OPINION OF MR ADVOCATE GENERAL DA CRUZ VILAÇA
delivered on 16 September 1987 *

Mr President,
Members of the Court,

1. We have before us for consideration today the applications lodged by six Member States — the Kingdom of Denmark, the Federal Republic of Germany, the French Republic, Ireland, the Kingdom of the Netherlands and the United Kingdom — seeking the annulment of eight decisions of the Commission concerning the clearance of the accounts of the European Agricultural Guidance and Guarantee Fund ('the EAGGF'), Guarantee Section, for the financial years 1981 (six decisions dated 28 August 1985) and 1982 (two decisions dated 1 July 1986), inasmuch as the decisions refused to charge to the EAGGF some of the funds paid by the Member States to various traders by way of intervention and/or export refunds for fish which the Commission regards as having been caught in excess of the authorized quotas.

2. As we shall see presently, a fundamental difference in the relevant legal context distinguishes the decisions relating to 1982 from those relating to the accounts for 1981. Nevertheless, the decisions are all of the same type, the questions they raise are to some extent the same and the arguments put forward by the Member States concerned are largely similar, so that I may discuss all the applications in the same opinion, with special mention and consideration of the particular features of each case.

* Translated from the Portuguese.

I — Legislative background and history of the dispute

3. The basic rules concerning the financing of the common agricultural policy were laid down in Regulation No 729/70 of the Council of 21 April 1970.[1] It provides that the common agricultural policy is to be financed by the European Agricultural Guidance and Guarantee Fund as part of the Community budget (Article 1 (1)), the Guarantee Section being responsible for financing 'refunds on exports to third countries' and 'intervention intended to stabilize the agricultural markets' (Article 1 (2)), provided that the refunds were granted and the intervention undertaken 'in accordance with the Community rules within the framework of the common organization of agricultural markets' (Articles 2 (1) and 3 (1)).

4. As regards the fishing industry, the main elements of a common policy were laid down for the first time in 1970 by Regulations Nos 2141/70 and 2142/70 of the Council of 20 October 1970.[2]

5. After the first enlargement of the common market the general rules applicable under the Community fisheries policy were revised by Council Regulations Nos 100/76 and 101/76 of 19 January 1976,[3] the first of which established a common organization

1 — Official Journal, English Special Edition 1970 (I), p. 218.
2 — Official Journal, English Special Edition 1970 (III), p. 707.
3 — Official Journal, L 20, 28.1.1976, pp. 1 and 19.

of the market in fishery products and the second a common structural policy for the fishing industry.

6. The regulations contained a scheme based on the same principles as the p revious regulations, adapted to meet the requirements of politicial and economic developments in the Community already reflected in the derogations permitted by Articles 100 and 103 of the Act of Accession.

7. The purpose of Regulation No 100/76 was essentially to fix fishing prices for the Community and to establish a single market based on uniform prices, created by fixing annually an official withdrawal price, or minimum guaranteed price, for each category of fish.

8. It was stated in the preamble to the regulation that the expenditure incurred by the Member States as a result of the obligations arising out of the application of the regulation was to be borne by the Community in accordance with Articles 2 and 3 of Regulation No 729/70.

9. Regulation No 100/76 was still in force in 1981 but was repealed and replaced with effect from 1 June 1982 by Council Regulation No 3796/81 of 29 December 1981 on the common organization of the market in fishery products, [4] in which there appeared a provision (in Article 26 (2)) which was not included in Regulation No 100/76. According to Article 26 (2) financing of intervention measures was to be restricted to the quantities or quotas of fish allocated to each Member State, out of the total volume of allowable catches (TACs).

4 — Official Journal, L 379, 31.12.1981, p. 1.

10. Regulation No 101/76 established for its part, as did its predecessor (Regulation No 2141/70), the rule that there must be equal conditions of access to and use of Community fishing grounds, based on the principle of non-discrimination and in accordance with the particular aims of economic integration and the establishment of the common market. The concern to avoid over-fishing was, however, already evident in Article 4, which provided that the Council could adopt 'the necessary conservation measures' and on the basis of which the Commission submitted the proposals for conservation measures which lie at the origin of these applications.

11. It is in particular in connection with the competence of the Commission to adopt those measures that the disputes before us today arose.

12. As was laid down in Article 102 of the 1972 Act of Accession and definitively confirmed by the Court in its judgments, [5] the power to determine fishing conditions with a view to protecting fishing grounds and conserving the biological resources of the sea passed to the Community exclusively on 1 January 1979 (on the expiry of the transitional period), and is now to be exercised by the Council, acting on a proposal of the Commission, as laid down in Article 102 of the Act of Accession and Article 43 of the Treaty.

13. It was not until 1983, however, that the Council reached agreement on a s et of Community rules for the conservation and management of fish stocks, in spite of the fact that as early as October 1976 (following the widening of fishing zones to 200 miles at the third Conference on the Law of the Sea) the Commission had

5 — Judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, at p. 1072, paragraph 17.

submitted to it the first proposals on the matter and the Council itself had approved on 30 May 1980 the general guidelines for a global common fisheries policy.

14. As a result — and because no suitable political agreement could be reached — the Council was forced to adopt provisional measures. It did so for the period between February 1977 and December 1980, mainly by means of a series of decisions, the last of which (Decision 80/993 of 28 October 1980 [6]) laid down the measures which were to apply up to 20 December of that year.

15. In general terms, the measures fell into two groups:

(i) on the one hand, the Council decided that the Member States must conduct their fishing activities in such a way as to *take into account* the TACs contained in particular in the Commission's proposals, and the part of the TACs made available to third countries under international agreements or conventions;

(ii) on the other hand, it provided in principle that the measures concerning the conservation and surveillance of fish stocks in existence on 3 November 1976 should continue to apply, permitting them to be modified only in accordance with the procedures and criteria referred to in Annex IV to the 'Hague Resolution' adopted on that date.

16. Annex VI to the Hague Resolution stated that as long as Community measures concerning the conservation of resources had not been approved, the Member States must not adopt unilateral measures but could take, as an interim measure and in a form which avoided discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts, provided that they first sought the approval of the Commission, which had to be consulted at all stages of the procedure.

17 For the year 1981, however, none of the provisional measures was renewed, and no agreement was reached on any definitive decision.

18 Although the Council adopted at its meeting in December 1980 a d declaration (which cannot have binding legal effect) to the effect that the Member States would conduct their fishing activities in such a way as to take into account the total allowable catches (TACs) for 1981 mentioned in the proposals submitted by the Commission in November and December 1980, it never approved the proposals despite the fact that the Commission modified them and presented them in a final version on 24 July 1981 (to take effect from 1 January). The Commission's proposals included rules for fixing the TACs for 1981 and the share available to the Community, taking into account international obligations assumed by it, on conditions for fishing and on the allocation amongst the Member States in 1981 of the total allowable catches.

19 In view of the difficulties resulting from the absence of agreement within the Council, the Commission submitted to it at its meeting on 27 July 1981 a declaration in which, referring to the case-law of the Court of Justice, it pointed out that it had certain rights and duties under Article 155 of the Treaty and, invoking the overriding public interest, it called upon the Member States to abide by the terms of its proposals

6 — Official Journal, L 298, 7.11.1980, p. 38.

and stated that in view of the circumstances it considered those proposals to be legally binding. The declaration drew immediate objections from the Council's Legal Department and from some of the Member States, and subsequently was the subject of questioning and criticism in the European Parliament. [7]

20. Nevertheless, the Commission reiterated its view in letters dated 28 July, announcing at the same time to the Member States that pending the next Council meeting it intended to approve catches which amounted to not more than three-quarters of the quotas proposed by it, and calling on the Member States to indicate what measures they proposed to take in order to ensure that that rule was observed.

21. In the case of one of the Member States (Ireland) the Commission further emphasized its views in a letter of 29 July with regard to herring fishing, stating that it would not approve fishing in excess of two-thirds of the quotas proposed by it and urging that Member State to adopt appropriate measures to ensure that that limit was respected.

22. Ireland immediately challenged the assertion that the Commission's proposals had binding force (and refused to accept that the quotas were compatible with the Hague Resolution), as did all the other applicants when, as early as 1984, during the procedure for clearing the accounts for 1980/81, the Commission informed them that expenditure incurred for intervention or export refunds relating to fish caught in excess of the quotas fixed by the Commission would not, in principle, be financed by the Community.

