REPORT FOR THE HEARING
in Joined Cases C-258/90 and C-259/90 *

I — Facts and written procedure

(a) *Legislative framework*

— Basic Regulation No 4028/86

1. Under 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), the Commission may grant Community financial aid for certain measures including, in particular, the re-orientation of fishing activities by means of exploratory fishing voyages. That aid is granted, upon the conditions laid down in Regulation No 4028/86, in order to facilitate structural change in the fisheries sector within the guidelines of the common fisheries policy.

2. Article 13 of Regulation No 4028/86 provides that:

'For the purposes of this Title, "exploratory fishing voyage" means any fishing operation carried out for commercial purposes in a given area with a view to assessing the profitability of regular, long-term exploitation of the fishery resources in that area.'

3. Under Article 14(1) of Regulation No 4028/86, the Commission is to grant Community financial aid to projects for exploratory fishing voyages:

'(a) to waters which do not fall within the sovereignty or jurisdiction of any State, or

(b) to waters which fall within the sovereignty or jurisdiction of a third country with which the Community has concluded or is negotiating a fishing agreement and to waters adjacent to the territory of Member States where no provisions of the Community legislation on fishing are applicable, or

(c) to waters under the sovereignty or jurisdiction of a Member State.'

Article 14(2) and (3) provides that:

'(2) To qualify for Community aid, the projects referred to in paragraph (1) must also:

(a) ...

(b) relate to voyages lasting for at least 60 days of fishing per year and per vessel in one or more sailings;

* Language of the case: Spanish.

(c) relate to fishing zones where, on the basis of an estimate of potential fishery resources, stable and profitable exploitation seems possible in the long term;

(d) provide for the presence on board of one or more scientific observers approved by the Member State concerned or, should this be impossible, for the participation of a scientific institute in the preparation of the voyage and in the processing of the results obtained.

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

4. The financial aid referred to in Article 14 consists of an incentive premium equal to 20% of the eligible cost of the voyage with a compulsory contribution from the State authorities of the Member State concerned which is between 10% and 20% of such cost. Projects for exploratory fishing voyages are to be submitted to the Commission through the Member State(s) concerned, once the favourable opinion of the latter has been obtained.

5. Article 16(3) of Regulation No 4028/86 provides as follows:

'Within two months of the submission of a project, the Commission shall decide whether to grant the premium .... This decision shall be notified to the beneficiaries and to the Member State(s) concerned. The other Member States shall be informed accordingly within the Standing Committee for the Fishing Industry ...'.

6. For each voyage the beneficiaries of the incentive premiums are to forward to the Commission and to the national authorities of the Member State(s) concerned, pursuant to Article 17 of the Regulation, a report concerning

'(a) the technical conduct of the voyage, and in particular the fishing methods used;

(b) the species caught, the locations at which they were caught, the corresponding yields and the by-catches;

(c) the economic results of the voyage;

(d) any other information collected by the observers'.

After examining the report, the Commission is to make it available to the other Member States.

— Implementing Regulation No 1871/87

7. The rules for implementing Regulation No 4028/86 are laid down by Commission Regulation (EEC) No 1871/87 of 16 June 1987 laying down detailed rules for implementing Council Regulation (EEC) No 4028/86 as regards schemes to encourage exploratory fishing (OJ 1987 L 180, p. 1).

Under Article 2(1) of Regulation No 1871/87, applications for Community financial aid must contain the particulars enabling the Commission to take a decision on those applications. Article 2(3) provides that:

'Applications as referred to in paragraph (1) shall be recorded on the day when they are received by the Commission.'

Article 3 of Regulation No 1871/87 contains a number of definitions, two of which read as follows:

'— the "beginning of a voyage" shall mean the day of departure from the port of operations or the last port of fitting out immediately before fishing operations ...

— the "end of the voyage" shall mean the day on which the vessel or the last of several vessels returns to the last port of landing ...'.

Article 3(2) goes on to provide that in order to qualify for an incentive premium, voyages may not begin until after the date on which the application for aid is recorded as received by the Commission.

Article 8 of Regulation No 1871/87, provides that incentive premiums may not be paid until the Commission has received the voyage report. Finally, Article 9 of Regulation No 1871/87 provides that:

'In the case of a project which comprises several successive voyages to the same fishing zone with a view to establishing the basis for stable long-term fishing the incentive premium for each voyage shall be paid only when the Commission has examined the voyage report(s) submitted by the applicant(s) on completion of the preceding voyages. Should the Commission consider that the results of such voyages hold out no prospects of stable long-term fishing in the zone concerned, it may decide not to grant the premium for the next voyage(s). Such decision shall be notified to the applicants and to the Member State(s) concerned. The other Member States shall be informed accordingly through the Standing Committee on the Fishing Industry.'

