REPORT FOR THE HEARING
in Case C-64/88 *

I — Relevant regulations and the pre-litigation procedure

By Regulation (EEC) No 2057/82 of 29 June 1982, the Council established certain control measures for fishing activities by vessels of the Member States ('the first control regulation'). Regulation No 2057/82 was repealed and replaced by Council Regulation (EEC) No 2241/87 of 23 July 1987 ('the second control regulation').

Article 1(1) of both control regulations requires each Member State, within ports situated in its territory and within maritime waters subject to its sovereignty or jurisdiction, to inspect fishing vessels flying the flag of, or registered in, a Member State in order to ensure compliance with all the regulations in force concerning conservation and control measures.

Article 1(2) of the same regulations provides that if the competent authorities of a Member State observe an infringement of the new regulations concerning conservation and control measures, they must take penal or administrative action against the skipper of the vessel responsible.

The technical measures for the conservation of fishery resources contemplated by the control regulations were laid down, first in Council Regulation (EEC) No 171/83 of 25 January 1983 ('the first conservation measures regulation') and then in Council Regulation (EEC) No 3094/86 of 7 October 1986 ('the second conservation measures regulation'), which replaced the first regulation from 1 January 1987. The technical measures include measures relating to mesh size, attachments to nets, by-catches and minimum size of fish which may be caught.

On 21 December 1984 the Commission sent to the French Government a letter of formal notice in which it complained that the French Republic had not complied with its obligations to inspect and to take action under Article 1 of the first control regulation. Referring to the missions accomplished by its inspectors in 1984, the Commission considered in the first place that the inspections at sea carried out by the French authorities were few in number and that when they were carried out they showed the use of nets with a mesh size less than the prescribed minimum or with an attachment contravening the first conservation measures regulation. Furthermore, when such infringements were found the French authorities did not take penal or administrative action against the skippers of

* Language of the case: French.

the vessels. In the second place, the Commission stated that as regards the inspections in the ports, there was no inspection of by-catches and that, in particular, in the ports of the Gulf of Gascony the rules relating to the minimum size of fish which might be caught were not applied.

On 22 January 1985, the French Government, without denying that certain infringements had been committed, replied that it was not possible to draw a general conclusion from inspections of limited duration carried out by the Commission's inspectors. Furthermore, the Commission had not sufficiently taken into account the special features of small-scale fishing in the Gulf of Gascony. Unlike fishing in the North Sea, fishing in the Gulf was for a large number of species, which necessitated the use of very diverse techniques in the same place, at the same time and sometimes on the same vessel. Application of the rules was not therefore always easy and required long experience and local knowledge. That was the reason for the information campaign for fishermen undertaken by the French Government in relation to the Community rules, in particular in relation to by-catches and attachments to nets.

In another letter, dated 28 May 1985, the French Government admitted that fishermen had landed in French ports hake of a size less than the size prescribed by the Community rules and that a certain number of coastal fishermen were using nets of an insufficient mesh. The French Government nevertheless pointed out that it had decided to organize an information and surveillance campaign from 15 May to 1 July 1985. During the campaign, trawlers would be inspected but the national authorities would not bring charges against those in default. After 1 July 1985, the authorities were instructed to bring charges against fishermen who were using nets with an appreciably smaller mesh than the standard. The same authorities were required to seize hake landed where they were patently smaller than allowed by the Community rules.

On 18 November 1986, the Commission sent to the French Government a reasoned opinion in which it confirmed the views set out in the letter of formal notice. Inspections carried out in 1985 showed that the infringements found in 1984 of the Community conservation rules laid down by the Community regulations were continuing. The Commission stated furthermore that the nature of the small-scale fishing in the Gulf of Gascony could not justify the incorrect application of the Community rules and that the information campaign for fishermen announced by the French Government merely confirmed the negligence of the national authorities. Finally, the letter of 28 May 1985 proved the existence of national tolerances, not in conformity with Community standards, regarding the minimum size of hake and the mesh size of nets.

In its reply of 21 January 1987 the French Government did not deny the existence of certain inadequacies in the application of the Community rules. It nevertheless claimed that, as regards 1984, a period of one year for implementing the first conser-

vation measures regulation could not be regarded as unusual in view of the requirements of that regulation. In addition, it explained the persistence of certain infringements in 1985 by the fact that certain provisions of the regulation, especially in relation to fishing in the Gulf of Gascony, were difficult to apply. The French Government mentioned the systematic inspections it had undertaken in 1986 in order to ensure observance of the Community standards in relation to conservation. A table of the inspections carried out in the Boulogne-sur-Mer area in relation to the minimum size of fish and mesh size of nets showed the results of that action.