23. In 1982 the situation was somewhat different.

24. In that year, as previously, the Council failed to approve in time the Commission's proposals (submitted on 17 and 21 June of that year), as a result of which the latter issued a declaration at the Council meeting of 21 July 1982 similar to that of 1981 though couched in less peremptory terms.

25. However, since final agreement proved difficult to achieve, the Council approved the application of provisional measures for periods which, taken together, covered the whole year. The measures resulted in the application of the following scheme: until 23 July the Member States were obliged to take into account the TACs proposed by the Commission on 24 July 1981, and from 24 July to 31 December they were to take into account the proposals of 21 June 1982.

26. In addition, on 25 January 1983, the Council approved Regulation No 170/83 establishing a Community system for the conservation and management of fishery resources, [8] pursuant to which was adopted Council Regulation No 172/83, of the same date, [9] which fixed retroactively the TACs for 1982, the share of those catches available to the Community, the way in which it was to be allocated between the Member States and the relevant conditions for fishing.

27. Those are the circumstances in which the Commission refused, when clearing the EAGGF accounts for the 1981 and 1982 financial years, to finance intervention measures and export refunds in the fishing sector granted in relation to fish which it

7 — European Parliament, Resolution of 17 September 1981 (Official Journal, C 260, 12.10.1981).

8 — Official Journal, L 24, 27.1.1983, p. 1.

9 — Official Journal, L 24, 27.1.1983, p. 30.

considered to have been caught outside the quotas fixed by it. It is that refusal of the Commission that a number of Member States now seek to impugn.

II — The decisions relating to the 1981 financial year

1. *The Commission's lack of powers*

28. The submission that the Commission had no power to regard its proposals as legally binding, and therefore to draw legal consequences from Member States' failure to observe them, is put forward by Ireland, France, the United Kingdom and Denmark, although each from a different standpoint and with different arguments.

29. An examination of that submission is crucial to a settlement of the dispute. In order to make it I shall give a brief review which will take us directly from the question of the ambit of the own power of decision conferred on the Commission, in 'normal' circumstances, by Article 155 of the Treaty to the existence, extent and limits of the Commission's powers of intervention in 'exceptional' circumstances when the Council fails to act.

30. *(1)* One of the applicants — Ireland — begins by calling attention to the fact that the vital function attributed to the Commission by Article 155 of the Treaty does not authorize it to go beyond the bounds laid down in that article, in particular to convert its own proposals on matters within the Council's sphere of competence into binding rules. That is borne out by the existence of the parallel provision in Article 145 of the Treaty defining the powers of the Council, and was recognized by the Court in its judgment of 6 July 1982 in Joined Cases 188 to 190/80 *France, Italy and the United Kingdom* v *Commission.* [10]

10 — [1982] ECR 2545, at p. 2573, paragraph 6.

31. That judgment does not enable us to resolve in its entirety the question raised by these applications, that is to say, the question how far the Commission's powers extend in the event of failure by the Council to exercise the powers conferred on it by the Treaty.

32. However, it does throw some light on the extent to which Article 155 may be relied upon to justify an act of the Commission.

33. As the Court clearly emphasized in paragraph 6 of the decision, the third indent of Article 155 merely provides 'in terms which are almost identical to those used in Article 145 to describe the same function of the Council, that the Commission is to have its own power of decision *in the manner provided for in the Treaty*'. [11]

34. Thus the third indent of Article 155 — like Article 145 — does not confer a general or unlimited power, so that everything must depend on the extent of the powers attributed to the institution by specific provisions in the Treaty (for example, Article 13 (2), Article 33 (4) and (7), Article 90 (2) — which was concerned in the case just cited — and Article 97) and it is not possible for it to arrogate to itself generally powers conferred on the other institutions.

35. It follows that, as Article 43 of the Treaty and Article 102 of the 1972 Act of Accession indicate, the power to define the conditions for fishing and to adopt measures for conserving the biological resources of the sea — which since the end of the transitional period belongs exclusively to the Community [12] — must be exercised by the

11 — The emphasis is mine.

12 — See *supra*, paragraph 12, and *infra*, paragraphs 42 and 43.

Council, the Commission's role being merely to initiate, which means to submit proposals to the Council.

36. The United Kingdom claims that only the Council has the power to give, if necessary — as it did in previous years by means of a number of provisional decisions — imperative effect to the Commission's proposals; it did not do so in 1981, however, and to concede that the Commission could, *de motu proprio*, give binding effect to its proposals is to create a dangerous precedent as regards the equilibrium of the Community institutions.

37. Whilst that is in fact the typical pattern of the distribution of powers laid down by the Treaty, reliance upon it is not sufficient to answer the question as to how to resolve borderline cases such as the one before us appears to be. It may be asked whether, if the Council fails to exercise the powers attributed to it, another institution or a Member State may or should take its place, and under what conditions.

38. More particularly, it may be asked whether in this case the Commission's powers, which are limited in principle to submitting proposals, may extend — and on what conditions — to the adoption of compulsory measures, if the Council fails to act, under the principle of continuity in the Community system and by virtue of its mission as custodian of the Treaties, which it is recognized as having, in the opening words of Article 155, in order to guarantee the functioning and development of the common market.

39. *(2)* The applicant Member States and the Commission have exchanged argument on this aspect of the case regarding the applicable law and the relevant case-law of the Court.

40. The various speakers at the hearing presented the main arguments of the parties, so that I need not reproduce them here.

41. Consequently, I shall now give my opinion on that critical aspect of the cases before us.

42. As we have seen, it is common ground that by virtue of Article 102 of the 1972 Act of Accession power to adopt, in the context of the common fisheries policy, measures for conserving maritime resources was transferred with effect from 1 January 1979 'fully and definitively to the Community' [5] and must now be exercised by the Council in accordance with that article and Article 43 of the EEC Treaty.

43. It is also not contested that in those circumstances the Commission's failure to act cannot 'in any case restore to the Member States the power and freedom to act unilaterally in this field'. [13]

44. Could the Commission do so? And under what conditions?

45. It may be said that it is now settled by the Court that the Commission and the Member States enjoy a power to act (including the power of decision)in the form of an obligation which assists them in the event of failure to act by the Council,

5 — Judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, at p. 1072, paragraph 17.

13 — Case 804/79, op. cit., paragraphs 18 and 20.

justified by the requirement that the Community remain in a position to fulfil its responsibilities in all circumstances.

46. That was established expressly by the Court in Case 804/79 [14] and has been acknowledged in a number of other judgments. [15]

47. Article 5 and the opening words of Article 155 of the Treaty provide the legal basis for inferring the existence of such responsibilities on the part of the Member States and the Commission respectively.

48. But they are not in themselves sufficient to resolve the difficulty of expressly defining the way in which the Member States and the Commission interact or what the conditions and restrictions governing their intervention may be; taken together, however, they do provide an indication as to what the answer may be.

49. Nevertheless, I consider that the judgment of 5 May 1981 to which I have referred provides us with the essential general guidelines on the basis of which a suitable division of powers may be agreed upon in these circumstances and on the basis of which the conditions governing, and the limits on, the Commission's powers of intervention may be defined.

50. The judgment dealt in fact with a period governed by one of the Council's provisional decisions, adopted on 25 June 1979. In the operative part of the decision, and in other similar decisions, the Court distinguished between the issue of the total allowable catches (TACs) and the 'technical measures of conservation and surveillance', and gave a different reply for each of those cases. Case 804/79 was concerned with 'conservation measures' adopted unilaterally by the United Kingdom.

51. I consider, however, that the general guidelines it lays down apply to the entire array of protective or conservatory measures (including the definition of TACs) which Article 102 of the Act of Accession covers by general reference.

52. Although the judgment was concerned with circumstances directly related to unilateral action by a Member State, defining the limits and conditions for that action, the principles set out therein are entirely applicable to the definition of the limits to which the Commission's actions are subject in the parallel situation where it has adopted unilateral measures itself.