(b) *Facts*

8. On 13 December 1989, two shipping companies, Pesquerias de Bermeo SA ('Pesquerias') and Naviera Laida SA ('Naviera'), both incorporated under Spanish law and having their registered office in Las Arenas-Guecho (Spain), submitted applications to the General Secretariat for Sea Fisheries in Madrid in order to obtain the grant of Community financial aid for two projects for exploratory fishing voyages to be made by the vessels 'Ceres' and 'Geminis' in the international waters of the South-West Atlantic around the 49° Article of the EEC Treaty parallel south and the Burwood bank

at 57° Article of the EEC Treaty south. The exploratory voyages were intended to evaluate the profitability of stable long-term fishing in the zone concerned.

9. On 7 February 1990 the national authorities informed Pesquerias and Navieras that, if the Commission of the European Communities were to adopt a favourable decision, the General Secretariat for Sea Fisheries would grant aid equivalent to 20% of the eligible costs for the conduct of the exploratory fishing voyages.

10. On 14 February 1990 Pesquerias and Naviera submitted to the Commission through the Spanish authorities two applications for incentive premiums for exploratory fishing voyages in the international waters of the South-West Atlantic Ocean. The acknowledgements of receipt, dated 7 March 1990, sent by the Commission to Pesquerias and Naviera, state that they do not presuppose in any way that the applications, which were given the numbers EXP/ES/2/90 and EXP/ES/1/90, complied with all the provisions of Regulation No 4028/86 and that the voyages in question may not begin before the date of receipt of the application by the Commission. The fishing vessels 'Ceres' and 'Geminis' commenced their exploratory fishing voyages on 22 February 1990 and 15 February 1990 respectively.

11. On 24 April 1990, at a meeting of the Standing Committee for the Fishing Industry ('the Standing Committee'), provided for by Article 16 of Regulation No 4028/86 the Commission representative made the following statement noted in the minutes under point 3.2:

'The Standing Committee was informed of developments concerning exploratory fishing voyages submitted to the Commission by the Member States from 1987 to 1989 (doc. XIV/86/90). The following statement was made by the Commission representative:

As part of the information which the Commission must provide to the Standing Committee on decisions to grant premiums which it must take with regard to exploratory fishing voyages under Article 16 of Regulation (EEC) No 4028/86, the Commission has drawn up a document summarizing the situation to date (XIV/86/90).

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

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

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

However, the Commission will examine with interest projects for experimental fishing voyages to other regions of the South-West Atlantic with a view to assessing the profitability of regular, long-term exploitation of the fishery resources.'

The Commission based that statement on the granting between 1987 and 1989 of 42 incentive premiums for 42 exploratory fishing voyages of which 25 were made in the South-West Atlantic Ocean and concerned the same species as those made by Pesquerias and Naviera.

12. On 25 April 1990 the Commission informed Pesquerias and Naviera that it considered that there were no grounds for continuing to finance exploratory fishing voyages to the South-West Atlantic and that consequently it could not envisage the grant of incentive premiums for voyages to that zone.

13. On 7 May 1990, the day after the receipt by Pesquerias and Naviera of the Commission's letters of 25 April 1990, they requested the Commission to reconsider its position and to grant the incentive premiums applied for because the exploratory fishing voyages of the vessels 'Ceres' and 'Geminis' had already commenced several weeks earlier with the support of the national authorities and because during that period they had made very considerable economic efforts.

In letters dated 25 May 1990, Pesquerias and Naviera stated that the applications for the projects had been submitted on 14 February 1990 and that the Commission acknowledged receipt of them on 7 March 1990. From the Commission's letters of 25 April 1990, received on 7 May 1990, it appeared that the decisions under Regulation No 4028/86 had not yet been taken and notified, as required by Article 16(3) within a period of two months. Consequently, Pesquerias and Naviera requested the Commission to grant the incentive premiums sought.

14. On 6 June 1990 the Commission adopted Decisions EXP/ES/2/90 and EXP/ES/1/90 addressed to the Kingdom of Spain as well as to Pesquerias and Naviera finding in Article 1 that the projects for exploratory fishing voyages in the waters of the South-West Atlantic Ocean did not fulfil the conditions necessary for obtaining Community financial aid under Regulation No 4028/86.

The second and third recitals of the preamble to the contested decisions are worded as follows:

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

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

15. Two judicial decisions of 25 June 1990 originating from the Spanish authorities record that Pesquerias and Naviera have suspended payments.

16. It is to be noted that on 7 November 1989 the Commission had granted incentive premiums for projects for exploratory fishing voyages submitted on 15 February 1989 by Pesquerias and Naviera. The 1989 voyages involved the same vessels, the 'Ceres' and the 'Geminis', the same zones of the South-West Atlantic and the same species as those to which the projects for 1990 voyages related with regard to which the Commission adopted the contested decisions.

17. The end-of voyage reports for the exploratory fishing voyages with which these proceedings are concerned were submitted to the Spanish General Secretariat for Seafishing on 8 October 1990 for the 'Ceres' and 5 October 1990 for the 'Geminis'.

(c) *Procedure*

18. The applications of Pesquerias and Naviera were lodged at the Registry of the Court on 23 August 1990.

19. By order of 4 October 1991, the Court decided, in accordance with Article 43 of the Rules of Procedure, to join Cases C-258/90 and C-259/90 for the purposes of the oral procedure and the judgment.

