JUDGMENT OF THE COURT (Third Chamber)

15 February 2007 *

In Case C-34/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 January 2004,

Commission of the European Communities, represented by T. van Rijn and C. Diderich, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by H.G. Sevenster, acting as Agent,

defendant,

* Language of the case: Dutch.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A.Tizzano, A. Borg Barthet, J. Malenovský (Rapporteur) and A. Ó Caoimh, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 13 July 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to withdraw the fishing licences for the vessels *Wiron III* and *Wiron IV* following the definitive transfer of those vessels to Argentina, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 5 of Council Regulation (EC) No 3690/93 of 20 December 1993 establishing a Community system laying down rules for the minimum information to be contained in fishing licences (OJ 1993 L 341, p. 93).

Legal context

Community legislation

2 The Agreement on relations in the sea fisheries sector between the European Economic Community and the Argentine Republic was approved on behalf of the Community by Council Regulation (EEC) No 3447/93 of 28 September 1993 (OJ 1993 L 318, p. 1; 'the Fishing Agreement'). The ninth recital in the preamble to that agreement states that the parties to the Fishing Agreement are 'convinced that this new type of cooperation in the fisheries sector will provide regular access to new fishing opportunities, further the aims of renewing and converting the Argentine fleet and restructuring the Community fleet and promote the rational exploitation of resources in the long term'.

3 Article 5(1) and (3) of the Fishing Agreement provides:

'1. The Parties shall create suitable conditions for the establishment in Argentina of undertakings using capital originating in one or more Member States of the Community and the creation of joint enterprises and joint ventures in the fisheries sector between Argentinian and Community shipowners with the aim of jointly exploiting and, where appropriate, jointly processing Argentinian fishery resources under the conditions laid down in Protocol I and Annexes I and II.

...

3. As part of its policy for the restructuring of its fleet, the Community shall facilitate the inclusion of Community vessels in undertakings established or to be established in Argentina. To that end, and as part of its policy for the technical renovation of its fishing industry, Argentina shall facilitate the transfer of current fishing licences and issue the appropriate new licences pursuant to this Agreement.'

4 Article 5 of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1), provided:

'1. The Council, acting in accordance with the procedure laid down in Article 43 of [the] Treaty, shall, before 31 December 1993, establish a Community system which shall apply from a date no later than 1 January 1995 laying down rules for the minimum information to be contained in fishing licences, to be issued and managed by Member States.

From the date of application of the Community system, Member States shall be required to operate national systems of fishing licences. Except where otherwise provided, all Community fishing vessels shall be required to have a fishing licence, which is attached to the vessel.

The above provisions shall apply without prejudice to any specific system which may be in force at the Community level or those required under present and future international agreements.

2. The licensing system shall apply to all Community fishing vessels in the Community fishing waters or operating in the waters of third countries or on the

high seas. The Community minimum information requirements shall also apply to third country vessels fishing in Community fishing waters where provided for under international agreements.'

5 Article 11 of Regulation No 3760/92 stated:

'Having regard to Title I, on a multiannual basis and for the first time not later than 1 January 1994, the Council, acting in accordance with the procedure laid down in Article 43 of the Treaty, shall set the objectives and detailed rules for restructuring the Community fisheries sector with a view to achieving a balance on a sustainable basis between resources and their exploitation. Such restructuring shall also take account on a case-by-case basis of possible economic and social consequences and of the specificities of the fisheries regions.'

6 According to the third recital in the preamble to Regulation No 3690/93, 'the Community system should set out the rules concerning the minimum information to be contained in the fishing licences for each fishing vessel flying the flag of a Member State'.

7 Article 1 of that regulation provides:

'1. A Community system of fishing licences shall be established laying down rules on the minimum information to be contained in the fishing licences referred to in Article 5 of Regulation (EEC) No 3760/92.

2. All Community fishing vessels shall be required to have a fishing licence for the vessel.

3. The licence must be kept on board the vessel.

4. Fishing vessels shall be forbidden to catch, retain on board, transfer or land fish where a fishing licence has not been granted or where the fishing licence has been withdrawn or suspended.'

8 Article 3 of Regulation No 3690/93 provides:

'The flag Member State shall issue and administer fishing licences for the fishing vessels flying its flag, having due regard to the provisions of Article 11 of Regulation (EEC) No 3760/92.'