53. I believe that the general principle to be deduced from the judgment of 5 May 1981 is that, in keeping with the Council's provisional decisions and the spirit of the 1976 Hague Resolution, intervention by the Commission and the Member States when the Council fails to act must be based on a process of *consultation* or *cooperation*, involving both parties (paragraphs 28 and 32).

54. That is undoubtedly borne out by the Court's express acknowledgement that despite the 'standstill' imposed in principle on the conservation measures in force after the end of the transitional period provided for in Article 102 the Member States were not totally deprived of the possibility of altering the measures, provided that the necessity for so doing was acknowledged and the alterations did not signify a new conservation policy (paragraphs 21, 22 and 25 *et seq.*).

14 — Case 804/79, op. cit., paragraphs 23 and 31.

15 — Judgment of 2 June 1981 in Case 124/80 *Officier van Justitie* v *Van Dam* [1981] ECR 1447; judgment of 16 December 1981 in Case 269/80 *Regina* v *Tymen* [1981] ECR 3079; judgment of 10 February 1982 in Case 21/81 *Openbaar Ministerie* v *Bout* [1982] ECR 381.

55. In such circumstances the Court emphasized the importance of a 'procedure for cooperation between the Member States and the Commission'.

56. And, although it acknowledged that the provisional decisions reflected the Council's intention of reinforcing 'the authority of the Commission's proposals' (paragraph 25), it regarded them as no more than 'the point of departure for concerted Community action' (paragraph 28).

57. In other words, even where the Commission is 'covered' by a provisional Council decision in which — directly or by means of a reference to the Hague Resolution — an important role is attributed to the Commission, the Court did not attribute to it, as was logical, an autonomous and binding power of decision, nor even the power to intervene unilaterally; it thus did not concede that the Commission's proposals had the character of 'independent sources of legal obligations', in the words of the British Government.

58. Having regard to 'the structural principles on which the Community is founded', the 'essential balances intended by the Treaty' (paragraph 23) and the need to respect 'the general task of supervision' conferred on the Commission by Article 155 of the Treaty in conjunction with the Council's provisional decisions (paragraph 30), the Court held, in essence, that the Commission had merely a 'right of veto', meaning that if measures were adopted of which it disapproved their validity could be challenged.

59. What the Court said was that the Member States had 'not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission' (paragraph 31).

60. Having regard to the 'observance of the essential balances intended by the Treaty', I do not see any justification for abandoning that model where, as in the cases before us, the Council remains inactive to the point of failing to adopt even provisional measures conferring on the Commission the same important role as was conferred on it by decisions approved previously.

61. Nothing more seems to be required by the condition that 'the Community . . . retain in all circumstances its capacity to comply with its responsibilities' (paragraph 23), nor does anything else appear to be implied by the obligations to act or to refrain from acting imposed on the Member States by Article 5 of the Treaty.

62. The Commission alleges that the Member States have an obligation, in the absence of a Council decision, to act in the Community interest, adopting whatever legislation, administrative measures or other rules as may be necessary, in accordance with the rules laid down by the Community institutions and in no event contrary to the objections, reservations or conditions expressed by the Commission.

63. The French Government contends, however — citing the judgments of this Court — that the Member States *may* but are not *obliged* to take, if necessary, appro-

priate conservation measures, always of limited range and never overriding the objections which the Commission may raise against such measures.

64. I consider, however, that even if one accepts the not unreasonable proposition that the Member States have special obligations to act if the Council fails to do so, in view of the responsibilities imposed on them by Article 5 of the Treaty, nothing indicates that they must do so precisely in accordance with the tenor of the Commission's proposals.

65. Once the transitional period laid down by Article 102 of the Act of Accession had expired, their obligations to act became even less specific than before and could not be fulfilled on terms other than those on which the Commission was bound to fulfil its own — in other words, in the context of consultations in which the Commission was to have the final say.

66. However, by imposing its own proposals as if they were imperative decisions which were legally binding, stating in advance that its opinion on national measures inconsistent therewith would always be unfavourable, the Commission perverted the consultation procedure, which is incompatible with both the adoption of unilateral measures by the Member States and the adoption of unilateral declarations or provisions by the Commission.

67. It will readily be conceded that to allow that the Commission may oppose action proposed by Member States is not the same as saying that its proposals are, purely and simply, compulsory *per se*: in the first case the national measures form the basis of the Commission's opinion, whereas in the second their contribution is left out of the account. It may be that ultimately there is, or there may be achieved, a concordance of views, but in the interests of 'good administration' a dialogue is dispensed with which might enable that concordance to be revealed or positions to be reviewed in the light of the various suggestions which may be made, which is a more solid foundation on which to anchor Community measures.

68. I see no reason to alter that view in the ingenious way in which the Commission explained its position, considering the quotas it proposed as being a maximum which the Member States could not exceed. Even in that case, the result is the same: the Commission unilaterally decided that its proposals were to be imperative and legally binding.

69. In my view the Commission has overplayed the undeniable importance attributed to its proposals by the Court: to regard them as having binding force is to take them, not as the point of departure for establishing the Community position, but as the irreversible result. In so doing the process of consultation regarded by the Court as essential was abandoned, thus disrupting the essential balances established by the Treaty. To use again the words of the judgment of 5 May 1981 (paragraph 30), the Member States were not 'trustees of the common interest', but were dictated to in accordance with criteria imposed by the Commission.

70. The Commission's proposals were indeed the subject of lengthy discussion in the Council.

71. However, there is no evidence — and none has emerged during the proceedings — that enables us to conclude without a shadow of a doubt that the Commission's proposals were the subject of consultations with the Member States in question conducted in accordance with the requirements which may be elicited from the case-law of the Court of Justice, that is, 'detailed' consultations conducted 'in good faith' and — in keeping with the requirement of transparency which is vital in this field — designed to achieve its aims, which means to achieve the joint adoption of measures to overcome the difficulties presented by the Council's failure to act.

72. It should not be forgotten that the Council's inability to reach an agreement was finally established at the meeting on 27 July 1981, and that only from that date did the Commission declare that it would draw from that fact the consequences which form the subject-matter of these actions. Until then the discussions were directed towards the approval of conservatory measures by the Council; afterwards, the Commission's proposals were not used as the basis of a fresh set of consultations, which ought to have been undertaken, in the proper manner, in order to deal with the new situation created by the Council's definitive failure to act.

73. In the circumstances, what remained was solely the Commission's view of what measures were needed to conserve fish stocks, which took the form of the quotas it proposed.

74. Now, the Court has definitively ruled that the Commission's proposals cannot in themselves constitute binding rules in *Regina* v *Tymen*,[16] in which the Court stated that Member States could not consider that unilateral measures adopted by them in the absence of action by the Council were approved merely by virtue of the fact that they were identical in content to the proposals submitted by the Commission to the Council with a view to taking concerted action at Community level.

75. That interference with the balance of power between the institutions does not, then, appear to be lawful.

76. A supplementary consideration of theory enables me to reinforce that conclusion.

77. In order to define the limits of the Commission's power to act when there is a legal vacuum as a result of the Council's failure to act, legal theorists have used two different bodies of theory: the 'standstill theory' and the 'theory of special powers' or of 'exceptional circumstances'.

78. The first recognizes that the Commission has the power to extend the validity of measures which have expired, maintaining the old rules for as long as the Council has neither renewed nor altered them formally. That practice has frequently been resorted to in the Community, particularly in the context of the common agricultural policy; the Court itself has recognized the practice as valid and it has the advantage of not departing materially from the rules created by the competent legislative organ.

79. According to the second, in a serious crisis where measures are urgently required, the Commission may be invested with 'legislative' powers to deal with the crisis,

16 — Case 269/80, op. cit., paragraphs 10 and 11.

creating new rules when the old prove to be already inadequate to meet the requirements of the situation. That view is basically what is reflected in the approach adopted by the Commission in its declaration of 27 July 1981. The theory of special powers is, it appears, recognized in the constitutional law or the jurisprudence of various Member States (Denmark, Italy, France, Germany), but its postulation was always based on the assumption that the circumstances were extremely grave, as in the case of war, for instance. In such circumstances the Head of State, the Government or the administration may adopt measures having a legislative character, originally within the Parliament's power, to be ratified by the latter as soon as possible.

