JUDGMENT OF THE COURT (First Chamber)

17 April 2008 *

In Joined Cases C-373/06 P, C-379/06 P and C-382/06 P,

APPEALS under Article 56 of the Statute of the Court of Justice, lodged on 5 September 2006,

Thomas Flaherty (C-373/06 P), residing in Mainster (Ireland),

Larry Murphy (C-379/06 P), residing in Brandyhill (Ireland),

Ocean Trawlers Ltd (C-382/06 P), established in Killybegs (Ireland),

represented by D. Barry, Solicitor, and A. Collins SC (C-373/06 P, C-379/06 P and C-382/06 P), and additionally by P. Gallagher SC (C-379/06 P),

appellants,

* Language of the case: English.

the other parties to the proceedings being:

Ireland,

intervener at first instance,

Commission of the European Communities, represented by B. Doherty and M. van Heezik, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano, A. Borg Barthet (Rapporteur), M. Ilešič and E. Levits, Judges,

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 20 September 2007,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2007,

gives the following

Judgment

1 By their appeals, Mr Flaherty, Mr Murphy and Ocean Trawlers Ltd ask the Court to set aside the judgment of the Court of First Instance of the European Communities of 13 June 2006 in Joined Cases T-218/03 to T-240/03 *Boyle and Others* v *Commission* [2006] ECR II-1699 ('the judgment under appeal'), by which the Court of First Instance (i) dismissed as inadmissible their applications for annulment of Commission Decision 2003/245/EC of 4 April 2003 on the requests received by the Commission to increase MAGP IV objectives to take into account improvements on safety, navigation at sea, hygiene, product quality and working conditions for vessels of more than 12 m in length overall (OJ 2003 L 90, p. 48; 'the contested decision'), and (ii) ordered them to bear their own costs.

2 By order of the President of the Court of 5 March 2007, Cases C-373/06 P, C-379/06 P and C-382/06 P were joined for the purposes of the oral procedure and the judgment.

Legal context

3 On 26 June 1997, the Council of the European Union adopted Decision 97/413/EC concerning the objectives and detailed rules for restructuring the Community fisheries sector for the period from 1 January 1997 to 31 December 2001 with a view to achieving a balance on a sustainable basis between resources and their exploitation (OJ 1997 L 175, p. 27).

4 According to Article 4(2) of that decision:

'In the Multiannual Guidance Programmes for Member States, increases in capacity resulting exclusively from safety improvements shall justify, on a case-by-case basis, an increase by the same amount of the objectives for fleet segments where they do not increase the fishing effort of the vessels concerned.'

5 The first paragraph of point 3.3 of the annex to Commission Decision 98/125/EC of 16 December 1997 approving the multiannual guidance programme for the fishing fleet of Ireland for the period from 1 January 1997 to 31 December 2001 (OJ 1998 L 39, p. 41; 'MAGP IV') is worded as follows:

'Member States may at any time submit to the Commission a programme of safety improvements. In accordance with Articles 3 and 4 of Decision 97/413/EC the Commission will decide whether any capacity increase foreseen by such a programme justifies a corresponding increase in the objectives of the MAGP IV.'

Background

6 The background to the dispute giving rise to the judgment under appeal, as set out therein, can be summarised as follows.

7 Between 1999 and 2001, correspondence relating to Article 4(2) of Decision 97/413 was exchanged between the Irish Department of the Marine and Natural Resources ('the Department') and the Commission.

8 During that period, each of the 23 applicants at first instance requested the Department to approve an increase in capacity for safety improvements, pursuant to Article 4(2) of Decision 97/413 and point 3.3 of the annex to Decision 98/125.

9 By letter of 14 December 2001, the Department requested the Commission to increase the polyvalent segment of the Irish fleet by 1 304 gross tonnes and the pelagic segment by 5 335 gross tonnes under Article 4(2) of Decision 97/413. That letter supplemented a previous request submitted by the Department concerning two vessels, which was sent to the Commission as a 'test case'.

10 The Department's letter stated that it was prompted by the requests of 38 owners of vessels who had altered or replaced their vessels, or who intended to do so. It was accompanied by detailed documentation relating to those 38 vessels. It is apparent from a table enclosed with the letter that 18 of the applicants at first instance were among those owners.