9 Article 5 of Regulation No 3690/93 reads as follows:

'The flag Member State shall suspend temporarily or definitively the fishing licences of vessels which are subject to temporary immobilisation and shall withdraw the fishing licences of vessels which are subject to definitive withdrawal from fishing activities.'

10 Pursuant to Article 8(1) and (2) of Council Regulation (EC) No 3699/93 of 21 December 1993 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products (OJ 1993 L 346, p. 1):

'1. Member States shall take measures to adjust fishing effort to achieve at least the objectives of the multiannual guidance programmes referred to in Article 5.

Where necessary, Member States shall take measures to stop vessels' fishing activities permanently or restrict them.

2. Measures to stop vessels' fishing activities permanently may include:

— scrapping,

— permanent transfer to a third country, provided such transfer is not likely to infringe international law or affect the conservation and management of marine resources,

— permanent re-assignment of the vessel in question to uses other than fishing in Community waters.

...

Member States shall ensure that vessels concerned by such measures are deleted from the registration lists for fishing vessels and from the Community fishing vessel register. They shall also ensure that deleted vessels are permanently excluded from fishing in Community waters.'

11 Article 9(1) of Regulation No 3699/93 stated:

'Member States may take measures to promote the re-orientation of fishing activities by encouraging the creation of temporary joint ventures and/or joint enterprises.'

12 Regulation No 3699/93 was repealed by the first paragraph of Article 20 of Council Regulation (EC) No 2468/98 of 3 November 1998 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products (OJ 1998 L 312, p. 19); the terms of Articles 8(1) and (2) and 9(1) are identical to the corresponding provisions of Regulation No 3699/93.

National legislation

13 Paragraph 4 of the Regulation concerning fishing licences of 27 December 1984 (*Nederlandse Staatscourant* 1984, No 253; 'the national regulation on fishing licences'), in the version in force at the time of the facts of the dispute, provided:

'1. With effect from 1 January 1995, fishing without a licence from a fishing vessel is prohibited, as is having on board, transshipping or discharging the species of fish listed in the annex.

...

4. The fishing licence referred to in subparagraph 1 must be held on board the fishing vessel; it shall lapse as soon as the fishing vessel in question is no longer used for fishing.'

Facts and the pre-litigation procedure

14 In the context of the Fishing Agreement, the vessels *Wiron III* and *Wiron IV*, flying the Netherlands flag and registered in the Netherlands, were transferred to Argentina during the month of July 1996. That transfer took place when a joint enterprise was founded, bringing together Community and Argentine shipowners, to which the Community granted aid. The vessels were deleted from the Netherlands fishing vessel register ('the Netherlands register') and entered in the Argentine register.

15 The Commission found that the fishing licences relating to the vessels *Wiron III* and *Wiron IV* had been used for other vessels.

16 By letter of 17 April 2001, the Commission informed the Kingdom of the Netherlands that the re-use of fishing licences was contrary to the obligation under Article 5 of Regulation No 3690/93 requiring the competent national authorities to withdraw licences from vessels which are subject to definitive withdrawal from fishing activities. The Commission's letter gave that Member State formal notice to submit its observations on the alleged failure to fulfil its obligations pursuant to the first paragraph of Article 226 EC.

17 In its reply of 15 June 2001 to that letter, the Kingdom of the Netherlands disputed the Commission's analysis and took the view that it had complied with its obligations under Community law.

18 Unconvinced by the arguments put forward in that reply, on 16 January 2003 the Commission sent a reasoned opinion to the Kingdom of the Netherlands in which, firstly, it restated the arguments set out in the letter of formal notice and, secondly, invited that Member State to indicate, within a period of two months from receipt of the reasoned opinion, what measures it proposed to take to end the alleged failure to fulfil its obligations.

19 In its response of 27 March 2003 to the reasoned opinion, the Kingdom of the Netherlands argued that it had wholly fulfilled its obligations under Community law and that it was not required to withdraw the fishing licences relating to the vessels *Wiron III* and *Wiron IV* on their transfer to Argentina.

20 In those circumstances, the Commission decided to bring the present action.

The action

Arguments of the parties

21 The Commission's action is based on Article 5 of Regulation No 3690/93, pursuant to which the flag Member State is to withdraw the fishing licences of vessels which are subject to definitive withdrawal from fishing activities.