80. I do not think that the situation we are concerned with can be assimilated to that type of case. The political impasse in the Council, although persistent, could not be regarded as a profound crisis jeopardizing the continued existence or the functioning of the Community to such an extent that, faced with an insurmountable paralysis of the competent institution as a result of *force majeure*, the 'executive' was entitled to arrogate to itself legislative powers.

81. It could perhaps be argued that overfishing was so serious that the Commission was entitled to exercise special powers to resolve the crisis as in the case of a constitutional emergency.

82. However, I do not consider that the situation, grave as it was, warranted such a distortion of the rules of sound inter-institutional balance.

83. Not only has it not been shown that it was not feasible in the circumstances to pursue the consultation procedure which the Court regarded as the correct path to the establishment of conservation measures when the Council failed to act, but in addition the adoption of such an approach would in fact be the solution which would best correspond to the extension by the Commission of the Council's provisional rules which expired in December 1980, without having to retain exactly the existing or proposed measures. The dialogue would enable them to be adapted to the circumstances and would comply with the principles governing the balance of powers among the institutions. Extending the validity of the previous rules (at least in spirit, extending the terms to include fixing national quotas in accordance with the proposed TACs) would, moreover, be the normal corollary of the principle of continuity in the Community which the Court regarded as the basis for suppletive action by the Commission.

84. The Council's provisional decisions (and the declaration recorded in the minutes of the meeting of 15-17 December 1980) speak of 'taking into account' the TACs proposed by the Commission, without saying that they are binding if the Council has never approved them. There is no indication that a unilateral attempt by the Commission to resolve the difficulty must be accepted if it consists in applying the proposed restrictions in anticipation as if they had been approved, taking advantage of the Council's failure to act in order to make the proposed TACs and quotas binding.

85. I believe that the Commission has always followed the 'standstill' theory in the many cases of failure to act with regard to fishing, this case being the first in which, unnecessarily, it clearly abandoned that theory.

86. On the basis of the foregoing considerations I conclude that the first submission in the application must be upheld and that consequently the decisions at issue concerning the clearance of the accounts for 1981 must be declared void on the ground that there were no binding rules fixing the TACs and quotas which were breached by the applicant Member States.

2. *The financial consequences of breaching the rules at issue; the principle of legal certainty*

87. The conclusion I have reached concerning the submission which I have just examined — that the Commission was not entitled to regard its proposals as binding in the circumstances in which it did, having omitted the necessary consultation procedure with the Member States required by the balance of powers instituted by the Treaty — is sufficient to resolve the second important question raised by the applicants.

88. Since there were no binding rules fixing the TACs and quotas which were breached by Member States' fishing activities, it cannot be said that the market withdrawals and the export refunds connected with fish caught in excess of the limits proposed by the Commission infringed any Community rule, and therefore there was no motive for refusing to allow them to be financed by the EAGGF pursuant to Article 3 of Regulation No 729/70.

89. Let us, however, admit the contrary: supposing that the Commission's quotas were legally binding, it must be ascertained whether breach of them justifies refusal to provide finance from the EAGGF.

90. The applicants are more or less unanimous in maintaining that in 1981 there was no established link between compliance with the TACs and the fishing quotas and Community financing, making the latter dependent on the former.

91. In general terms, they draw attention to the fact that at that time no rule existed which expressly established such a dependency and which thus provided justification in law for refusing Community finance on the basis that the fish had been caught in excess of the fixed quotas.

92. No such relationship is to be found either in Regulation No 100/76, establishing the common organization of the market in fishery products, or in Regulation No 101/76, on structural policy in the fisheries sector. Neither of them (as Ireland pointed out) provides, moreover, for TACs or catch quotas, or for any other restrictions on the quantities of fish which could be caught by each Member State.

93. Again according to Ireland — and in spite of the existence of proposals which were discussed in 1981 — the principle of allocating TACs and catch quotas amongst the Member States was agreed on by them only on the introduction of the common fisheries policy, that is to say, according to the Netherlands, in 1983.

94. Moreover, as those Member States pointed out, the connection between the financial rules and compliance with the TACs and quotas established in order to preserve fish stocks was not expressly introduced until the adoption of Article 26 (2) of Regulation No 3796/81; it is

instructive, in this context, to compare the antepenultimate recital in the preamble to that regulation with the corresponding recital in Regulation No 100/76, the difference in the wording of which reveals the fact that it was new to the Community financing of fishing activities.

95. The Netherlands argues that the express adoption of the provision in Article 26 (2) merely emphasizes the absence of such a rule prior to 1 June 1982, meaning that before that date intervention measures in the fisheries sector were unconditionally eligible for Community financing.

96. In addition, the Netherlands Government and others pointed out that Article 26 (2) itself is restricted to intervention measures; neither it nor Article 25 contains any restriction concerning the eligibility for financing of export refunds, the difference between the two systems (introduced only after 1981) being explained, according to those Member States, by the fact that exported fish — which the exporter may acquire anywhere on the European market — does not influence the Community market.

97. In the case of export refunds Commission Regulation No 2730/79 of 29 November 1979, which lays down common detailed rules for the application of the system of export refunds on agricultural products, [17] likewise makes no mention of compliance with the quotas as a condition for eligibility for financing.

98. Article 7 (1) of Regulation No 110/76 of 19 January 1976, which, as we know, laid down general rules for granting export refunds in the fisheries sector, made payment of them subject merely to proof that the products were of Community origin and were exported outside the Community.

99. The Danish Government considers that if those conditions are fulfilled the trader is entitled to require payment by the national authorities of the refunds and the authorities have no option but to pay the relevant amount.

100. Since there is no corresponding provision in any Community legislation the Member States cannot impose the supplementary condition for payment of the refunds that proof be given that the quantities to which they relate were caught within the quotas. Consequently, such a condition when imposed by the Commission in connection with Community financing must be unlawful.

101. The Danish Government points out that the Commission's view leads to an absurd result: on the one hand, the Member States are obliged to pay refunds without requiring proof that the fish to which they relate were caught within the quotas, whereas on the other hand in connection with the clearing of the accounts they may find that the Commission will refuse to finance wholly or in part refunds which have already been paid.

102. As was pointed out by the Federal Republic of Germany, the imposition of such a condition amounts, moreover, to introducing a means of control not provided for in any regulations, contrary to what has been the case in other common market organizations such as that governing the sugar market, in which quota schemes and the issuing of import and export certificates were provided for.

17 — Official Journal, L 317, 12.12.1979, p. 1.

103. Furthermore, as some of the Member States argued with vigour, proof that the quotas have been complied with in connection with export refunds would be practically impossible to provide since fish exported through a Community port may have been caught and purchased in the territory of another Member State, so that it would not be legitimate to deduct it from the fishing quotas of the country of export.

104. That was undoubtedly one of the reasons, as the Commission admitted, for which Article 26 (2) of Regulation No 3796/81 did not incorporate export refunds into its rules on the payment of intervention measures after 1981.

105. To sum up: the applicants consider that in the absence of an express provision prohibiting export refunds for fish caught outside the quotas, it is not possible to speak of an infringement of Community rules because the Member States could not refuse to pay them.

106. Admittedly, there are the provisions in Articles 2 (1) and 3 (1) of Regulation No 729/70, which provide for financing by the Community of refunds paid and intervention undertaken 'in accordance with the Community rules within the framework of the common organization of agricultural markets': the applicants claim that they must be interpreted strictly, however.

107. In the United Kingdom's view, in order to exclude certain expenditure from Community financing on the ground that a Community rule has been violated, it is necessary to demonstrate the existence of a causal nexus between the infringement and the expenditure which has been disallowed, so that the Commission must show that the alleged infringement entailed an increase in the expenditure which it is sought to make the Community bear.

108. In addition, the German Government argues that the spirit and purpose of the principles governing financing contained in that regulation and underlying the relevant judgments of the Court permit the Community to refuse to finance the relevant expenditure only where there has been an infringement of clear and precise rules governing the financial sphere, that is to say, the provisions concerning financing and the expenditure connected with a common market organization, and more concretely the provisions establishing the conditions of form or substance which must be satisfied in order for a particular amount to be paid out.