11 The operative part of the contested decision is worded as follows:

'*Article 1*

Eligibility of requests

The requests to increase MAGP IV tonnage objectives will be considered eligible subject to the following conditions:

1. the requests have been forwarded on a case-by-case basis by the Member State before 31 December 2001;

2. the vessel must be properly registered in the Fleet Register of the Community;

3. the vessel concerned has an overall length of 15 m or more;

4. the increase in tonnage is the result of modernisation works over the main deck performed or to be performed on an existing registered vessel at least five years old on the starting date of the works. In the case where a vessel has been lost at sea, the increase in tonnage is the result of a greater volume over the main deck of the replacement vessel with respect to the vessel that was lost;

5. the increase in tonnage is justified in order to improve safety, navigation at sea, hygiene, product quality and working conditions;

6. the volume under the main deck of the modified vessel or the replacement vessel is not increased.

Requests to increase the MAGP IV power objectives will not be eligible.

Article 2

The requests that are accepted according to the criteria fixed in Article 1 are those listed in Annex I.

The requests that are rejected according to the criteria fixed in Article 1 are those listed in Annex II.

Article 3

This Decision is addressed to the Kingdom of Belgium, Ireland, the Kingdom of the Netherlands, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland.'

12 The list of 'rejected requests' in Annex II to the contested decision includes the present appellants' requests in respect of new vessels to replace, respectively, the *MFV Westward Isle* (Flaherty), the *MFV Menhaden* (Murphy) and the *MFV Golden Rose* (Ocean Trawlers Ltd). None of those vessels was lost at sea.

Procedure before the Court of First Instance and the judgment under appeal

13 Before the Court of First Instance, 23 applicants sought annulment of the contested decision in so far as it rejected their requests for an increase in the capacity of their vessels. The requests all related to the building of new vessels to replace existing vessels which had not been lost at sea. In support of their case, the applicants invoked a lack of competence on the Commission's part, a breach of the duty to state reasons and breach of the principle of equal treatment.

14 In the judgment under appeal, the Court of First Instance examined, first, the plea of inadmissibility which the Commission raised with a view to securing a ruling that the applicants were not directly and individually concerned by the contested decision for the purposes of the fourth paragraph of Article 230 EC. The Court of First Instance dismissed that plea on the grounds, essentially, (i) that the decision must be considered to be a series of individual decisions, each affecting the legal situation of the owners of the vessels listed in the annexes to the decision, including the applicants, who were characterised by reference to all other persons and distinguished individually in the same way as an addressee of the decision, and (ii) that the decision directly affected the applicants' legal situation, leaving no discretion to the addressees as regards their obligation to implement it.

15 The Court of First Instance nevertheless rejected as inadmissible the applications of four of the applicants at first instance, three of whom are the present appellants. It held as follows in paragraphs 61 and 62 of the judgment under appeal:

> '61 However, in view of Ireland's answers to the questions put to it by way of measure of organisation of procedure, the Court has raised of its own motion the question whether four of the applicants had an interest in acting in the present case … The applicants in question are Thomas Flaherty (T-224/03), Ocean Trawlers Ltd (T-226/03), Larry Murphy (T-236/03) and O'Neill Fishing Co. Ltd (T-239/03).
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> 62 It follows from those answers that the requests submitted by those four applicants were based on their intention at the material time to have vessels built and given the names set out in Annex II to the contested decision. It transpired, however, that those applicants did not have those vessels built, so that at the date of the contested decision they were not in fact owners of the vessels in question. It follows that those applicants had no interest in bringing an action. In any event, they are not individually concerned by the contested decision since the vessels in question are fictitious.'

16 Second, the Court of First Instance examined the dispute in relation to the vessels of the 19 other applicants at first instance, as follows:

> '105 It must be pointed out that Article 4(2) of Decision 97/413 … imposes no limit as regards the age of a vessel eligible for an increase in capacity on safety grounds. At first sight, the wording of that provision permits any increase in

capacity resulting from safety improvements, provided that those increases do not lead to an increase in the fishing effort. If the Council had intended to exclude new vessels it would in all likelihood have made its intention clear …

…

108 Contrary to the Commission's contention, the concept of improvements referred to in Article 4(2) of Decision 97/413 must be understood not as referring to improvements to a particular vessel but as referring to the national fleet. In that regard, it should be noted, in particular, that point 3.3 of the annex to Decision 98/125 refers to a "programme of safety improvements" of the national fleet in general.