22 The Commission submits that the obligation to withdraw fishing licences must be interpreted as meaning that the fishing capacity made available by such withdrawal may not be re-used for the issue of new licences to other vessels, since such re-use would be contrary to the first subparagraph of Article 8(1) of Regulation No 3699/93, pursuant to which Member States are to take measures to adjust fishing effort to achieve at least the objectives of the multiannual guidance programmes. If the Community authorised such re-use of licences relating to vessels definitively transferred to a non-Member State, the objective of reducing the fishing fleet would not be achieved.

23 That would still be the case even though the definitive transfer took place in the context of the founding of a joint enterprise. Such a transfer, expressly provided for in the third indent of point 1.2(a) of Annex III to Regulation No 3699/93, constitutes one possibility for transfer of vessels to a non-Member State.

24 Furthermore, according to the Commission, the definitive transfer to Argentina of the two vessels in question, in the context of the founding of a joint enterprise, constitutes a measure to which the rules of the Community structural policy are applicable. The distinction made by the Kingdom of the Netherlands between permanent transfer to a non-Member State within the meaning of Regulation No 3699/93 and that undertaken in the context of the Fishing Agreement is thus without foundation. That approach is contrary to Regulation No 3699/93, to the Fishing Agreement, to the Commission's decision of 16 December 1996 which granted Community financial assistance to the shipowners concerned ('the decision of 16 December 1996'), and to the nature of the transfer at issue. The Commission's analysis is, moreover, confirmed by the case-law of the Court of First Instance of the European Communities (Joined Cases T-44/01, T-119/01 and T-126/01 *Vieira and Others* v *Commission* [2003] ECR II-1209).

25 The implementation of the multiannual guidance programmes for the fishing fleets takes a number of forms. Articles 8 and 9 of Regulation No 3699/93 both tend towards implementation by the permanent transfer of fishing vessels to a non-

Member State (Article 8) or by the founding of joint enterprises (Article 9) and, therefore, in accordance with the definition set out in Article 5 of that regulation, towards achieving a set of objectives allowing for the orientation of fishing effort. However, pursuant to the third indent of point 1.2(a) of Annex III to Regulation No 3699/93, the grant of financial assistance to joint enterprises referred to in Article 9 of that regulation is subject to the condition that the aid must be accompanied by the permanent transfer of the vessel to the non-Member State concerned. It follows that the measure provided for in Article 9 is inseparable from a concomitant measure, that is to say the definitive transfer of a vessel to a third country with a view to reducing fishing activities.

26 The Kingdom of the Netherlands argues that the Commission gives Article 5 of Regulation No 3690/93 a wide interpretation. In its view, that article does not specify the conditions under which it is possible to issue new fishing licences.

27 Moreover, the two vessels in question were deleted from the Community and Netherlands registers after their transfer to Argentina in the context of the Fishing Agreement. Pursuant to Article 4(4) of the national regulation on fishing licences, those vessels' licences lapsed automatically and not as a result of their withdrawal, in accordance with the provisions of Article 5 of Regulation No 3690/93.

28 Furthermore, Regulation No 3690/93 does not apply to the transfer of the vessels at issue in the present action. That transfer was carried out in the context of the Fishing Agreement and not for the purposes of implementing the multiannual guidance programme referred to in Title II of Regulation No 3699/93. The financial assistance granted at the time of that transfer was financed not by the Financial Instrument for Fisheries Guidance but in its entirety by the Community. The two systems also differ from the point of view of the procedure put in place. Under the

Fishing Agreement, approval of projects for the founding of joint enterprises and their maintenance is given by a joint committee, whereas, under that regulation, that procedure is the responsibility of the Commission and the Member States. Finally, the grounds of the decision of 16 December 1996 refer solely to Article 7(1) of the Fishing Agreement and to Regulation No 3447/93.

29 In any event, even if Regulation No 3690/93 were to be considered applicable to the transfer to Argentina of the vessels *Wiron III* and *Wiron IV*, it is a transfer within the meaning of Article 9 of Regulation No 3699/93 which took place in the context of the founding of a joint enterprise and not under Article 8 of that regulation, which refers to a permanent transfer. There was therefore no prohibition against utilising the fishing capacity made available in the Netherlands register to issue licences to other vessels. Those two articles refer to two separate measures and are based on different aid schemes. Article 8 relates to the 'adjust[ment of] fishing effort', while Article 9 refers to the 're-orientation of fishing activities'. The transfer of a vessel under the latter article could doubtless involve an adjustment of fishing effort, but such a connection is in no way necessary.

