JUDGMENT OF THE COURT (Fifth Chamber)
26 April 1988 *

In Case 207/86

Asociación Profesional de Empresarios de Pesca Comunitarios (Apesco), represented by S. Munoz Machado, of the Madrid Bar (Spain), with an address for service in Luxembourg at the Chambers of A. May, avocat, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by R. Fischer, Legal Adviser, F. Lopez de Rego and D. Calleia, members of the Commission's Legal Department, acting as Agents, with an address for service in Luxembourg at the office of G. Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, plateau du Kirchberg, Luxembourg,

defendant,

supported by

The Kingdom of Spain, represented by F. Javier Conde de Saro, Director-General for Coordination of Legal and Institutional Community Affairs in the State Secretariat for the European Communities, acting as Agent, assisted by R. Sanchez de Lerin García-Ovies of the State Legal Department for Matters before the Court of Justice of the European Communities, with an address for service in Luxembourg at the Spanish Embassy, 4-6 boulevard Emmanuel-Servais,

and by

Internacional Pesquera Coruñesa SA (Interpesco SA), whose registered office is in La Coruña (Spain),

* Language of the Case: Spanish.

Miya SA, whose registered office is in Ondarroa (Spain),

Lagunak SL, whose registered office is in Pasajes de San Pedro (Spain),

Asociación de Armadores de Buques de Pesca con Derechos de Acceso a las Pesquerias de la CEE (Ceepesca), whose registered office is in Madrid (Spain),

represented by J. L. Meseguer Sánchez, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of E. Korn, 21 rue de Nassau,

interveners,

APPLICATION for a declaration that the Commission's decision approving the list of vessels flying the flag of Spain authorized to fish at the same time during the month of July 1986 in waters falling under the sovereignty of the Member States of the European Economic Community as constituted on 31 December 1985 is void,

THE COURT (Fifth Chamber),

composed of: G. Bosco, President of Chamber, U. Everling, Y. Galmot, R. Joliet and F. Schockweiler, Judges,

Advocate General: J. Mischo
Registrar: J. A. Pompe, Deputy Registrar

having regard to the Report for the Hearing and further to the hearing on 9 December 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 10 February 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 4 August 1986, the Asociación Profesional de Empresarios de Pesca Comunutarios (hereinafter referred to as 'Apesco') brought an action pursuant to the second paragraph of Article 173 of the EEC Treaty for a declaration that the Commission's decision of 24 June 1986 approving the list of vessels flying the flag of Spain authorized to fish at the same time during the month of July 1986 in waters falling under the sovereignty of the Member States of the European Economic Community as constituted on 31 December 1985 is void.

2 Articles 156 to 166 of the Act of Accession of Spain and Portugal to the European Economic Community of 12 June 1985 (Official Journal 1985, L 302, p. 9) (hereinafter referred to as the 'Act of Accession') contain the transitional rules governing access by vessels flying the flag of Spain to the waters of the former Community of Ten. As regards non-specialized fishing, those rules provide that 300 Spanish vessels on the list of names, known as the 'basic list', in Annex IX to the Act of Accession may be authorized to fish in the waters of the former Community of Ten.

3 However, of those 300 vessels only 150 standard vessels are to be authorized to fish at the same time provided that they appear on a periodical list adopted by the Commission. By 'standard vessel' is meant a vessel having a horsepower of 700 hp or more but less than 800 hp. Other vessels are to count as more or less than a unit according to whether their horsepower is less than 700 hp or equal to or more than 800 hp.

4 Article 163 of the Act of Accession provides that the Spanish authorities are to submit drafts of the periodical lists to the Commission which, after checking them, is to approve the lists.

5 It is not disputed that, when drawing up the draft periodical lists, the Spanish authorities apply a ministerial order of 12 June 1981 *(Official Journal of the Spanish State* No 157 of 2 July 1981). Pursuant to that order, all vessels appearing on the

list of those vessels that, on 23 April 1980, had a right of access to the waters of the former Community of Ten are to obtain a right of access to the Community fishing zones. In order to adapt the number of Spanish vessels to existing fishery resources, that ministerial order allows for cumulating in one or more operational vessels the fishing rights of other vessels that belonged to the same owner, principally in cases where, under prescribed conditions, the sale, breaking-up or export of those vessels has taken place.