20. 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.

21. The Court, by decision of 9 July 1991 taken pursuant to Article 95(1) and (2) of the Rules of Procedure, assigned the case to the Second Chamber.

II — Forms of order sought by the parties

(a) *In Case C-258/90*

22. *Pesquerias* claims that the Court should:

(i) declare admissible the application for the annulment of the Commission's decision of 6 June 1990 refusing it financial aid under Council Regulation No 4028/86 for a project for an exploratory fishing voyage in the South-West Atlantic Ocean;

(ii) declare void the aforesaid decision of the Commission of 6 June 1990 on the grounds that, by virtue of Articles 173,

174, 189 and 190 of the EEC Treaty and in breach of Community law, it is vitiated by a misuse of powers, infringes essential procedural requirements and also disregards the order of precedence of legislation, is insufficiently reasoned and shows other legal defects and declare that the applicant company is entitled to receive the Community aid refused by that decision, amounting to PTA 43 931 600, pursuant to Article 15(1) of Council Regulation (EEC) No 4028/86;

(iii) declare that under Articles 176, 178 and 215 of the EEC Treaty the applicant company is entitled to compensation for the damage and loss sustained by it owing to the late and unlawful adoption of the decision of the Commission, dated 6 June 1990, in accordance with the general principles common to the laws of the Member States, the amount of compensation to be sufficient to remedy the adverse effects of the contested decision;

(iv) order the defendant to pay the costs.

In its reply Pesquerias claims that the Court should also:

(i) declare void the aforesaid Commission decision on the ground that it constitutes a breach of Articles 173, 174, 175, 189 and 190 of the EEC Treaty for non-observance of Community rules, error of fact and of law, breach of the principles of legal certainty and legitimate expectation, misuse of power, procedural irregularity, insufficient reasoning and contradiction with its own decisions and declare that Pesquerias is entitled to receive the Community financial aid refused by that decision;

(ii) declare that pursuant to Articles 176, 178 and 215 of the EEC Treaty Pesquerias is entitled in its capacity of applicant company to receive compensation for the damage and loss caused to it, amounting in total to PTA 95 414 000, the amount estimated to be necessary to remedy the adverse effects of the contested decision;

(iii) order the Commission to pay the costs.

Pesquerias requests the Court to allow it to offer evidence by

'(1) The placing on the case file of the documents attached to its application and reply;

(2) The hearing, should the Court consider this appropriate, of skipper Juan Carlos Gonzalez Fernandez, residing at No 93-1, Calle Barbón, Vigo (Spain) and Senora del Carmen Sainza Souca, a biologist residing at 40-4 B, Avenida Atlántica, Vigo (Spain), who was seconded to the vessel "Ceres" which made the fishing voyage to which these proceedings relate;

(3) The communication by the Commission of the reasons justifying the change of criterion as regards the fishing zones and, in particular, the South-West Atlantic, dating back to the meeting of 24 April 1990.'

23. The *Commission* claims that the Court should:

(i) as regards the application for the annulment of its decision of 6 June 1990, dismiss the application lodged by Pesquerias de Bermeo SA;

(ii) as regards the claim of Pesquerias de Bermeo for a declaration that it is entitled to receive the financial aid that was refused, declare that claim inadmissible;

(iii) as regards the claim for damages

— declare that claim inadmissible or, in the alternative,

— dismiss that claim;

(iv) order the applicant to pay the costs.

As regards the offer of evidence made in the reply, the Commission claims in its rejoinder that this is 'inadmissible on the ground that the proposal made in points 1 and 2 is already set out in the annexes to the application and to the reply and, as regards the question dealt with in point 3, the Commission has already stated its position in this regard in its defence and rejoinder'.

(b) *In Case C-259/90*

24. *Naviera* claims that the Court should:

(i) declare admissible the application for the annulment of the Commission's decision of 6 June 1990 refusing it financial aid under Council Regulation No 4028/86 for a project for an exploratory fishing voyage to the South-West Atlantic Ocean;

(ii) declare void the aforesaid decision of the Commission of 6 June 1990 on the grounds that, by virtue of Articles 173, 174, 189 and 190 of the EEC Treaty and in breach of Community law, it is vitiated by a misuse of powers, infringes essential procedural requirements and also disregards the order of precedence of legislation, is insufficiently reasoned and shows other legal defects and declare that the applicant company is entitled to receive the Community aid refused by that decision, amounting to PTA 43 931 600, pursuant to Article 15 of Council Regulation (EEC) No 4028/86;

(iii) declare that under Articles 176, 178 and 215 of the EEC Treaty, the applicant company is entitled to compensation for the damage and loss sustained by it owing to the late and unlawful adoption of the decision of the Commission dated 6 June 1990, in accordance with the general principles common to the laws of the Member States, the amount of that compensation to be sufficient to remedy the adverse effects of the contested decision;

(iv) order the defendant to pay the costs.