109 It is also appropriate to bear in mind the objectives of Decision 97/413. The objective of that decision is to conserve the fishing stocks in Community waters. However, the Council took into account "the need to ensure the highest safety standards in the Community" (12th recital). Accordingly, it included Article 3 (which concerns fishing vessels of less than 12 metres overall) and Article 4(2) in the decision.

110 Contrary to the impression given by the Commission, it is not necessary, in order to ensure the abovementioned objective of Decision 97/413, that new vessels be excluded from the regime established by Article 4(2) of that decision. The Court emphasises, in that regard, that Article 4(2) is consistent

with that objective in that it prohibits any increase in the fishing effort. The Commission, which puts forward very considerable arguments which are not based on safety grounds, could have examined the vessels, case by case, in order to establish whether or not there was an increase in the fishing effort. In fact, it states itself that the prohibition of such an increase seeks to satisfy the general objective of Decision 97/413, which is to reduce the quantity of fish caught in the Community …

…

134 In the light of all of the foregoing, the Court finds that in adopting in the contested decision criteria not provided for in the rules applicable in the present case, the Commission exceeded its powers. The first plea must therefore be upheld and the contested decision must be annulled and it is therefore unnecessary to examine the remaining pleas.'

The appeals

17 In their appeals, the appellants submit that the finding of the Court of First Instance on the admissibility of their actions was incorrect in law. They request that the Court set aside the judgment under appeal in so far as it dismissed their applications and ordered them to bear their own costs of the proceedings at first instance. They also ask the Court to annul the contested decision and to order the Commission to pay the costs of the proceedings at first instance and of this appeal.

18 The Commission contends that the appeals should be dismissed as unfounded and that the applicants should be ordered to pay the costs.

Arguments of the parties

19 The appellants submit before the Court of Justice that the Court of First Instance wrongly concluded that they had no interest in bringing proceedings and were not individually concerned by the contested decision since the vessels in respect of which requests for an increase in capacity had been made were fictitious.

20 First, the appellants submit that the admissibility of their actions must be determined by reference to their interest in bringing proceedings at the time when the request for an increase in capacity was lodged, rather than by reference to a future, hypothetical event. Therefore, by determining the interest in bringing proceedings as at the date of the adoption of the contested decision, the Court of First Instance applied an incorrect legal test.

21 Second, they claim that it is clear from the documents submitted to the Court of First Instance that, both at the date on which their applications were lodged before the Court of First Instance and at the date of adoption of the contested decision, on the assumption that the latter may be regarded as being the relevant date, they were in fact owners of the vessels in respect of which the Commission had received and refused requests for an increase in capacity. It follows that the Court of First Instance made a substantive error in the assessment of the documents lodged at first instance, which should, according to settled case-law, justify setting aside the judgment under appeal.

22 Third, the appellants submit that the Court of First Instance found in the judgment under appeal that all the requests for an increase in capacity related to new vessels, many of them having been made in respect of vessels proposed to be built. That is said to be clear from the requests submitted to the Commission on the appellants' behalf. Moreover, the Court of First Instance did not determine whether each of the vessels in respect of which a request had been submitted had been built as at the date of adoption of the contested decision or when the actions for annulment were

brought, since that point was irrelevant. The appellants also submit that, since the Court of First Instance held that the Commission was bound to consider applications to build new vessels, the Court of First Instance should have determined those applications according to the applicable law. Consequently, the finding that the appellants were not individually concerned since the vessels in question were fictitious has no basis in law and is contradicted by the reasoning itself in the judgment under appeal.

23 The Commission contends that the admissibility of an action cannot be determined on the basis of a future hypothetical event. However, the Court of First Instance did not invoke such an event. On the contrary, it took into account the undisputed fact that the appellants have never built the vessels referred to in Annex II to the contested decision. According to the Commission, there was no evidence therefore to identify the owners of those vessels.

Assessment

24 The question whether the Court of First Instance made an error of law by declaring the actions brought before it by the appellants to be inadmissible must be examined on the basis of that Court's assessment of the appellants' interest in bringing proceedings and of the question whether or not they were individually concerned.