Findings of the Court

30 The Court observes, as a preliminary point, that it is common ground in the present case that the vessels *Wiron III* and *Wiron IV* were entered in the Argentinian register and that, accordingly, they were definitively transferred to Argentina.

31 The complaint raised by the Commission in its application for a declaration by the Court, as set out in paragraph 1 of the present judgment, is that by failing to withdraw the fishing licences relating to those vessels following their definitive transfer to Argentina, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 5 of Regulation No 3690/93.

32 It is appropriate to recall that, pursuant to the provisions of Article 5 of Regulation No 3690/93, where a fishing vessel is subject to definitive withdrawal from fishing activities, the licence relating to that vessel is to be withdrawn.

33 Thus, before the Court considers the substance of the Commission's complaint, preliminary issues arise as to, first, what exactly constitutes definitive withdrawal of a fishing vessel from fishing activities and, second, whether the definitive transfer of such a vessel to Argentina in the context of the founding of a joint enterprise can be treated in the same way as a definitive withdrawal from fishing activities within the meaning of Article 5 of Regulation No 3690/93.

Definitive withdrawal from fishing activities

34 It is common ground that neither Article 5 of Regulation No 3690/93 nor that regulation as a whole gives any indication as to how the phrase 'definitive withdrawal from fishing activities' is to be understood. However, in Regulation No 3699/93, more precisely in Article 8(2) thereof, it is stated that measures to stop vessels' fishing activities permanently may include, inter alia, scrapping, permanent transfer to a non-Member State, provided such transfer is not likely to infringe international law or affect the conservation and management of marine resources, and permanent re-assignment of the vessel in question to uses other than fishing in Community waters.

35 Regulations No 3690/93 and No 3699/93 differ greatly in both subject-matter and purpose. Regulation No 3690/93, as is clear more particularly from the third recital in its preamble, sets out the rules concerning the minimum information to be contained in fishing licences, whereas Regulation No 3699/93 lays down the criteria

and arrangements regarding Community structural assistance in the fisheries and aquaculture sector.

36 However, although the purpose of those two regulations is different, there is nothing to indicate that the meaning of 'measures to stop vessels' fishing activities permanently' applies exclusively to Regulation No 3699/93 and that it cannot be used in the context of other instruments of secondary legislation relating to the sphere of fishing policy.

37 Regulation No 3699/93, which defines the measures to stop vessels' fishing activities permanently, was, moreover, adopted after Regulation No 3690/93. As is clear from most language versions of Regulation No 3699/93, particularly from the German, Spanish, French and Italian versions, the Community legislature knowingly intended to choose the same expression as that already used in Regulation No 3690/93.

38 Accordingly, there is nothing to preclude the definition ensuing from Regulation No 3699/93 being used in the context of the implementation of Article 5 of Regulation No 3690/93 regarding the temporary or definitive suspension of fishing licences.

39 The various 'measures to stop vessels' fishing activities permanently' listed in Article 8(2) of Regulation No 3699/93, include, in particular, 'permanent transfer to a third country'. In the present case, the fishing vessels *Wiron III* and *Wiron IV* were transferred to 'a third country', namely the Argentine Republic.

40 The Kingdom of the Netherlands submits, however, that the transfer of those vessels to Argentina took place in the context of the Fishing Agreement. That would mean that the transfer cannot be treated in the same way as a measure to stop vessels' fishing activities permanently within the meaning of Article 8(2) of Regulation No 3699/93. Nevertheless, that argument must be rejected.

41 The wording of Article 8(2) of Regulation No 3699/93 in no way precludes the notion of 'measures to stop vessels' fishing activities permanently' being applied to the permanent transfer of vessels on the basis of an international agreement concluded between the Community and a non-Member State. On the contrary, that provision makes express reference, in its second indent, to compliance with international law and, consequently, with international agreements.

42 For its part, the Fishing Agreement does not preclude a transfer of fishing vessels in accordance with its provisions being classified as a 'measure to stop vessels' fishing activities permanently' within the meaning of Community law.

43 It follows that the permanent transfer of vessels to a non-Member State pursuant to an international agreement constitutes a measure to stop vessels' fishing activities permanently within the meaning of Article 8(2) of Regulation No 3699/93. Accordingly, in the present case, the definitive transfer of the vessels *Wiron III* and *Wiron IV* to Argentina must be regarded as a 'measure to stop vessels' fishing activities permanently' for the purposes of Community law.