109. The measures restricting fishing by means of catch quotas are designed to conserve and manage fish stocks, and thus have nothing to do with regulating the market and financing the relevant policies, and there is no relationship, in the absence of an express provision to that effect (which never came into being as regards export refunds) between the quota system introduced by the Commission in 1981 and the financing of the common market organization.

110. In view of that, the Member States could not refuse the payment of intervention and export refunds to traders who sought such payment in accordance with the applicable Community law. They were not entitled to modify the rules contained in that law and the institutions, which alone were competent to do so, did not adopt any measures which precluded such payment in the event that the catch quotas established by the Commission had been exceeded.

111. If they sought to exclude certain expenditure from Community financing the

institutions could not, owing to the existence of the principle of good faith laid down in Article 5 of the Treaty, omit to explain to the Member States what expenditure would not be accepted by the EAGGF. Since the failure to act was the fault of the Council, the Community had a special obligation to ensure that Member States were not exposed to financial disadvantage in the context of the clearance of their accounts.

112. By failing to do so, as a number of the applicant Member States pointed out, the Commission breached the principles of legal certainty and the protection of legitimate expectations.

113. Ireland, for example, alleged that the relationship between quotas and the financing of intervention was not established until 1983 by Regulation No 3796/81, so that the Member States could not know in 1981, when the proposed TACs and quotas were still being discussed and intervention was being paid pursuant to Regulation No 100/76, that the relationship would be regarded as legally established.

114. Moreover, in the absence of any Community decision or regulation following the Commission's declaration of 27 July 1981, Ireland maintains that the Member States were entitled to have a legitimate and reasonable expectation that that declaration would not entail legal consequences, particularly in view of the fact that in the absence of a clear and imperative Community rule any national measure restricting fishing would be open to challenge in the courts.

115. Above all, as the Netherlands Government pointed out, the Commission failed to adopt any measures temporarily suspending or reducing refunds from the time when it noted a difference between the amounts caught and the quotas proposed for them in order to remove the incentive to continue fishing represented by refunds and market withdrawals. As a result it was unacceptable for the Commission, when clearing the EAGGF accounts, to place on the Member States the entire responsibility for the quotas having been exceeded.

116. In that context the Federal Republic of Germany cited the case-law of the Court[18] to the effect that the principles of clarity in the law and legal certainty require that rights and obligations deriving from rules which impose burdens must be made known without ambiguity and with clarity. Thus in particular in the economic and politically sensitive sphere of common agricultural policy financing governed by Regulation No 729/70, given the financial import of Articles 1 and 2 of that Regulation, it was essential, according to the Federal Government, for Member States to know from the start, and clearly, whether certain conduct on the part of one of them could entail for it financial consequences in connection with the clearing of its accounts.

117. Moreover, as the United Kingdom pointed out, the Commission's declaration of 27 July 1981 merely introduced provisional measures because the Council had not approved common rules. When the Council did adopt those rules on 1 January 1983, it did so with retroactive effect for 1982 but not for 1981, and in so doing, according to the British Government, it limited the validity of those measures, so that they could not be regarded as constituting definitive Community rules for 1981.

18 — Judgment of 9 July 1981 in Case 169/80 *Administration des douanes* v *Gondrand frères* [1981] ECR 1931, at p. 1942, paragraph 17; judgment of 22 February 1984 in Case 70/83 *Kloppenburg* v *Finanzamt Leer* [1984] ECR 1075, at p. 1086, paragraph 11.

118. Let us consider those arguments, comparing them with the Commission's own arguments on the matter.

119. Before I go further, I think it must be admitted that there is a natural relationship between market policy and conservation measures. As was already stated in the preamble to Regulation No 100/76, the common organization of the market in the fisheries sector must take account of the fact that it is 'in the Community interest to preserve fishing grounds as far as possible'; even for specific purposes, their preservation undoubtedly constitutes an essential element of regularity in market supplies in the medium and long term, and thus in maintaining the source of fishermen's income in the Community.

120. As Article 40 (3) of the Treaty provides, a 'common organization ... may include all measures required to attain the objectives set out in Article 39'.

121. It is incontestable that measures to conserve stocks help to ensure that the aims of the common fisheries policy are achieved: protecting stocks enables market relations to be established and pursued for the long-term and on solid foundations, provided that the appropriate structures are there for them.

122. The Court appears to have confirmed that when it declared, in *Kramer,* [19] that 'the existence of the common organization of the market involves an obligation on the part of the Member States to ensure that catches should be limited in such a way as to keep the effects on the functioning of that organization to a minimum'.

123. In that context the response to the crucial question as to the interpretation of the phrase in Articles 2 (1) and 3 (1) of Regulation No 729/70 'Community rules within the framework of the common organization of agricultural markets' is clear: it must not be strictly interpreted.

124. That was precisely the approach adopted by the Court when it explained in its judgments of 7 February 1979 [20] and 27 February 1985 [21] that Regulation No 729/70 'permits the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down *in the various sectors of agricultural production*' (the emphasis is mine).

125. I see no reason to alter the conclusion which those decisions appear to justify.

126. In the first place, Regulation No 729/70 contains no restriction which would justify the assumption that Community financing should be refused only when there has occurred a breach of particular rules — those of a financial or technical nature defining the conditions of form or substance governing the payment of sums to a beneficiary (for instance, time-limits, rules fixing prices, calculations of the amount of aid to be given, etc).

127. In the second place the broad interpretation of the Community rules pertaining to the organization of the agricultural markets appears to be that best suited to the prin-

19 — Judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279.

20 — Case 11/76 *Netherlands* v *Commission* [1979] ECR 245 and Joined Cases 15 and 16/76 *France* v *Commission* [1979] ECR 321.

21 — Case 55/83 *Italy* v *Commission* [1985] ECR 683.

ciples underlying the rules in question: the financial burden imposed on the offending Member State, in a proper apportionment of the burdens to be borne, operates also as a kind of persuasive force to ensure that Community law is complied with in its entirety and not only in that part most directly concerned with the payments which form part of the relationship of 'must/have' between the EAGGF and the Member States.

128. As the Commission pointed out, it would be difficult to accept that the EAGGF should finance expenditure incurred as a result of a clear breach of Community law.

129. In my view, that applies as much to the rules fixing the TACs (the total allowable catches) as to those which allocate them amongst the Member States. In that respect I do not agree that a distinction may be made (as France submits) between 'conservation measures' and 'measures relating to conservation management': observance of the fishing quotas allocated to the fishermen in each country is generally an efficient means of restricting the total volume of catches under conditions which ensure equality between fishermen in the various Member States, a principle which can only be departed from in very special circumstances (see, for example, Regulation No 500/87 of 16 February 1987 [22]).

130. Observance of the quotas, as long as they exist, must therefore be placed on an equal footing with observance of the TACs for the purposes of EAGGF financing.

131. Failure to abide by quotas by fishermen in one Member State would give them an advantage, moreover, as the Commission also pointed out, over those of a Member State where the Community rules were observed. Such a breach of the principle of equal treatment enunciated in Article 40 (3) of the Treaty would result in a distortion of the conditions of competition which would be aggravated if the Community were obliged to finance such conduct.

132. As the Court stated in the reasons for its decision in Case 11/76 (paragraph 9):

'... the management of the common agricultural policy in conditions of equality between traders in the Member States requires that the national authorities of a Member State should not, by the expedient of a wide interpretation of a given provision, favour traders in that State to the detriment of those in other States where a stricter interpretation is applied;

... if such distortion of competition between Member States arises despite the means available to ensure the uniform application of Community law throughout the Community it cannot be financed by the EAGGF but must, in any event, be borne by the Member State concerned'.

133. In view of the wording of Articles 2 and 3 of Regulation No 729/70 and their interpretation — in the light of logic and the aims envisaged by the Community legislator — it does not seem necessary, therefore, to have an express provision stipulating that failure to observe one of the rules relating to the conservation policy amounts to failure to observe a 'Community rule within the framework of the common organization of the agricultural markets' in order for the corresponding financial consequences to arise.

22 — Official Journal, L 51, 20.2.1987, p. 3.

134. Such a precise statement of the principle might be a dead letter; it is thus clear why the absence of an express statement of that requirement in Regulations Nos 100/76 and 110/76 does not suffice to prevent financing being refused for intervention measures on the ground that duly established rules on conservation have been breached.