Interest in bringing proceedings

25 According to established case-law, an applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the time at which the action is

brought, failing which it will be inadmissible. That purpose must continue, like the interest in bringing proceedings, until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage to the party bringing it (see, to that effect, Case 53/85 *AKZO Chemie and AKZO Chemie UK* v *Commission* [1986] ECR 1965, paragraph 21; and, by analogy, Case C-19/93 P *Rendo and Others* v *Commission* [1995] ECR I-3319, paragraph 13; Case C-174/99 P *Parliament* v *Richard* [2000] ECR I-6189, paragraph 33; and Case C-362/05 P *Wunenburger* v *Commission* [2007] ECR I-4333, paragraph 42).

26 It follows from paragraphs 61 and 62, read in conjunction with paragraph 17, of the judgment under appeal, that the Court of First Instance took into account the appellants' status as owners — at the date of the contested decision — of the vessels referred to in Annex II to the decision as being crucial to the determination of their interest in bringing proceedings.

27 The Court of First Instance thus proceeded on the basis that 19 of the applicants, who implicitly were held to have already built or commenced building the vessels in question, could be regarded as being owners of the vessels at the date of the contested decision and therefore had an interest in procuring its annulment, whereas the same could not be said for the other four applicants. As to the latter, the Court of First Instance held that, at the date of the contested decision, they had not yet built the vessels referred to in Annex II to that decision, so that they were not owners of the vessels in question. The Court of First Instance inferred from this that they had no interest in bringing an action.

28 In that respect, it must be borne in mind that the present cases concern an authorisation procedure. A certain tonnage is authorised for the fishing fleet of each Member State and specific increases in that tonnage may be approved by Commission decision if certain criteria are fulfilled. Those criteria include the increase in tonnage capacity resulting from modernisation works to the vessels concerned in order to improve safety.

29 It must be noted also that it was not submitted before the Court of First Instance that that procedure requires the necessary works to be carried out, or at least initiated, before the authorisation in question is granted. As paragraph 61, read in conjunction with paragraph 17, of the judgment under appeal shows, it is the Court of First Instance which raised that question of its own motion.

30 However, in its examination of that question, the Court of First Instance did not refer to any provision of applicable Community law that would give rise to such a requirement.

31 Moreover, the Court of First Instance held in paragraphs 100 to 134 of the judgment under appeal, and it is not disputed in the present appeals, that safety improvements which would justify an increase in tonnage capacity may be achieved by having a replacement vessel built.

32 In those circumstances, the Court of First Instance disregarded the fact that anyone who, in compliance with the applicable rules in that regard, has sought an increase in capacity on the ground of safety improvements by having a replacement vessel built clearly has an interest in seeking the annulment of a decision refusing the corresponding authorisation. While it is true that the interest is more urgent for those who had already, at the time of the decision, committed expenditure to the building of a vessel, those who have not yet commenced such building nevertheless have such an interest.

33 Annulment of a Commission decision refusing the authorisation sought means, in effect, for all those whose requests were rejected, that the granting of an authorisation becomes possible again following a fresh examination of those requests, which the Commission is obliged to undertake. Where such authorisation is forthcoming, it means that whatever steps remain to be taken in order to achieve or use the increased capacity sought may be taken in compliance with any applicable conditions and time-limits.

34 Therefore, the Court of First Instance committed an error of law in holding, in paragraph 62 of the judgment under appeal, that the appellants did not have an interest in bringing an action on the ground that, at the date of the contested decision, they had not had the vessels referred to in Annex II to the decision built, so that at the date of that decision they were not owners of the vessels.

35 Consequently, it must be held that all the applicants at first instance had an interest in bringing an action against the contested decision.

Individual concern

36 First of all, it must be borne in mind that the Court has consistently held that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed by a decision (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at 107; Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 11; and Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraph 53).

37 In declaring the actions of four of the applicants, including the present appellants, to be inadmissible, the Court of First Instance also concluded that the latter were not individually concerned within the meaning of the fourth paragraph of Article 230 EC. The Court of First Instance did accept that all the applicants at first instance were directly concerned by the contested decision and that the fact that they were owners

of the vessels mentioned in the annexes thereto was sufficient to establish individual concern, but it nevertheless distinguished the appellants solely on the ground that the vessels in question were 'fictitious'.