In its reply Naviera claims that the Court should also:

(i) declare void the aforesaid decision on the ground that it constitutes a breach of Articles 173, 174, 175, 189 and 190 of the EEC Treaty for non-observance of Community rules, error of fact and of law, breach of the principles of legal certainty and legitimate expectation, misuse of power, procedural irregularity, insufficient reasoning and contradiction with its own decisions and that Naviera is entitled to receive the Community financial aid refused by that decision;

(ii) declare that pursuant to Articles 176, 178 and 215 of the EEC Treaty Naviera is entitled in its capacity of applicant company to receive compensation for the damage and loss caused to it, amounting in total to PTA 104 534 000, the amount estimated to be necessary to remedy the adverse effects of the contested decision;

(iii) order the Commission to pay the costs.

Naviera requests the Court to allow it to offer evidence by:

(i) the placing on the case file of the documents attached to its application and reply;

(ii) the hearing, should the Court consider this appropriate, of skipper Juan José Oubina Kessler, residing at 8-3 B, Calle Concepción Arenal, Coruña (Spain) and Luis Ambrosio Blázquez, a biologist residing at 125-3, Avenida de Portugal, Madrid (Spain), seconded to the vessel 'Geminis', which made the fishing voyage to which these proceedings relate;

(iii) the communication by the Commission of the reasons justifying the change of criterion as regards the fishing zones and, in particular, the South-West Atlantic, dating back to the meeting of 24 April 1990.

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

(i) as regards the application for the annulment of its decision of 6 June 1990,

dismiss the application of Naviera Laida SA;

(ii) as regards the claim of Naviera Laida SA for a declaration that it is entitled to receive the financial aid that was refused, declare that claim inadmissible;

(iii) as regards the claim for damages

— declare that claim inadmissible or, in the alternative,

— dismiss that claim;

(iv) order the applicant to pay the costs.

As regards the offer of evidence made in the reply, the Commission claims in its rejoinder that this is

'inadmissible on the ground that the proposal made in points 1 and 2 is already set out in the annexes to the application and to the reply and, as regards the question dealt with in point 3, the Commission has already stated its position in this regard in its defence and rejoinder'.

III — Pleas in law and arguments of the parties

Admissibility

26. *Pesquerias and Naviera* consider first of all that they clearly have capacity to sue: they are the addressees of the contested decisions which are of direct and individual concern to them; their individual interest resides in the fact that the contested decisions affect only their addressees, known by name to the Commission; they are directly governed by those decisions.

27. The *Commission* does not contest the formal admissibility of the applications of Pesquerias and Naviera.

Substance

28. In their applications Pesquerias and Naviera make a number of claims of a different nature. The first of those claims, based on Article 173 of the EEC Treaty, concern the annulment of Decisions EXP/ES/2/90 and EXP/ES/1/90 of the Commission of 6 June 1990. The second seek a declaration that the Commission is obliged to adopt decisions stating that they are entitled to the incentive premiums sought. The third claims, made pursuant to Article 178 and 215 of the EEC Treaty, seek compensation for the damage which Pesquerias and Naviera allegedly suffered owing to the adoption by the Commission of the contested decisions of 6 June 1990.

The claims for the annulment of the Commission decisions of 6 June 1990

29. *Pesquerias and Naviera* support their claims for annulment by making two pleas in law alleging the breach of Council Regulation No 4028/86 and based on rules of Community law laid down in Articles 173, 174, 189 and 190 of the EEC Treaty.

30. Pursuant to the first of those pleas, Pesquerias and Naviera assert that the Commission's decisions of 6 June 1990 disregard the order of precedence of rules of law, are wrong in fact and in law and are insufficiently reasoned.

31. As regards the alleged breach of the principle of the order of precedence of rules of law, Pesquerias and Naviera observe that in Community law the legislative power is in the hands of the Council. Generally, the Commission only has power to adopt implementing regulations. The implementation of that Community law may also take the form of special acts of implementation, such as decisions. Just as it is a fundamental principle that an implementing regulation must not derogate from the basic regulation from which it is derived, the Commission's decisions of 6 June 1990 must not conflict with Regulation No 4028/86, that regulation being of higher rank since it was adopted by the Council. The grant of Community financial aid is subject to specific conditions laid down in Regulation No 4028/86 which the Commission must observe. Thus, under Article 16(3) of Regulation No 4028/86, the Commission must adopt its final decision 'within two months of the submission of a project'. That time-limit was binding on the Commission. Citing the judgment of 8 April 1976 in Case 43/75 (*Defrenne* v *Sabena* [1976] ECR 455), Pesquerias and Naviera argue that otherwise a breach of the law would be made into a rule of interpretation, a position which the Court could not adopt without acting in conflict with the task assigned to it by Article 164 of the Treaty. Whereas it is the case that where the Member States are bound by an obligation to achieve a specific result within a given period, the applicability of the provision imposing that obligation cannot be affected by the fact that the obligation imposed was not fulfilled, the situation should be the same where the Community institutions do not observe such an obligation. From the judgment in Case 39/72 (*Commission* v *Italian Republic* [1973] ECR 101), confirmed by the judgment in Case 128/78 (*Commission* v *United Kingdom* [1979] ECR 419), Pesquerias and Naviera deduce that just as it is not permissible for a Member State to apply the provisions of a regulation in a partial or selective manner, the Commission may not be permitted to leave Regulation No 4028/86 unapplied. That regulation has been infringed since the contested decisions were adopted after the expiry of the two-month period and because they denied Pesquerias and Naviera certain rights which that regulation gave them.