6 On the basis of a draft periodical list drawn up by the Spanish authorities pursuant to the abovementioned ministerial order, the Commission approved on 24 June 1986 the periodical list for the month of July 1986 and transmitted it to the Spanish authorities. In a telex of 25 June 1986 the competent Spanish authority notified the list to Apesco.

7 The members of the association Apesco are the operators of vessels that appear on the basic list contained in Annex IX to the Act of Accession but do not enjoy cumulated rights of fishing pursuant to the Spanish ministerial order of 12 June 1981. That association considered that the periodical list for July 1986 was discriminatory as regards its members. Their vessels had been allocated an average of 12.58 fishing days, whereas vessels belonging to members of the Asociación de Armadores de Buques de Pesca con Derechos de Acceso a las Pesquerias de la CEE (hereinafter referred to as 'Ceepesca'), in which are grouped the operators of vessels appearing on the basic list that enjoy cumulated fishing rights, obtained an average of 19.67 fishing days.

8 Apesco therefore brought the present action in which it requests the Court to declare void the decision by which the Commission approved the draft periodical list for the month of July 1986, to recognize that the discrimination suffered by the vessels belonging to its members should be ended and to order the Commission to provide its members with compensation in future periodical lists for the lost days' fishing.

9 The Kingdom of Spain, Ceepesca, Internacional Pesquera Coruñesa SA (Interpesco SA), Miya SA and Lagunak SL intervened in the proceedings in support of the Commission.

10 Reference is made to the Report for the Hearing for a fuller account of the legal background to the dispute, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The action for annulment

Admissibility

11 The Commission considers that the action for annulment is admissible only in so far as Apesco is acting in the name of persons operating at least one vessel that appears on the contested periodical list. The other members of Apesco are not concerned directly and individually by that list.

12 It should be pointed out that the periodical list at issue either allocates or refuses by implication to each of the 300 vessels identified on the basic list a right to fish in the waters of the previous Community of Ten during the month of July 1986. The contested decision therefore concerns each operator of those vessels by reason of an attribute peculiar to him and hence distinguishes him individually just as if he were an addressee. Moreover, the contested decision leaves no discretion to the State authorities with regard to vessels authorized to fish during the period in question. It thus directly concerns each operator of the vessels appearing on the basic list. Therefore all the members of Apesco, whether or not they operate vessels appearing on the contested list, are concerned directly and individually by the contested decision.

13 The Commission and all the interveners maintain in addition that in these proceedings Apesco may not ask the Court to rule on the compatibility of the Spanish ministerial order of 12 June 1981 with Community law.

14 It should be made clear in that connection that it is not the purpose of the action to obtain a declaration that the ministerial order in question is incompatible with Community law. Apesco confines itself to relying upon that incompatibility as an argument in support of its action directed against the decision approving the periodical list to which it objects. That fact is not of such a kind as to affect the admissibility of the action.

15 The interveners, Ceepesca, Internacional Pesquera Coruñesa SA (Interpesco SA), Miya SA and Lagunak SL, maintain that the action is out of time and devoid of purpose because it was brought in August 1986, that is to say at a time when the contested list was no longer applicable.

16 It must be emphasized that the action was brought within the time-limit prescribed in the third paragraph of Article 173 of the Treaty. Moreover, Apesco has an interest in challenging the list for July 1986, even though it is no longer applicable, in order to prevent a repetition of the alleged illegality in future lists.

17 It follows from the foregoing that the action is admissible.

Substance

18 In its first submission Apesco maintains that the Commission was in breach of the Act of Accession in approving a draft list drawn up on the basis of Spanish law, the drafting of the lists being governed exclusively by the Act of Accession.

19 It must first be recalled that Article 163 (1) of the Act of Accession provides that the Spanish authorities are to submit to the Commission drafts of the periodical lists and in Article 163 (2) it is further stated that after having been checked those lists are to be approved by the Commission. It is thus the task of the Spanish authorities to draw up the drafts of the periodical lists.