38 As the Advocate General noted at points 31 and 32 of her Opinion, the word 'fictitious' has two possible meanings. The ordinary meaning of the word relates to something that is not genuine or is feigned to exist and therefore exists only in the imagination. Applied to the present cases, it would imply that the appellants did not really want to replace their original vessels with alternative vessels incorporating additional safety capacity, or that it was merely a vague idea or plan to which no effect of a discernible kind was given.

39 It follows from paragraph 62 of the judgment under appeal that, with regard to the appellants, the Court of First Instance inferred that their vessels were 'fictitious' from the fact that those vessels had not been built at the date of the contested decision.

40 It is true, as the Commission submits, that the question whether a particular vessel has been built or not is a question of fact which cannot be the subject of an appeal, unless it transpires that the Court of First Instance has distorted the facts in that regard. However, whether the fact that a planned vessel has not yet been built means that an applicant is not individually concerned is a question of law which may properly be appealed.

41 For the same reasons as those indicated in paragraphs 25 to 32 of this judgment in relation to the interest in bringing proceedings, it must be held that the Court of First Instance committed an error of law in holding, in paragraph 62 of the judgment under appeal, that the appellants were not individually concerned on the ground

that, at the date of the contested decision, they had not had the vessels referred to in Annex II to the decision built, so that at the date of that decision they were not owners of the vessels. In fact, since they had submitted individual requests for an increase in safety tonnage in respect of the vessels referred to in Annex II, it is sufficient to note that that is a circumstance capable, in accordance with the case-law referred to in paragraph 36 of this judgment, of differentiating them from all other persons and of distinguishing them individually just as in the case of the person addressed by that decision.

42 It follows that the judgment under appeal must be set aside in so far as it declared inadmissible the applications brought before the Court of First Instance by the three appellants in this case.

43 Under Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court is to quash the decision of the Court of First Instance. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

44 In the present case, since the state of the proceedings is such as to permit final judgment in the matter, it falls to the Court to give final judgment on the appellants' applications for annulment of the contested decision.

45 An examination of the procedural documents produced before the Court of First Instance shows that, once the admissibility of the appellants' actions before that Court is accepted, there is nothing to differentiate them from the 19 other applicants whose actions were declared admissible. All the actions related to the same subject-matter and all the applicants, represented by the same lawyers, relied on the same pleas in law.

46 As regards the plea in law by which the applicants alleged before the Court of First Instance a lack of competence on the part of the Commission, inasmuch as the latter had, in Article 1(2) of the contested decision, applied a criterion not provided for in the applicable Community provisions, it must be held, on the same grounds as those set out in paragraphs 100 to 134 of the judgment under appeal, particularly in paragraphs 105 and 108 to 110, that Article 4(2) of Decision 97/413 imposes no limit as regards the age of a vessel eligible for an increase in capacity on safety grounds, and that the concept of improvements referred to in that provision refers to improvements to the national fleet, instead of to a particular vessel. It is not necessary therefore, in order to attain the objective pursued by that decision of conserving the fishing stocks in Community waters, that new vessels be excluded from the regime laid down by that provision.

47 In those circumstances, it must be held that, by adopting in the contested decision criteria which are not provided for in the applicable legislation, the Commission exceeded its powers. That plea must therefore be upheld and, without there being any need to examine the other pleas relied upon by the appellants, the contested decision must be annulled in so far as it applies to the vessels of the appellants.

Costs

48 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the appellants have applied in their pleadings for the Commission to be ordered to pay their costs of both the proceedings at first instance and the present appeals, and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 13 June 2006 in Joined Cases T-218/03 to T-240/03 *Boyle and Others* v *Commission* (i) in so far as it dismissed as inadmissible the applications of Mr Flaherty, Mr Murphy and Ocean Trawlers Ltd for annulment of Commission Decision 2003/245/EC of 4 April 2003 on the requests received by the Commission to increase MAGP IV objectives to take into account improvements on safety, navigation at sea, hygiene, product quality and working conditions for vessels of more than 12 m in length overall, and (ii) in so far as it ordered the appellants to bear their own costs;**

2. **Annuls Decision 2003/245 in so far as it applies to the vessels of Mr Flaherty, Mr Murphy and Ocean Trawlers Ltd;**

3. **Orders the Commission of the European Communities to pay the costs incurred by Mr Flaherty, Mr Murphy and Ocean Trawlers Ltd in respect of both the proceedings at first instance and the present appeals.**

[Signatures]