32. In the view of Pesquerias and Naviera, the contested decisions contain an error of fact and an error of law.

The error of fact consisted of the Commission's view that it could extend indefinitely the period for taking a decision on the grant

of the premium referred to in Article 15 of Regulation No 4028/86. By so acting, the Commission contravened the principle of legal certainty which the Court laid down in particular in Joined Cases 205 to 215/82 (*Deutsche Milchkontor* v *Germany*, [1983] ECR 2633), Case 10/78 (*Belbouab* v *Bundesknappschaft* [1978] ECR 1915), Case 44/81 (*Germany* v *Commission* [1982] ECR 1855) and Case 70/83 (*Kloppenburg* v *Finanzamt Leer* [1984] ECR 1075). The breach of that principle manifested itself in the Commission's postponement of the date of entry into force of a decision when the date originally laid down has already passed. Community legislation should be certain and its application foreseeable for the individual. Citing in particular the judgment in Case 235/82 (*Ferriere San Carlo* v *Commission* [1983] ECR 3949), Pesquerias and Naviera argue that the contested decisions are contrary to Community law since as a general rule the principle of legal certainty precludes a Community measure having its starting point fixed at a date prior to its publication. If the Commission took its decision after the expiry of the two-month period provided for in Article 16(3) of Regulation No 4028/86, the Commission must be made to bear any damage resulting from a late decision. Such an error of fact must not injure the undertakings applying for financial aid.

The error of law consists in the Commission having based the contested decisions on criteria adopted subsequently to the date of expiry of the two-month period. The applications for financial aid for exploratory fishing voyages contained all the relevant details, such as the duration, conduct and date of commencement of the voyage, which could not be prior to the date of receipt of the application by the Commission. Consequently, if the decisions refusing aid, taken at the end of a period of four months following the date of submission of the applications to the Commission and six months following the submission of the applications to the competent national authorities, were to be held lawful, this would represent a breach of the spirit and substance of the rules of Regulation No 4028/86. By reserving to itself indefinitely the right to reject applications for financial aid the Commission acted in breach of the principle of legitimate expectation as laid down by the Court in its judgment in *Deutsche Milchkontor*, cited above, and in Case 289/81 (*Mavridis* v *Parliament* [1983] ECR 1731).

33. Pesquerias and Naviera point out that Article 190 of the Treaty requires decisions to contain a statement of reasons such as to allow the person concerned to ascertain whether the decision addressed to him is vitiated by a defect enabling its lawfulness to be challenged. The scope of that obligation to state reasons is to be assessed with regard to the circumstances of the case.

The only reasons given in the contested decisions are contained in the last recitals of their preambles, according to which the exploratory fishing voyages did not fulfil the conditions referred to in Article 14(2)(c) of Regulation No 4028/86.

Pesquerias and Naviera cannot accept such a statement of reasons because in order to envisage stable and profitable fishing in the long term several successive voyages, as men-

tioned in Article 14(3) of Regulation No 4028/86, are necessary. A project may consist of several successive voyages to the same fishing zone in order to establish the basis for stable long-term exploitation. The characteristics of stable and profitable long-term exploitation, as thus laid down, cannot be disregarded or altered by Commission decisions.

Furthermore, Pesquerias and Naviera consider that the contested decisions of the Commission are in conflict with its decisions of 7 November 1989 according financial aid to Pesquerias and Naviera in respect of the same vessels and the same fishing zone in the South-West Atlantic. In its decisions of 7 November 1989, the Commission confirmed that all the conditions necessary for obtaining financial aid were fulfilled and the 1989 projects were amongst those appearing to be the most suited to the interests of the Community in implementing a common fisheries policy. As regards the 1990 applications, submitted in February 1990, the shipowning companies, reckoning on the procedure followed the previous year by the Commission in the case of exploratory fishing voyages in the same waters and with the same vessels, were refused financial aid because the Commission had in the meantime changed the criteria. That change was announced only on 24 April 1990 in the minutes of the Standing Committee. The Commission's refusal to grant aid is contrary to the general principle that a person is estopped from acting in conflict with his own previous acts.

34. As their second plea in law, alleging a breach of rules of Community law, in particular Articles 173, 174, 189 and 190 of the EEC Treaty, Pesquerias and Naviera rely upon a breach of essential procedural requirements and a misuse of power.

