JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)
8 March 1995 *

In Case T-493/93,

Hansa-Fisch GmbH, a company governed by German law, established at Schenefeld, Germany, represented initially by Heinrich-Werner Goltz, then by Rafael Barber-Llorente, Rechtsanwälte, Hamburg,

applicant,

v

Commission of the European Communities, represented by Thomas van Rijn and Ulrich Wölker, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision refusing to submit the applicant's request for a fishing licence to the Moroccan authorities in accordance with Annex I to the Agreement on relations in the sea fisheries sector

* Language of the case: German.

between the European Economic Community and the Kingdom of Morocco, as approved by Council Regulation (EEC) No 2054/88 of 23 June 1988 (OJ 1988 L 181, p. 1) and by Council Regulation (EEC) No 3954/92 of 19 December 1992 (OJ 1992 L 407, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fourth Chamber),

composed of: K. Lenaerts, President, R. Schintgen and R. García-Valdecasas, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 30 November 1994,

gives the following

Judgment

Legal background

1 Articles 167 and 354 — which contain identical provisions — of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic, annexed to the Treaty concerning the accession of the Kingdom of Spain

and the Portuguese Republic to the European Economic Community, signed on 12 June 1985 (OJ 1985 L 302, p. 9, hereinafter 'the Act of Accession') provide that:

1. Upon accession, the administration of fisheries agreements concluded by those States with third countries is to be the responsibility of the Community.

2. The rights and obligations flowing from the agreements referred to in the first paragraph for those States are not to be affected during the period for which the provisions of such agreements are provisionally maintained.

3. As soon as possible, and in any event before the expiry of the agreements referred to in paragraph 1, the decisions appropriate for the continuation of fishing activities resulting therefrom are to be adopted in each case by the Council, acting by a qualified majority on a proposal from the Commission, including the possibility of prolonging certain agreements for periods not exceeding one year.

2 By Regulation (EEC) No 2054/88 of 23 June 1988 (OJ 1988 L 181, p. 1, hereinafter 'the EEC-Morocco Agreement'), the Council approved the conclusion of an agreement on relations in the sea fisheries sector between the European Economic Community and the Kingdom of Morocco and laid down provisions for its implementation.

3 By Regulation (EEC) No 3954/92 of 19 December 1992 (OJ 1992 L 407, p. 1), the Council approved the conclusion of a new agreement for the same purpose. The first sentence of Article 8(1) of that agreement provides:

'Fishing activities by Community vessels in Morocco's fishing zone shall be subject to the holding of a licence issued by the Moroccan authorities at the request of the competent Community authorities ...'

Point A.1 of Annex I to the agreement provides:

'Each quarter the competent Community authorities shall submit to the competent Moroccan authorities, via the Delegation of the Commission of the European Communities to Morocco, a list of vessels which request to engage in fishing activities within the limits specified for each fishing category in the fishing datasheets annexed to the Protocol ...'

4 Undertakings submitting requests must apply to the authorities of their Member State (in Germany, the Bundesamt für Ernährung und Forstwirtschaft, Federal Office for Food and Forestry, hereinafter 'the Bundesamt'), which check that the technical conditions are met before forwarding the requests to the Commission.

Facts

5 The applicant is a company incorporated under German law, whose activities comprise, in particular, the operation of fishing vessels. It owns the vessel 'De Hoop' with which it wishes to carry out longline fishing in Morocco's fishing zone, under

the EEC-Morocco Agreement. It has therefore submitted various licence requests to the Commission via the Bundesamt.

6 Because the permitted tonnage had been exceeded, the Commission, in accordance with Annex I to the agreement, refused to submit the applicant's licence requests for the first, second and fourth quarters of 1992 to the Moroccan authorities. However, its request for the first quarter of 1993, slightly in excess of the tonnage limit, was accepted after difficult negotiations between the Commission and the Moroccan authorities, as a result of which the applicant re-equipped the 'De Hoop' to meet the requirements of longline fishing off the Moroccan coasts.

