary year for it to be granted in that year, as required by Article 37(1) of Regulation No 4028/86.

The letters of 12 February and 31 October 1990 confirm that argument. Consequently, since the Commission's failure to act was in breach of the Treaty, the Court should order the Commission to grant Echebastar the financial aid it has requested, particularly since, contrary to what the Commission claims, it had sufficient funds in 1990 to accept Echebastar's project for aid.

Moreover, as the Commission's letter of 18 December 1990 also signifies that Echebastar's project fulfilled all the conditions necessary for it to be granted Community financial aid, that aid ought to have been granted in 1989, in the second decision, or on 30 April 1990, or at the very latest on 31 October 1990, since the necessary funds were available in each of those cases. Consequently, the Court should declare that Echebastar is entitled to the aid.

Finally, since the Commission took only one decision in 1990 concerning ECU 82.56 million, whereas Article 40(2) of Regulation No 4028/86 provided for a mandatory allocation of ECU 160 million per annum, the refusal to grant aid to Echebastar cannot be justified by claiming that the funds had been used up.

Consequently, aid to the amount of PTA 195 650 000 must be paid to Echebastar, and the Court is entitled to make an order to that effect.

55. The *Commission* contends that the applicant is confusing the obligation to define a position — favourable or unfavourable — which is the subject matter of the action for failure to act, with the obligation to grant the subsidy requested, which is the subject-matter of a possible action against an unfavourable decision. Consequently, that application is, firstly, inadmissible in the context of the present action, in which the applicant can request only that the institution called upon to act should adopt the act requested of it, but not that that act should be a favourable decision. Alternatively, that claim cannot be well founded because the mere fact that the time-limit laid down in the regulation for the adoption of the act expired — *quod non* — does not limit Commission's discretionary power with regard to the adoption of a favourable or unfavourable decision.

The claims for compensation

56. *Echebastar* asks for compensation for the damage and economic loss which it suffered as a result of the Commission's failure to act. The file on the case shows that the damage is genuine, certain, individual and immediate, and is a direct result of the Commission's failure to act. In the present case there is a 'sufficiently flagrant violation of a superior rule of law for the protection of the individual', in accordance with the case-law of the Court. The delay caused by the Commission's failure to comply with the time-limit of two months laid down in Article 175 of the Treaty, the Commission clearly has consequences for fishing activity which has already commenced, thus forcing the fishing undertaking to finance the whole project and at least pay the interest corresponding to the financial aid which the Commission should have granted within the time allowed. Thus the causal link between the damage suffered and the failure to act is proven (see the judgment in Case 310/81 *EISS* v *Commission* [1984] ECR 1341).

The damage consists in both the loss suffered and the loss of earnings. According to Echebastar, the loss suffered is the result, firstly, of the failure to grant the Community financial aid and, secondly, of Echebastar's having itself financed what should have been financed by the Community aid, from the date on which the aid ought to have been paid, that is to say 31 October 1990, until the date when it is ultimately paid. The amount awarded should be such as to restore Echebastar to the position it would have been in if the Commission had not failed to act and thereby infringed the Treaty. Echebastar must therefore be compensated for the costs it incurs by reason of these proceedings.

The damage arising from financial costs can be appraised, at the legal rate in Spain, on the basis of the following factors:

(1) Financial costs arising from the non-receipt of the financial aid in the first and the second 1989 decisions — interest at the legal rate from 31 October 1989 to 31 October 1989 — PTA 2 934 750 — PTA 195 650 000 at 9%. Law No 37 of 28 December 1988 —

PTA 2 934 750

(2) Failure to adopt a decision in 1990. Interest at the legal rate from 1 January 1990 to 31 December 1990: PTA 19 565 000 — PTA 195 650 000 at 10%. Law No 4 of 29 June 1990. Fifth supplementary provision.

PTA 19 565 000

(3) Failure to adopt a decision in 1991. Interest at the legal rate from 1 January 1991 to 31 December 1991: PTA 19 565 000. — PTA 195 650 000 at 10%. Law No 31 of 27 December 1990. Second supplementary provision.

PTA 19 565 000

Consequently, the interest at the legal rate from 31 October 1989 to 31 December 1991 amounts to a total of *PTA 42 064 750* in accordance with Spanish law. That is the compensation sought by Echebastar.

57. The *Commission* considers, firstly, that Echebastar's claim for compensation is inadmissible because Echebastar attributes the damage which it claims to have suffered not to the mere delay of one and a half months before the Commission defined its position on 18 December 1990, but to the Commission's failure to grant aid requested, which the applicant maintains it was required to grant. Such a claim can be based only on the unlawfulness of the decision not to grant financial aid, which is not the object of the present proceedings. Moreover, the Commission refuses to accept the main premise on which the alleged non-contractual liability is based, that is to say the existence of a failure to act, in infringement of the Treaty; the very reason for the delay was to enable it could fulfil a obligation which took priority.

G. F. Mancini
Judge-Rapporteur