Misuse of power has been defined by the Court of Justice in particular in its judgment in Joined Cases 18 and 35/65 (*Gutmann* v *Commission of the EAEC* [1966] ECR 103). Thus, a decision may amount to a misuse of powers if it appears, on the basis of objective, relevant and consistent facts, to have been taken for purposes other than those stated. Consequently, the Commission's conduct consisting in notifying Pesquerias and Naviera, more than four months after the submission of official applications for exploratory voyages, that it had changed its opinion and that it would not grant the aid at a time when the voyages had already commenced constitutes a manifest and grave misuse of powers. The misuse of powers is particularly flagrant in this case: by the Commission's decision of 7 November 1989 Pesquerias and the Naviera were granted financial aid because the voyages planned in 1989, involving the same vessels and the same fishing zones, were in accordance with the aim laid down in Article 14(2)(c), namely 'stable and profitable exploitation ... in the long term'. In 1990, the same companies were refused financial aid in respect of the same vessels operating in the same zones of the South-West Atlantic. Such a dramatic change in a space of time of less than six months suggests a misuse of power. In support of that argument Pesquerias and Naviera cite the third recital in the preamble to Regulation No 4028/86.

The alleged breach of essential procedural requirements, consists in the decisions having been notified, not two months, but four months after the submission of the application. By delaying the adoption of the contested decisions the Commission infringed the principle of legitimate expectation, particularly since only a few months before, on 7 November 1989, the Commission had taken the opposite decision on similar applications.

35. The *Commission* points out first of all a contradiction in the arguments of Pesquerias and Naviera. Proceeding on the assumption that the contested decisions are unlawful because they were adopted after the expiry of the two-month period provided for in Article 16(3) of Regulation No 4028/86, Pesquerias and Naviera request the Commission, in their letters of May 1990, to adopt favourable decisions on the projects for exploratory fishing voyages. Thus, such favourable decisions would also have been adopted outside the two-month period in any event. Logically, such favourable decisions would be unlawful. However, Pesquerias and Naviera consider that favourable decisions adopted even after the expiry of the two-month period would be valid. Pesquerias and Naviera accordingly consider that the time-limit in question is not mandatory. The Commission also relies on the fact that the favourable decisions adopted in 1989, nine months after the submission of the applications for financial aid, have not been legally challenged by Pesquerias and Naviera in proceedings for annulment.

Contrary to the argument of Pesquerias and Naviera, the mere submission of an application for financial aid for exploratory fishing voyages does not automatically oblige the Commission to adopt a favourable decision on the application submitted officially through the competent national authorities and with their approval. First of all, there are a number of formal conditions whose observance must be checked by the Commission. Secondly, Regulation No 4028/86 lays down substantive conditions requiring the Commission to undertake an evaluation and a technical assessment. This is the case, for example, with the condition laid down in Article 14(2)(c), which requires that the project must 'relate to fishing zones where, on the basis of an estimate of potential fishery resources, stable and profitable exploitation seems possible in the long term ...'. In making such an evaluation, the Commission has a margin of discretion. This is all the more the case since the proper evaluation of such substantive conditions depends on data obtained objectively through the pursuit of the policy of granting aid for previous or contemporaneous fishing voyages to the same zone.

The Commission had at its disposal, on the one hand, the information provided by Pesquerias and Naviera and, on the other hand information spread over the period from 1987 to 1989 on 25 projects conducted in the same waters in respect of the same species on the basis of which it had made its statement in the Standing Committee on 24 April 1990. In making that statement, the Commission did not alter the criteria for granting aid. It confined itself to applying the conditions governing its decisions on applications for incentive premiums: if an application for aid was submitted for an exploratory fishing voyage whose purpose

was to gather a set of data on a particular zone, it is self-evident that such a voyage could not be financed if the data it was to provide had already been gathered on other voyages which in fact included those made in 1989 by Pesquerias and Naviera.

Finally, a reading of Regulations Nos 4028/86 and 1871/87 bears out the Commission's argument as to its margin of discretion. For example, Article 1 of Regulation No 4028/86 provides that the Commission 'may' grant financial aid; the structure and language of the four paragraphs of Article 14 of the same regulation highlight the Commission's power of assessment; Article 16(3) of the regulation provides that the Commission is to 'decide whether to grant the premium'; according to the third recital of the preamble to Regulation No 1871/87, applications for Community financial assistance must contain data 'enabling the Commission to take a decision thereon...'; the actual payment of the incentive premium is subject to the conditions laid down in Articles 8 and 9 of Regulation No 1871/87.

36. In the Commission's view, the only order of precedence of legislation that has been established by the Court of Justice makes implementing measures subordinate to parent measures with the latter measures being subordinate to the Treaty. That hierarchy is a substantive one and not organic according to the institution which adopted the measures. The contested decisions are not open to challenge because it was the Commission which adopted them. Regulation No 4028/86 established a difference in functions empowering the Commission to take decisions on incentive premiums as referred to in Article 15 of the regulations.