7 By letters of 28 December 1992 and 1 February 1993, the applicant submitted to the Bundesamt a request covering the second quarter of 1993, which was forwarded to the Commission.

8 The Commission again negotiated with the Moroccan authorities over the applicant's request for that quarter. At first, the Moroccan authorities tentatively agreed that the vessel in question could be included, even though that again meant that the tonnage limit would be slightly exceeded. Subsequently, they insisted that the tonnage limit must be strictly observed. The Commission therefore refused to include the 'De Hoop' in the list of licence requests submitted to the Moroccan authorities for the second quarter of 1993. Mr Fiedler, of the Bundesamt, was informed of that refusal by telephone on 7 May 1993. The decision and the reasons on which it was based were sent to the applicant by telefax on 12 May 1993.

9 Those were the circumstances in which the applicant brought the present proceedings by application lodged at the Registry of the Court of First Instance on 13 July 1993. Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry. The Court nevertheless requested the parties to reply in writing to a number of questions.

10 By decision of the Court of First Instance of 7 July 1994, after hearing the views of the parties, the case was assigned to the Fourth Chamber sitting as a chamber of three judges.

11 By letter of 18 July 1994 under the second paragraph of Article 21 of the (EC) Statute of the Court of Justice, the Court put two questions to the Council on the interpretation of Articles 167(3) and 354(3) of the Act of Accession.

12 The Council answered those questions by letter of 30 September 1994.

13 The hearing took place on 30 November 1994. The parties presented oral argument and answered questions put by the Court.

Forms of order sought

14 In its application, the applicant claims that the Court should:

(i) annul the Commission's refusal to include the request for a fishing licence for vessel HF 571, 'De Hoop', in the list of licence requests in the longline fishing category to be submitted to the Moroccan authorities under the EEC-Morocco Agreement;

in its reply, it further claims that the Court should:

(ii) order the defendant to pay the costs.

The Commission contends that the Court should:

(i) dismiss the application; and

(ii) order the applicant to pay the costs.

Pleas in law and arguments of the parties

15 The applicant puts forward, in substance, two pleas in law in support of its application. The first alleges a breach of Article 7 of the EEC Treaty in that, in the name of the principle of relative stability, the Commission favours Spanish and Portuguese fishermen at the expense of those from the other Member States of the Community. The second plea alleges a breach of the principle of the protection of legitimate expectations in that the defendant had assured the applicant that it was included on the list submitted to the Moroccan authorities.

First plea: Breach of Article 7 of the Treaty

Arguments of the parties

16 The applicant maintains that the Commission's refusal to submit its request for a fishing licence to the competent Moroccan authorities constitutes a breach of Arti-

cle 7 of the Treaty in that it is the result of a discriminatory practice of the Commission which, on its own admission, favours Spanish and Portuguese fishermen at the expense of those from other Member States.

17 The applicant stresses that there is no basis for such discrimination, whether in the EEC-Morocco Agreement, in any agreement between States relating to the allocation of the fishing quota acquired by the Community under that agreement or in the principle of relative stability. It concludes, in its reply, that the contested decision has no legal basis.

18 In that connection, the applicant first states that the EEC-Morocco Agreement, far from laying down a preferential right to licences for fishermen from the Member States which have traditionally fished in Moroccan waters, provides that the fishing rights are acquired by the Community in return for financial compensation of ECU 360 million, paid by the Community and not by certain Member States. Those rights should therefore benefit fishermen from the Community as a whole.

19 Secondly, the applicant asserts that there has been no agreement between States sharing out the fishing opportunities acquired by the Community under its agreement with Morocco nor, it adds in its reply, has the Council distributed those opportunities as required both by Article 11 of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1) and by Article 8(4)(ii) 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). The applicant considers that it was not for the Commission to take over the Council's role by defining and applying discriminatory criteria for the distribution of the fishing opportunities in question.