44 In that regard, the fact that such a transfer took place in the context of the founding of a joint enterprise is irrelevant. That fact, referred to in Article 9 of Regulation No 3699/93, does not affect the implementation of Regulation No 3690/93.

Withdrawal of the fishing licences

45 Accordingly, the question arises whether, in the present case, the fishing licences of the vessels *Wiron III* and *Wiron IV*, which were both transferred definitively to Argentina, were withdrawn by the competent Netherlands authorities.

46 The Kingdom of the Netherlands submits that, after their transfer under the Fishing Agreement, those vessels were deleted from the Community and Netherlands registers and that, pursuant to Paragraph 4(4) of the national regulation on fishing licences, those licences lapsed automatically, which equates to their withdrawal.

47 The Commission does not dispute that the fact that the fishing licences relating to the vessels *Wiron III* and *Wiron IV* have lapsed pursuant to that national provision may be classified as withdrawal. However, it points out that the fishing capacity made available by the transfer of those vessels was used for other vessels.

48 The Commission also submits that that plea in defence is a new plea since, during the pre-litigation phase, the Kingdom of the Netherlands did not rely on Paragraph 4(4) of the national regulation on fishing licences, nor did it raise the automatic withdrawal of the licences relating to those vessels by reason of their lapsing. On the contrary, that Member State expressed a different opinion, claiming that it was not necessary to withdraw fishing licences where vessels were permanently transferred to a third country.

49 With regard to the plea of inadmissibility raised by the Commission against that plea in defence, suffice it to note that such an objection is contrary to the general principle of respect for the rights of the defence. According to the case-law of the

Court, the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the EC Treaty not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see the order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 17). Thus, once the subject-matter has been defined, the Member State has the right to raise all the pleas available to it in order to defend itself. Moreover, there is no rule of procedure which requires the Member State concerned to put forward, during the pre-litigation procedure, all the arguments in its defence, in an application based on Article 226 EC (see Case C-414/97 *Commission* v *Spain* [1999] ECR I-5585, paragraph 19).

Issue of new fishing licences

50 The Commission submits that it follows from Article 5 of Regulation No 3690/93 that, where vessels have been permanently transferred to a non-Member State, the Member State must not merely withdraw the licences relating to the vessels thus transferred, but must refrain from utilising the fishing capacity thus made available in the national register to issue new licences. Such use would be contrary to the objectives of Article 8 of Regulation No 3699/93, a provision which forms part of a Community policy for the restructuring of the Community fleet. That argument must, however, be rejected.

51 It should be noted, firstly, that the wording of Article 5 of Regulation No 3690/93 does not prohibit, as such, utilisation of fishing capacity made available by the transfer of vessels to a non-Member State to issue new licences, since that article merely requires the flag Member State to withdraw the fishing licences relating to vessels which are subject to definitive withdrawal from fishing activities. It follows from the foregoing that the Kingdom of the Netherlands complied with that obligation to withdraw fishing licences.

52 With regard to Article 8 of Regulation No 3699/93, it is sufficient to point out that Article 5 of Regulation No 3690/93, the sole provision referred to in the Commission's pleadings, makes no reference to that article at all. In any event, Article 8 of Regulation No 3699/93 lays down, inter alia, what the measures to stop vessels' fishing activities permanently may include and requires vessels deleted from the register to be excluded from fishing in Community waters. It does not, however, follow from that provision that the fishing capacity made available in the national register of fishing vessels by the permanent transfer of vessels to a non-Member State should not be used to issue new fishing licences.

53 Even if the Commission could, under the procedure laid down in Article 226 EC, have taken action against the Kingdom of the Netherlands on the basis of other provisions of Community law in respect of the system for issuing new fishing licences, as the Advocate General observed in point 45 of her Opinion, it is common ground that the breach of such provisions does not constitute the subject-matter of the failure to fulfil obligations complained of (see Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraphs 58 to 60, and Case C-225/04 *Commission* v *France* [2006] ECR I-5251, paragraph 24).

54 It follows from all the foregoing that the Commission's complaint alleging infringement of Article 5 of Regulation No 3690/93 is unfounded.

55 In those circumstances, the action brought by the Commission must be dismissed.

Costs

56 Under Article 69(2) of the Rules of Procedure, 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 Kingdom of the Netherlands has applied for costs, and the Commission has been unsuccessful, the latter must be ordered to pay the costs.

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

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]