The Commission considers that the two-month period provided for in Article 16(3) of Regulation No 4028/86 is not mandatory. That period has no other purpose than to indicate to applicants for incentive premiums the time from which the Commission might be in default. From that point in time, the person submitting the application is entitled to use the means put at his disposal by the Treaty in order to have the institution's default put right. Failure to observe the time-limit has no effect on the content of a decision concerning an application for Community financial aid. Such a decision, even if adopted after the period of two months has elapsed, might therefore be favourable or unfavourable for the applicants.

37. As regards the errors of fact and of law which it allegedly committed, the Commission points out that since the submission of the applications of 14 February 1990 and until the adoption of the contested decisions of 6 June 1990, the applicants Pesqueries and Naviera received various information and explanations indicating the decision which the Commission would take on the applications and suggesting that the Commission did not consider the period provided for in Article 16(3) of Regulation No 4028/86 to be indefinite.

The Commission maintains that under Article 42(2) of the Rules of Procedure of the Court an applicant is not allowed to allege fresh breaches of the principles of legal certainty and the protection of legitimate expectation in its reply. In any event, the decided cases cited by Pesquerias and Naviera in support of its pleas in law have no relevance to the present cases.

The Commission denies that it committed an error of law in adopting the contested decisions. It does not lose the power to grant or refuse Community financial aid once the two-month period has passed. No provision of Community law or of Regulation No 4028/86 supports the proposition that the Commission is obliged to grant aid once the two-month period has expired or that the Commission's silence during a period of two months is equivalent to a favourable decision on applications for incentive premiums. Furthermore, the allegedly new criteria were not adopted after the expiry of the two-month period.

The Commission considers that it has not acted in breach of any alleged principle that a person is estopped from acting in conflict with his own previous acts. The 1989 projects were different from the 1990 projects. They had to be examined at the time when and in the context in which they are submitted in order to evaluate whether they met the conditions laid down by Regulation No 4028/86. The fact that the 1989 projects were approved does not mean that the 1990 projects must be approved because otherwise the Commission would be obliged to approve all the successive applications submitted by Pesquerias and Naviera so long as they related to the same vessels, species and fishing zones.

38. In the Commission's view, the reasoning of the contested decisions is sufficient; 'several successive campaigns', as referred to Article 14(3) of Regulation No 4028/86, are not necessary in order to establish whether fishing is 'stable' and 'profitable' 'in the long-term' as stipulated in paragraph 2(c) of that article. Article 14(3) has no other purpose than to allow a project for an exploratory voyage to relate to several successive voyages, to be made to the same fishing zone. Article 14(2)(c), however, provides for the case of a specific project which, in order to qualify for the incentive premium, must necessarily relate to fishing zones where, on the basis of an estimate of potential fishery resources, stable and profitable exploitation seems possible in the long term. Paragraphs (2) and (3) of Article 14 concern different cases. This is confirmed by Article 9 of Regulation No 1871/87. Therefore, it is not necessary, in order for a project to be able to satisfy Article 14(2)(c), for it to consist of several voyages as referred to in paragraph (3) of that article.

39. As regards the alleged misuse of power, the Commission denies that in adopting the decisions of 6 June 1990 it committed a misuse of power. In adopting the contested decision the Commission followed no other aims than those for which powers were conferred upon it by Regulation No 4028/86. After examining both the information already obtained by Community fishermen with regard to the marine potential of the zone of the South-West Atlantic and the results of the exploration of that zone, it considered quite simply that an exploratory fishing voyage to evaluate the profitability of regular and stable exploitation of the resources of that zone was not justified and that consequently the fishing voyage proposed by Pesquerias and Naviera did not fill the conditions for the granting of Community financial aid. The Commission considers that it could take that course because, besides the

commercial aims pursued, any exploratory fishing voyage also has the aim of gathering information enabling the profitability of regular and stable exploitation of the resources of the zone concerned to be evaluated. The Commission is neither empowered nor obliged to grant financial aid for voyages whose aim is to obtain information and carry out evaluations in a zone which has already been sufficiently explored and evaluated pursuant to previous voyages. A voyage made in those conditions cannot be regarded as a project for a 'exploratory fishing voyage' within the meaning of Regulation No 4028/86.

In the Commission's view, observance of the two-month period is not an essential procedural requirement. A time period is not a procedural element of a measure but an element extraneous to it. Since it does form part of the process for drawing up measures as a procedural condition determining their validity, a time period relating to the adoption of such measures cannot therefore be regarded as a procedural requirement for the measure concerned.

The claims for a declaration that Naviera and Pesquerias are entitled to the Community financial aid that has been refused

40. *Pesquerias and Naviera* consider it self-evident that the annulment of the decisions taken would require the Commission, in accordance with Article 176 of the Treaty, to adopt the measures that would be needed, in compliance with judgments of the Court, to grant the Community financial aid that was refused.

41. The *Commission* considers that this claim of Pesquerias and Naviera is inadmissible. The Court might declare the contested decisions null and void. However, it is for the Commission, pursuant to Article 176 of the EEC Treaty, to take the necessary measures to comply with the judgment of the Court.