135. Nevertheless, it must be admitted that it would be going too far to accept that a minor breach of Community rules, even of the most recondite and insignificant ones, can serve as a ground for refusing finance.

136. That is not the case if fishing quotas have been breached provided that they had the necessary legal force: failure to observe them would not only prejudice the achievement of the aims of conserving stocks under the common organization of fishery markets, but would result in an increase in the expenditure charged to the EAGGF if it entailed supplementary intervention payments for market withdrawals of all or some of the fish caught.

137. However, that does not mean, in my view, that there need not be a causal link between the breach and the additional expenditure incurred.

138. In order for the breach of the Community rules to be penalized in the context of the clearance of the EAGGF accounts (and not only under Article 169 of the Treaty), the breach must entail financial consequences, inasmuch as it gave rise to additional, and unjustified, expenditure.

139. I think that that is what is to be inferred from the Court's statement (in its judgments of 7 February 1979 in Cases 11/76 and 18/76) that the provisions of Articles 2 and 3 of Regulation No 729/70 'permit the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down . . . '.

140. That is also to be inferred from the purposes of the procedure for clearing accounts presented by the Member States for expenditure to be financed by the EAGGF, as the Court has defined that expenditure. [23]

141. In the case in hand there is undoubtedly such a causal nexus as regards the fish caught outside the quotas and covered by intervention arrangements.

142. It might even be present in relation to fish caught within the quotas if it can be shown that exceeding the quotas disturbed the market conditions (in particular by lowering prices) in such a manner that by that means, too, the total quantity of fish offered for intervention was increased. Such a relationship is more difficult to establish, however, and that is perhaps reflected in the way in which the Commission determined the method of calculation to be used.

143. In order to make a proper assessment of the legal position in the case before us I think, however, that another factor should be taken into account, and that is the subsequent adoption of Regulation No 3796/81; as we know, Article 26 (2) of that regulation establishes a link between the quota rules and those pertaining to financial compensation for market withdrawals, but does not do so for export refunds.

23 — Judgment of 7 February 1979 in Joined Cases 15 and 16/76 *France* v *Commission* [1979] ECR 321, at p. 337; judgment of 14 January 1981 in Case 819/79 *Germany* v *Commission* [1981] ECR 21, at p. 34.

144. The Commission maintains that Article 26 was not intended to extend or restrict the ambit of the general rule in Regulation No 729/70, being concerned primarily with relations between the Member States and their nationals, and stipulating, with effect solely from 1 January 1982, that they must refuse fishermen and fishermen's organizations any intervention aid for fish caught in excess of the quotas.

145. I do not challenge the basis of the Commission's interpretation; but I consider that the new legal factor introduced by the adoption of Article 26 (2) of Regulation No 3796/81 is relevant even with regard to resolving the difficulties present in 1981.

146. In the first place, as regards export refunds, it would be technically very difficult to establish a method of ascertaining whether or not exported fish came from catches made within the quotas. Since exporters are able to acquire fish in any part of the Community, owing to the free movement of goods within the Community, the quantity exported cannot simply be deducted from the quota of the country of export, whose fishermen may have observed the quota strictly. Only a costly and complicated certification procedure, for which Community legislation does not provide and which is incompatible with the free movement of goods if introduced unilaterally, would enable the quantities of fish caught in excess of the quotas and imported from one Community country to another to be identified.

147. Consequently, it is not surprising that Regulation No 3796/81 established a link between quotas and market withdrawals but not between quotas and export refunds.

148. As I understand it, however, the question here is not whether failure to comply with the quotas constitutes breach of a 'Community rule', but whether or not it is possible to ascertain whether a quota has been exceeded. From that point of view Regulation No 3796/81, even if it does not necessarily restrict the ambit of Regulation No 729/70, explains in fact the link which it is possible to make between Community financing and compliance with the quotas in the case of intervention measures, omitting any express reference to export refunds, as in the latter case ascertaining that the quotas have been breached is, as Community law stands at present, very difficult. That is the only way in which one can explain, since the purpose of Article 26 is to clarify matters, why it did not include both cases, although Title V, 'General provisions', covers them and Article 25 expressly provides for the granting of export refunds, which were thus excluded from the ambit of Article 26.

149. Hence, although it came into force in 1982, Regulation No 3796/81 must be relevant: in 1981 the Commission, as it has conceded, was unable to say with certainty that refunds had been paid for fish caught in excess of quotas, and it was surely for that reason that it adopted the 'maximalist' approach in its financial calculations.

150. For those reasons the Commission's argument based on the lack of uniformity in the application of Community law can only have relative value: as Community law stands at present the lack of uniformity is

the natural consequence — unjust though it undoubtedly is — of the absence of a Community system of control.

151. As regards market withdrawals, too, however, Regulation No 3796/81 must be regarded as relevant. If it was necessary to clarify the situation, it must have been unclear in the past; and regardless of the original position under Article 3 of Regulation No 729/70, I am sensible to the notion that rules which result in the imposition of a financial burden ought to be clear and precise. Although in the case of market withdrawals the possibility of ascertaining whether or not fish has come from within the quota is not at issue here, (because it is withdrawn by the national producers" organizations), the Commission itself has acknowledged that the situation was not clear in 1981.

152. I need only recall the debate concerning the binding nature of the proposals for quotas submitted by the Commission: the objection immediately raised (justly, in my view) by the Council members, by its legal department and by the Parliament itself, the relevant legal precedents and the circumstances in which the proposals were pronounced to be binding by the Commission are sufficient to create, as regards their being 'Community rules within the framework of the common organization of the agricultural markets', such doubt that it does not appear to be legitimate to make failure to abide by them a ground for refusing Community financing.

153. Moreover, the Commission's declaration — which did not expressly mention the consequences which it would draw from failure to abide by its proposals, as regards the clearance of accounts, referring solely, without further explanation, to the use of 'all the means in its power' — was not adopted until the middle of the year. Until then there was only the Council's declaration in the minutes of the meeting held on 15 to 18 December 1980, in which it was stated that Member States would conduct their fishing activities in such a way that the catches made by their ships *would take* into account the *TACs (and not the quotas)* proposed by the Commission for 1981.

154. The relevant legal context was thus not sufficiently clear and precise to enable the Member States to know exactly what rules were applicable and to determine without ambiguity the financial consequences which the Commission intended to attach to breach of them.

155. For that reason it cannot be said that this case involved a *clear* breach of the Community rules, since a condition which the Commission itself appears in all its documents to rely on for refusing Community finance does not prove to have been fulfilled.

156. That being so, the requirements of legal certainty, the importance of which the Court has recognized more than once,[24] prevent, in my view, the Member States from being penalized in the context of clearance of the EAGGF accounts for merely failing to have ensured that the quotas proposed by the Commission were observed.

157. That does not mean that one must accept without reserve the argument put forward by the Netherlands and the Federal

24 — See, for example, *Gondrand frères*, op. cit., paragraph 17, and *Kloppenburg*, op. cit., paragraph 11. In the latter there appear the following words: '... it is necessary to emphasize, as the Court has already done on several occasions, that Community legislation must be unequivocal and its application must be predictable for those who are subject to it'. And in its judgment of 10 July 1980 in Case 32/79 the Court particularly emphasized — in another context, admittedly, but in terms which leave no room for ambiguity — that 'the requirement of legal clarity is indeed imperative in a sector in which any uncertainty may well lead to incidents and the application of particularly serious sanctions'([1980] ECR 2403, paragraph 46).

Republic of Germany that the Commission ought to have suspended refunds as soon as it ascertained that the quotas had been exceeded: it is difficult to see how it could have done so, and in any case, there is not sufficient evidence that it had available to it the information necessary for it to do so.

158. Nor does it mean that Denmark is entirely correct in alleging that the breach of Article 5 (2) (b) of Regulation No 729/70 (the period for clearing the accounts for the financial year ended at the end of 1982 and not in 1985), although not sufficiently serious to make the procedure invalid, estopped the Commission from imposing 'a new legal concept' (the link between Community quotas and financing).