By letters dated 24 March and 14 May 1987 the Commission requested the French Government to inform it of the action taken on the charges drawn up by the national authorities on the occasion of the inspections carried out by the Commission's inspectors.

By letters dated 21 May and 29 July 1987 the French Government forwarded the information requested. The national authorities had pursued all the infringements which they had found either by sending the offending fishermen a warning or forwarding the charge drawn up against them to the Procureur de la République.

II — Written procedure and conclusions of the parties

The Commission's application was registered at the Court Registry on 29 February 1988.

The written procedure followed the normal course. 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 enquiry.

The *Commission* claims that the Court should:

— Declare, pursuant to the second paragraph of Article 169 of the EEC Treaty, that, by failing to undertake control activities ensuring compliance with the technical conservation measures laid down in Council Regulations Nos 171/83 and 3094/86, the French Republic has failed to fulfil its obligations under Article 1 of Council Regulations Nos 2057/82 and 2241/87;

— Order the French Republic to pay the costs.

The *French Republic* contends that the Court should:

— dismiss the application;

— order the Commission to pay the costs.

III — Pleas in law and arguments of the parties

The *Commission* states that Article 1 of the first and Article 1 of the second control regulation imposes on Member States two obligations. The first, of a preventive nature,

is for inspections, both on sea and land, of fishing vessels flying the flag of a Member State. The second, of a punitive nature, requires penal or administrative action to be taken against the master of the vessel concerned. In the Commission's view, the national authorities discharge their task only in so far as infringements which could be found on inspection are recorded and appropriate proceedings are taken. It appears, however, from the reports of the Commission's inspectors that not all the infringements committed in relation to the mesh size of nets, attachments to nets, by-catches and the size of fish had been noted by the national inspection authorities, which implies that there is inadequate inspection. That led in turn to a failure to take penal or administrative action against the skippers of the vessels.

The Commission stresses the seriousness of the infringement with which the French Republic is charged. The persistent failure of the French authorities in relation to inspection has given fishermen the impression that certain technical conservation standards are not applicable, which has led them to continue to commit infringements.

In its application, the Commission offered to adduce evidence of its statements by all legal means. In its reply it added that it held at the disposal of the Court the reports of inspections carried out by its officers since 1984. It stated that those documents must remain of a confidential nature in order to ensure the efficacy of future action by its inspectors and to protect the rights of identifiable third parties mentioned therein.

The findings of the Commission's inspectors are confirmed by answers given by the French Government during the pre-litigation procedure. In the first place, the letter of 28 May 1985 shows that the French Government instructed its departments not to draw up charges for infringements of the rules relating to mesh size committed between 15 May and 1 July 1985 and that it confined itself during that period to warning those in breach to comply with the rules in force. Furthermore, it brought proceedings against fishermen from 1 July 1985 only where they had used nets the mesh size of which was appreciably less than the standards laid down or where they landed hake of a patently smaller size than the standards defined by the Community rules. In the second place, it was only in 1986 that the French Government undertook systematic action to inform fishermen and to train the inspectorate in order to ensure compliance with the technical measures for conservation, which had nevertheless been in force since 1983.

The Commission considers that the arguments put forward by the French Government to demonstrate that inspection was adequate are inconclusive. First, the table relating to infringements committed in 1986 in the Boulogne-sur-Mer area relate only to two types of infringement, namely those concerning the minimum size of fish and the mesh size of nets, and relate only to infringements in respect of which charges were drawn up whereas the proceedings for

failure to fulfil obligations under the Treaty refer to infringements which the national authorities had not recorded. The figures relating to French vessels inspected in 1986 took account of inspections carried out by all the Member States concerned in the waters under their sovereignty and not of those carried out by the French authorities alone. Furthermore, the figures do not relate to the area where small-scale fishing is carried out and cover infringements in relation to log books and landing declarations which are not the subject of the application to the Court. The letter of 30 June 1987 sent to the prefects of the maritime regions do not show that the French Government has fulfilled its obligations in the matter of controls since the letter is confined to giving a reminder of the existence of the Community standards in relation to mesh size and justifying their application.