The claims for damages

42. *Pesquerias and Naviera* state that as a result of the refusal of their applications they were obliged to file petitions in bankruptcy. Consequently, citing the judgment in Case 5/71 (*Zuckerfabrik Schöppenstadt* v *Council* [1971] ECR 975), they claim damages for the injury caused by an institution in the exercise of its functions. The conditions to be satisfied in order for the Communities to incur liability (laid down by the Court in its judgment in Case 99/74 *Grand Moulins des Antilles* v *Commission* [1975] ECR 1531 and its judgment in Case 4/69 *Lütticke* v *Commission* [1971] ECR 325) are fulfilled in the present case. The damage suffered by the companies is certain, actual and considerable and has a direct effect on the life of the undertakings concerned. The damage arises directly from the unlawfulness of the conduct of the Commission which committed a sufficiently serious breach of a higher ranking rule of law for the protection of individuals. The causal link between the Commission's conduct and the damage relied upon is incontestable. The contested decisions were adopted at a time when the exploratory fishing voyages were already under way and were on the point of being completed, on

8 July 1990 in the case of the vessel 'Geminis' and on 11 July 1990 in the case of the vessel 'Ceres'. If Pesquerias and Naviera had known about the decisions in time they could have refrained from undertaking the exploratory voyages or reduced their extent. There is therefore a causal link within the meaning of the judgment in Case 310/81 (*EISS* v *Commission* [1984] ECR 1341) because the evidence capable in fact and in law of sustaining a causal link between the alleged damage and the specific wrongful acts imputable to the Community is thus present.

Pesquerias and Naviera claim compensation for both the losses incurred and loss of profit. The losses result from the refusal to grant the Community financial aid to which must be added the loss of the 20% aid which the Spanish General Secretariat for Sea Fishing had granted subject to the grant of Community aid. The loss of profit must also be added to the losses suffered so that the amount to be awarded should enable the applicants to be put back in the situation in which they would have been if the Commission had not adopted the contested decisions. In support of the latter claim Pesquerias and Naviera cite the judgment in Case 79/71 (*Heineman* v *Commission* [1972] ECR 579). Finally, they claim compensation for the costs incurred in relation to these proceedings. The damages claimed for Pesquerias and Naviera are quantified as follows:

In the case of Pesquerias

1. Loss of profit due to the curtailment of the voyage	PTA	6 800 000
2. Additional financial expenditure	PTA	5 345 000
3. Loss of assets	PTA	31 636 600
4. Adverse effects of the suspension of payments		
4.1 — Suppliers	PTA	10 100 000
4.2 — Business	PTA	15 600 000
4.3 — Cost of proceedings	PTA	30 000 000
4.4 — Injury to business reputation	PTA	27 569 000
	PTA	127 050 600

In the case of Naviera

1. Loss of profit due to the curtailment of the voyage	PTA	12 000 000
2. Additional financial expenditure	PTA	5 766 000
3. Loss of assets	PTA	35 618 000

4. Adverse effects of the suspension of payments		
4.1 — Suppliers	PTA	10 100 000
4.2 — Business	PTA	15 600 000
4.3 — Cost of proceedings	PTA	30 000 000
4.4 — Injury to business reputation	PTA	31 068 000
	PTA	140 152 000

From those figures must be deducted the financial aid granted by the Spanish authorities for the exploratory fishing voyages in question, which was PTA 36 760 800 for Pesquerias and PTA 39 348 400 for Naviera.

43. The *Commission* considers that the claims for damages submitted by Pesquerias and Naviera must be dismissed as inadmissible or unfounded.

Those claims are inadmissible on account of the imprecision of the forms of order claimed in relation to recognition of a right to obtain financial aid and in relation to the costs. Those claims entirely detract from those seeking compensation for the damage allegedly arising from the refusal to grant the incentive premiums, the costs arising from these proceedings and 'other damage'.

In any event, the Commission considers the claims for compensation unfounded because Pesquerias and Naviera have not proved that the conditions relating to the unlawfulness of the conduct of the institutions, the existence of the damage and a causal link between the conduct and damage, which must exist in order for non-contractual liability to be incurred, are fulfilled. The Commission disputes the fact that Pesquerias and Naviera were driven to declare the suspension of payments which is nothing other than a temporary lack of liquid assets. Nor is it correct that Pesquerias and Naviera would have been able to refrain from making the voyages if they had known of the contested decisions within the two-month period. The vessel 'Ceres' began its voyage eight days, and the vessel 'Geminis' one day, after the submission of the applications: in order to abandon the voyages the Commission would have had to adopt the contested decisions virtually the day after the submission of the applications. In any event, Pesquerias and Naviera did in fact reduce the duration of the fishing voyages. Moreover, Pesquerias and Naviera were not only rash enough to begin the fishing voyages at their own risks without waiting for the Commission's decision but also did not interrupt them following the Commission's statement to the Standing Committee or following receipt of the Commission's letter of 25 April 1990. The Commission concludes that the alleged damage is directly and exclusively attributable to the lack of circumspection of Pesquerias and Naviera.

G. F. Mancini
Judge-Rapporteur