159. The wording of Articles 2 and 3 of Regulation No 729/70 and the date of the Commission's declaration on the legal nature of its proposals (27 July 1981) tend to belie the notion that a 'new legal concept' was imposed only when the accounts came to be cleared. If the Commission's proposals were undoubtedly binding 'Community rules', the refusal to allow financing was entirely in keeping with the Commission's practice and with the case-law of the Court.

160. It so happens that those proposals were not ***undoubtedly*** binding Community rules, and hence could not entail ***with certainty***, in 1981, the legal consequence of refusal to allow financing.

161. It is clear that up to the time when the accounts were cleared there was a degree of uncertainty and, as Denmark conceded, the Governments had to accept that. Article 5 of Regulation No 729/70 restricted it, in principle, to one year: what the delay in approving the accounts did was to prolong that period of uncertainty — a circumstance which, it must be admitted, made the situation worse.

162. Be that as it may, what I have said is sufficient to justify the conclusion that the principle of legal certainty — or of legitimate expectations — was breached in a manner sufficient to warrant, on that ground also, the annulment of the decisions at issue.

3. *Breach of procedural requirements and abuse of procedure*

163. Under this heading I can group the following three submissions:

(a) The decisions at issue are not supported by any act of the Community institutions formally invested with binding legal effect: the Commission merely made a declaration to the Council, but did not adopt a decision or a regulation in accordance with the terms of Article 189 of the Treaty. That is the argument put forward by Ireland.

(b) The United Kingdom considers that the decisions at issue are not adequately reasoned as required by Article 190 of the Treaty.

(c) Finally, some of the applicants (the Netherlands, the Federal Republic of Germany, the United Kingdom) submit that the Commission ought to have brought an action for failure to fulfil obligations on the part of the Member States under Article 169 of the Treaty; the procedure for clearing EAGGF accounts should not be used as a means of applying financial sanctions for breaches of Community law, especially as it does not afford the same procedural guarantees as do actions for failure to fulfil obligations under Article 169.

164. I shall examine each of those allegations in turn.

165. As to the first, I believe that its merits should be considered in conjunction with the argument relating to legal certainty and legitimate expectations. It may be admitted that the failure to transform the Commission's declaration into an act which was formally binding, within the meaning of Article 189 of the Treaty, reinforced the doubts entertained by the applicant Member States as to its binding force and thus also strengthened their conviction that it could not entail financial consequences or that it constituted no more than an 'opinion'.

166. As to the alleged failure to state the reasons for the decisions at issue, I regard it as clearly unfounded. The Court has already held [25] that it is not necessary for the statement of reasons to be set out in full detail in the text of the decision itself if it has been made known to the addressees unequivocally in some other form. In this case, apart from the numerous bilateral contacts which had taken place, reference to the summary report which accompanied the decisions was sufficient to enable the Member States to know the reasons on which the decisions were based well enough to challenge them before the Court and to enable the Court to review them.

167. Lastly, as regards the 'abuse of procedure', it is sufficient to read the Court's decision of 7 February 1979 in Joined Cases 15 and 16/76, already cited, to see that it is unfounded.

168. The Court stated there that the two types of action are independent of one another, pursue different ends and are governed by different rules. In the case of Article 169, the Commission enjoys a discretionary power to assess the offending Member States' failure to fulfil its obligations and to decide whether to bring an action, and may even decide not to bring an action if appropriate; in the procedure for clearing accounts there is no such possibility, and the Commission has merely to decide whether the accounts comply with the rules governing the allocation of financial burdens. That is what it did in this case, although the parties are in dispute as to the ambit of the rules in question.

4. *The method used by the Commission to calculate the amount of finance refused*

169. Some of the applicants — France, Denmark, the Netherlands, the United Kingdom and Germany — challenge the Commission's method of calculation.

170. Since the Commission did not have the information necessary to enable it to determine the amount of fish caught in excess of the quotas and which had given rise to expenditure, it considered that, save where shown otherwise, all the fish caught in excess of the quotas had given rise to expenditure to be financed by the EAGGF.

171. Subsequently, in letters addressed to the Member States, it explained the method it had used, inviting them when the accounts were finally cleared to check the figures obtained by its 'maximalist' calculation and to provide any information which might justify altering them.

172. The Commission states that all the Member States with the exception of Denmark and the United Kingdom made free use of that opportunity.

25 — Judgment of 27 January 1981 in Case 1251/79 *Italy* v *Commission* [1981] ECR 205, at pp. 221 and 222.

173. The Commission considers that any new challenge on that point in the context of these applications must be regarded as out of time according to Article 42 (2) of the Rules of Procedure.

174. In the light of the conclusions I have reached on the submissions already examined I do not think it necessary for the Court to rule on the merits of this new submission.

175. I will, however, say a few words about it.

176. In the first place, I do not think that the objection raised by the Commission regarding the timing of the submission put forward by the applicants is relevant.

177. The Member States concerned have shown adequately that the conditions imposed by Community law for obtaining the finance for which they applied were met.

178. However, I consider that the United Kingdom is correct to argue that the judgment in Case 49/83[26] cited by the Commission in support of its own argument rather tends to confirm that the Member States are always at liberty to present to the Court proof that the expenditure challenged was in fact legitimately incurred.

179. Were it otherwise, their rights of defence would be seriously compromised.

180. As to the substance, I would also say that, in adopting the principle that all fish caught in excess of the quotas and which gave rise to expenditure was not eligible for EAGGF finance, the Commission does not appear to have taken the most correct approach for determining the methodology for clearing the EAGGF accounts.

181. The result of that method is basically that intervention expenditure is primarily assumed to result from fishing carried out in excess of the quotas and thus not eligible for EAGGF financing. Hence, intervention expenditure is eligible for financing only in so far as the quantities which gave rise to the costs were greater than the quantity of fish caught in excess of the quotas.

182. The result could be to exclude from Community financing both expenditure related to excess catches and that relating to fish caught within the quotas, even before the latter have been exceeded. Even if Articles 2 and 3 of Regulation No 729/70 are interpreted broadly, there is no justification for refusing, as a matter of principle and subject to proof of the contrary, to admit for Community financing expenditure relating to fishing within the quotas.

183. Consequently, by basing its calculations on a false presumption, the Commission offended its own logic and that which governs the system of Community financing of expenditure connected with the functioning of the common market organizations.

184. Admittedly, it did so — on its own admission — for practical reasons connected with the lack of information available on Member States' observance of the conservation measures. The absence of such information was largely due to the absence of Community controls which further development in Community law in that field would certainly enable to be established.

26 — *Luxembourg* v *Commission* judgment of 12 July 1984 [1984] ECR 2931.

185. However, it would seem at first sight that the monthly summaries sent to the Commission by the Member States should enable intervention expenditure to be kept more or less strictly in line with the rate of exhaustion of the quotas, in which case it would be possible for the Commission to determine the time from which quotas were being exceeded and intervention expenditure was being incurred 'in breach of Community law'.

186. Nevertheless, the Commission did accept any proof to the contrary and various Member States made use of the possibility to show the Commission that the intervention expenditure did not relate to fish caught in excess of the quotas, and on that basis to make it adjust its figures.

187. Some did not do so, however, when their accounts were being cleared.

188. It must be recognized in this context that these applications have not produced all the information necessary to enable us to be certain that each item of expenditure was properly incurred, particularly in the case of intervention expenditure connected with fish caught within the quotas but which might be the result of the effect on the market of catches in excess of the quotas.

189. Consequently, in my view, if the Court must decide on this submission it will be necessary to request additional information from the parties and invite them to submit more detailed argument in this respect, which may enable the amount of the expenditure regarded as having been incurred in breach of the Community rules to be reduced.

190. I must say directly, however, that the Netherlands is not quite correct to argue that the date when the link was established between the quotas and the financing was 27 July 1981, the date of the Commission's declaration to the Council, there having been no restriction until then on the payment of refunds.

191. The fact is that once that connection was generally accepted in principle it had to take into account the fact that the quotas fixed by the Commission at that date were applicable for the whole of the 1981 fishing year; what matters, therefore, in principle, is not the date on which the quotas were fixed, but rather the time when the amount of fish caught exceeded them.

192. Only if the quota attributed to a particular country was exceeded before 27 July would there be a problem, but in that case the argument concerning legal certainty would support the argument put forward by the Netherlands.