The Commission maintains that the grounds of justification put forward by the French Government cannot be accepted. It states that the French Government has, by unilaterally judging the scientific value of certain standards laid down by the first conservation measures regulation, deliberately chosen to defer their application. To accept such a justification would amount to subjecting the applicability of a Community regulation which is directly applicable in every Member State and binding in every respect to the view which each Member State takes of the expediency of its implementation. The Commission states that the deficiencies in inspections persisted after the second conservation measures regulation was adopted. The possibility of social unrest cannot enable a Member State unilaterally to avoid its obligations.

The *French Government* agrees with the Commission in regarding the two control regulations as requiring Member States to inspect fishing vessels and to bring proceedings where an infringement is found.

It contends that it correctly discharged its obligations in the matter of controls and that the Commission has not shown that it in fact failed to fulfil its obligations as alleged.

As regards whether there was in fact any failure to fulfil obligations, the French Government considers that unless the existence of infringements regards proof of lack of inspection, the Commission has not proved that there is any failure. In Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791 the Court held that in proceedings under Article 169 of the Treaty for failure to fulfil an obligation, it was incumbent upon the Commission to prove the allegation that the obligation had not been fulfilled and that it could not rely on any presumption. Furthermore, in not making precise complaints the Commission makes it impossible for the Member State against which a failure to fulfil obligations is alleged to express an opinion on the facts complained of before proceedings before the Court are initiated and during those proceedings. In particular, the French Government says that the Commission ought to have forwarded a non-confidential version of its inspectors' reports.

The French Government contends furthermore that it has discharged its obligations to inspect. First, the information and inspection campaign referred to in the letter of 28 May 1985 was initiated and pursued,

as is shown by the letter of 30 June 1987 from the Secrétaire d'Etat à la Mer, to the prefects of the maritime regions. That campaign was not in vain for of the 4101 inspections at sea of French vessels 3646 were carried out by the French authorities in their waters. French vessels are among the most frequently monitored vessels in the Community. Those inspections disclosed a limited number of infringements of the conservation standards which shows that the rules are indeed applied. As regards inspections on land, moreover, the number of infringements found by the French authorities is higher than the number found in several other Member States. The French Government has also discharged its obligations to take punitive measures. Thus, action has been taken in respect of all the infringements found when the Commission's inspectors carried out their inspections.

The letters from the French Government do not, furthermore, prove the alleged failure to fulfil obligations. First, the letter of 22 January 1985 refers to the serious efforts made by the French authorities to ensure observance by the fishermen of the Community regulations, especially those in relation to by-catches and attachments to nets. Secondly, the letter of 28 May 1985 indicates the measures which the Director of Sea Fishing intended to put into effect in order to reduce the number of infringements of the standards relating to the mesh size of nets and the minimum size of fish.

Finally, the French Government states that it never intended to dispense itself from observing its Community obligations by not applying, for reasons of expedience, certain rules contained in the first conservation measures regulation. The inadequacy of the results obtained with regard to the proper application of the provisions relating to mesh size and the minimum size of fish simply shows how difficult it is to apply those provisions.

IV — Question put to the Commission and the standpoint of the French Government

The Court requested the Commission to produce a non-confidential document which would indicate, in accordance with the technical conservation measures in question, the evidence establishing that the French Government had not fully complied with its obligations in relation to inspection during the relevant period.

In reply the Commission forwarded a summary of the report drawn up by its inspectors following inspections which they had carried out in France between 1984 and 1987, a table of infringements of the Community provisions on technical measures of conservation, as found during those inspections and a list of all the ports visited.

The Commission points out that it confined itself to forwarding to the Court the summaries drawn up for internal use by its departments from the reports of inspection because those summaries faithfully record the findings made by its inspectors over four years. 'In order to make the documents thus produced non-confidential', it had, however, removed all passages which would

enable the persons involved to be identified directly or indirectly.

The French Government makes the following observations on the Commission's reply. It states that it is not for it to dispute the reasons for which the Commission did not wish to specify the ports inspected on each occasion and the date of the inspections. That fact makes particularly difficult any attempt to challenge or explain the facts complained of. In another context, that of observance of the right of undertakings to a fair hearing in matters of competition, the Court held that if the Commission felt it could not communicate the whole of a document to the undertaking concerned for reasons of confidentiality and the protection of business secrets it should abstain from using that document as evidence (Case 107/82 *AEG* v *Commission* [1983] ECR 3151).

In view of the information supplied by the Commission, the French Government continues to maintain that it complied with its obligations in relation to inspection and the application of the Community technical measures for the conservation of fishing resources.

R. Joliet
Judge-Rapporteur