20 It should then be pointed out that the Act of Accession, implementing Commission Regulation No 3531/85 of 12 December 1985 (Official Journal 1985, L 336, p. 20) and Council Regulation No 3781/85 of 31 December 1985 laying down the measures to be taken in respect of operators who do not comply with certain provisions relating to fishing contained in the Act of Accession of Spain and Portugal (Official Journal 1985, L 363, p. 26) impose an obligation on the Spanish authorities to comply with certain rules when drawing up the drafts of the periodical lists.

21 Thus the vessels included must be entered on the basic list. They must qualify as standard vessels or as more or less than a unit according to their horsepower. The draft may not number more than 150 standard vessels. Those vessels must be distributed over specific zones and in relation to the categories of species fished. Each vessel must be allocated at least six consecutive days' fishing. Only vessels that have not been involved in the commission of previous offences against the rules in question may be included. The draft lists must contain in addition a series of details such as the exact identification of the vessels, their owners or charterers, specification on a daily basis of which vessels are authorized to fish and the intended method of fishing.

22 It should be emphasized that neither the Act of Accession nor the abovementioned regulations give any indication to the Spanish authorities of the criteria they should apply when selecting from all the vessels fulfilling the conditions described above those which will be entered on the draft lists.

23 It follows that the Spanish authorities must carry out their selection in accordance with rules of national law. In that selection they must also, however, comply with the principle of equality enunciated in Article 40 (3) of the Treaty which, as the Court held in its judgment of 25 November 1986 (in Joined Cases 201 and 202/85 *Klensch and Others* v *Secretary of State for Agriculture and Viticulture* [1986] ECR 3477), is binding on Member States when they are adopting measures relating to the common organization of the agricultural markets pursuant to a Community regulation. It is for the Commission to check whether the national rules applicable to the matter are in conformity with the principle of equality and, if they are not, to initiate if necessary the procedure provided for in Article 169 of the Treaty.

24 In those circumstances the first submission must be rejected.

25 In its second submission Apesco claims that the Commission was in breach of the principle of equality when it approved a draft list which granted more fishing rights to some vessels than to others.

26 It should be recalled in that connection that, as explained above, the Act of Accession lays down a series of rules with which the Spanish authorities must

comply when drawing up draft periodical lists and that the Commission must check whether those rules have been complied with when it approves the lists. The Act of Accession does not, however, require that the draft lists should state the reasons for which some vessels obtain fewer fishing rights than others or none at all, or mention to which organizations the operators of the various vessels belong.

27 It is thus apparent that the system introduced by the Act of Accession does not put the Commission in a position to judge whether the Spanish authorities have complied with the principle of equality between operators or associations of operators of vessels when drawing up any particular draft list.

28 It follows that although it is incumbent upon the Commission to check whether the internal rules that the Spanish authorities apply when drawing up the draft lists are compatible with Community law, it is not its task to examine whether the principle of equality has been complied with in every case. Such review falls within the jurisdiction of the national courts to which the procedure under Article 177 of the Treaty is available.

29 The second submission must therefore also be rejected.

30 It follows from the foregoing that the action for annulment is unfounded and must be dismissed.

The other claims in the application

31 As regards the claims in the application in which the Court is requested to recognize that the discrimination suffered by the vessels belonging to members of Apesco should be brought to an end and to order the Commission to allocate to members of that association compensation, in future periodical lists, for the lost days' fishing, these must be held to be inadmissible. The Court may not issue such orders in proceedings based on Article 173 of the Treaty.

Costs

32 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs. Since Apesco has failed in its action it must be ordered to bear the costs, including those of the interveners.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the application for annulment as unfounded;

(2) Dismisses the remainder of the application as inadmissible;

(3) Orders Apesco to pay the costs, including those of the interveners.

Bosco Everling

Galmot Joliet Schockweiler

Delivered in open court in Luxembourg on 26 April 1988.

J.-G. Giraud
Registrar

G. Bosco
President of the Fifth Chamber