III — The decisions relating to the 1982 financial year

193. As we have seen, in 1982 the legal position differed materially from what it was in 1981.

194. Although in that year, too, the Council was unable to approve the proposals on TACs and quotas put forward by the Commission, it adopted provisional measures which were successively renewed throughout the year.

195. Moreover, on 25 January 1983 the Council finally approved Regulations Nos 170/83 and 172/83 fixing, with retroactive effect, the TACs for 1982 and their allocation amongst the Member States.

196. As far as the arguments of the parties are concerned, it is important to note, first, that in Case 239/86 Ireland challenges, as it does in Case 325/85, the power of the Commission to confer any binding character whatsoever on its proposals for TACs and quotas.

197. For the reasons already set out regarding that submission in connection with the previous applications, it is doubtful whether the absence of approval by the Council of the conservatory measures which it had power to adopt was compensated for by the Commission in the proper manner, that is to say, on the basis of the consultation procedure which I have described.

198. In 1982 the Council did adopt a series of provisional measures; they were limited, however, to stating that as a guideline the Commission's proposals should be *taken into account*, without conferring on them unambiguously binding legal force.

199. Be that as it may, the argument relied upon by Ireland in this respect loses some of its force when compared with the Commission's allegation, in Case 325/85, that the retroactive approval of the TACs and quotas by Regulation No 172/83 was sufficient to remove any irregularities.

200. The view put forward by the Netherlands in Case 237/86 in this context differs from that of Ireland. In its application, the Netherlands stated that in 1982 it adopted national restrictions on catches based on the most recent proposals of the Commission, and that the national quota for mackerel was finally fixed at a level which was approved by the Commission.

201. However, as the Commission decided to refuse financing in the amount of HFL 13 317 224 in connection with export refunds for mackerel which, it maintained, had been granted in breach of the quotas, the Netherlands brought these proceedings, denying that financial consequences in the context of EAGGF accounts could attach to failure to observe the quotas, if indeed the failure to respect them could be proved. In substance it alleged: (a) that the conservatory measures, being based primarily on biological considerations, were entirely distinct from market policy; (b) that neither Regulation No 100/76 nor Regulation No 3796/81 on the organization of the markets contained any restriction on the quantities of fish in respect of which export refunds could be granted, and even if such restrictions did exist they would be inapplicable in the absence of controls; (c) that Regulation No 729/70 merely linked eligibility of expenditure for financing by the EAGGF to compliance with the rules on the organization of the markets, the Commission's view amounting to an erroneous extension of those criteria to other elements of Community law entirely foreign to market functioning; and (d) that, consequently, the TACs and quotas proposed by the Commission for 1982 must not be regarded in that respect as Community rules for the purposes of Article 2 (1) of Regulation No 729/70.

202. In reply to that, I rely on the considerations I put forward regarding the second

submission in the applications challenging the decisions concerning 1981.

203. In my view, the relationship between conservatory measures and the organization of the markets does not, in principle, permit them to be excluded from the ambit of the Community rules whose observance is, according to Regulation No 729/70, a condition for having expenditure financed by the EAGGF.

204. The legal position in 1982 (as in 1981) was not, however, such as to enable traders and Member States to form the sure conviction that there was such a connection between observance of the quotas and financing by the EAGGF.

205. It should be borne in mind, moreover, that Regulation No 3796/81 established, on 29 December 1981, that link expressly only with regard to market withdrawals, excluding from its ambit export refunds, whereas the Netherlands' application concerns solely the latter. As the Commission itself acknowledged, the enormous difficulty of supervision in that regard is largely sufficient to explain the legislature's caution, there being no reason to be more strict in that regard with Member States than with itself.

206. The Netherlands' application should be upheld therefore on the ground that the legal position was far from clear in 1982 and the Commission has not been able to show that it was possible to check compliance with the quotas in connection with export refunds.

207. A similar conclusion applies to the application lodged by Ireland, which also relies expressly in this context on the alleged breach of the principles of legal certainty and the protection of legitimate expectations.

208. Admittedly, as we have seen, the background to the dispute is somewhat different here to what it was as regards 1981, particularly in view of the fact that in Ireland's case the application concerns not only expenditure connected with export refunds but also expenditure connected with withdrawals of fish from the market. If, however, it is possible with regard to the former to apply (as in the case of the Netherlands) the argument based on the wording of Article 26 (2) of Regulation No 3796/81, the same cannot be said of the second kind of intervention.

209. Here, however, the legal uncertainty which Ireland may complain of derives directly from the uncertainty regarding the existence of binding Community rules, failure to comply with which was to be sanctioned by the refusal of financing by the EAGGF.

210. It appears in fact that, despite the declaration made by the Commission on 21 July 1982 and the Council's provisional decisions, and in spite of the new element represented by Regulation No 3796/81 (published on 31 December 1981 and applicable from 1 June 1982 [27]) the truth is that the TACs and quotas were not fixed until January 1983, by means of Regulation No 172/83, and the retroactive effect given to them by that regulation was not envisaged in Regulation No 170/83, the regulation which was its legal basis.

27 — Ireland argued that Council Regulation No 1865/82 of 28 June 1982 (Official Journal, L 206, 14.7.1982, p. 1) suspended the application of Articles 13 and 14 of Regulation No 3796/81; but that fact did not alter the situation, of the arguments which might be based on the existence of the last-mentioned regulation as regards 1982. It did not affect Article 26 (2), and did not suspend its application, so that from 1 June 1982 the rule contained in that Article applied to the provisions in Regulation No 3796/81 which were not suspended by Regulation No 1865/82 (that is to say, Articles 8 and 16 to 18) and, if necessary, to Article 11 of Regulation No 100/76 itself, which Regulation No 1865/85 reintroduced with effect from 31 December 1982.

211. For the whole year the Member States were simply invited to take into account the TACs proposed by the Commission, which, moreover, did not include an allocation of catches between the Member States.

212. In the circumstances, even bearing in mind the prudence which should be exercised in regard to the conservation of stocks and the responsibilities of the Member States in the light of Article 5 of the Treaty, they could not have been required to observe, during the 1982 fishing year, a quota which they could only guess at, even after examining the Commission's proposals.

213. Ireland considers that in the circumstances it could not be said that in 1982 there were clear and precise rules breach of which could justify refusal to finance intervention under Article 3 of Regulation No 729/70.

214. A few words now on another question raised by the Government of the Netherlands. In the alternative, it submitted that the Commission did not take into account in its calculations the quantities of fish coming from zones not subject to quotas (40 501 tonnes of mackerel, according to the shipping authorities).

215. The Commission challenged the figures provided by the Netherlands and explained that the reply to a parliamentary question on which the Netherlands also based its argument was not relevant, since it dealt with mackerel fishing in general and not mackerel fishing solely by Community fishermen, there being no reference to the Netherlands' share in the catches coming from non-Community waters.

216. Should the Court rule on that aspect of the question, it would doubtless be necessary to request further explanation and additional proof in order to enable the Netherlands to establish its case in accordance with the rules concerning the onus of proof.

IV — Conclusion

217. In the light of what I have said I propose, in summary, that the Court:

(a) allow the applications submitted by Ireland (Case 325/85), France (Case 336/85), the United Kingdom (Case 346/85) and Denmark (Case 348/85) concerning the decisions regarding the clearance of accounts for 1981, on the ground that it is not possible to consider that there were binding Community rules fixing the TACs and quotas which must be observed by the Member States;

(b) in the alternative, as regards those applications, and in the main as regards the applications submitted by the Netherlands (Cases 326/85 and 237/86), the Federal Republic of Germany (Case 332/85) and Ireland (Case 239/86), uphold them on the ground that there was a breach of the principle of legal certainty;

(c) consequently, declare the decisions void in part, in accordance with the pleadings of the parties.

218. If that approach is not adopted by the Court, I consider that it will be necessary to reopen the procedure in order to obtain additional information and proof to enable the Court to review the calculations made by the Commission and, hence, the figures challenged in the clearance of the accounts.

219. In accordance with my main conclusion I propose that the costs of the proceedings should be borne by the Commission (Art. 69 (2) of the Rules of Procedure), with the exception of those in Case 326/85, in which each party must bear its own costs because there was no request that the defendant be ordered to pay the costs.