20 Thirdly, the applicant stresses that the Commission's discriminatory practice cannot be justified by reference to the principle of relative stability embodied in Regulations No 170/83 and No 3760/92. In the applicant's submission, that principle does not apply to the distribution of fishing opportunities arising under agreements concluded with non-member countries, such as Morocco, in such countries' fishing zones. In its reply, it adds that it is clear from the case-law of the Court of Justice (Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2671 and Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073) that the principle is intended solely to protect the distribution of fishing rights effected between the old Member States against the claims of new Member States such as Spain and Portugal.

21 Nor, it considers finally, may the Commission base its discriminatory policy on Articles 167(3) (for Spain) and 354(3) (for Portugal) of the Act of Accession. Those provisions require the Council merely to adopt 'the decisions appropriate for the continuation of fishing activities resulting' from the agreements concluded by Spain and Portugal before accession but do not specify who is to benefit from maintaining those fishing activities. The Council may either renew the agreements concluded by Spain and Portugal or conclude a new agreement with the non-member State concerned. If it chooses the first option, the Council maintains the status quo for Spain and Portugal as regards both their rights and their obligations. If, however, it chooses the second option, the Council is required only to maintain the fishing activities covered by those agreements. In the present case, the Council chose the second option by entering into a new agreement with Morocco. It was therefore free to distribute the fishing opportunities opened up by that agreement between the various Member States, since the Member States bear, via the Community, the financial burden of the agreement. The applicant considers, therefore, that a decisive factor in the present case is that the EEC-Morocco Agreement is a new, separate agreement and not a renewal of the bilateral agreements previously entered into by Spain and Portugal.

22 The applicant concludes that the provisions of the Act of Accession cannot justify the unequivocal preference accorded to Spain and Portugal in the allocation of the fishing capacities arising under the agreement with Morocco.

23 The applicant claims that its analysis does not give rise to a legal vacuum with regard to the criteria for distributing the fishing opportunities arising under the EEC-Morocco Agreement. Those opportunities should be distributed on the basis of the general principles to be derived from the regulations relating to fisheries policy, as interpreted by the Court of Justice (*Portugal and Spain* v *Council*, cited above). In the applicant's view, the agreement with Morocco 'establishes new fishing opportunities ... not previously prosecuted under the common fisheries policy' within the meaning of Article 8(4)(iii) of Regulation No 3760/92. It concludes that it was for the Council, acting by a qualified majority on a proposal from the Commission, to decide on the method of allocation taking into account the interests of all Member States. In the applicant's submission, the unequivocal preference shown by the Commission towards Spain and Portugal in the allocation of the new fishing opportunities opened up by the agreement with Morocco does not take into account the interests of all the Member States.

24 The Commission freely admits that Spanish and Portuguese vessels are given priority on the lists which it submits to the Moroccan authorities under the EEC-Morocco Agreement and thus — in view of the number of applications submitted by those countries — account for a large majority of the requests on those lists.

25 It argues that it is obliged to take that approach both by Articles 167(3) (for Spain) and 354(3) (for Portugal) of the Act of Accession and by Articles 4(1) of Regulation No 170/83 and 8(4)(ii) of Regulation No 3760/92, which enshrine the principle of relative stability.

26 As regards Articles 167(3) and 354(3) of the Act of Accession of Spain and Portugal, the Commission submits that it is clear from the economy of those provisions and in particular from a comparison of their first and second with their third paragraphs that the reference in the latter to the 'continuation of fishing activities resulting therefrom' can only apply to the period following the expiry of the bilateral agreements concluded by Spain and Portugal with non-member States and that such 'continuation' can only be for the benefit of Spain and Portugal. Such agreements are 'their' fishing agreements, which they 'contributed' to the Community

and which they can no longer extend bilaterally since they have transferred the power to do so to the Community. That 'loss' should therefore be offset by the 'continuation' of the fishing activities of Spanish and Portuguese vessels. That interpretation is corroborated by the 'Joint declaration concerning fisheries relations with third countries' annexed to the Act of Accession, which refers in turn to the policy mentioned in internal negotiation documents No 305 (E) of 2 May 1985 (for Spain) and No 259 (P) of 7 May 1985 (for Portugal).

27 The regulations too, in the Commission's submission, lead to the same result as the Act of Accession. Article 4(1) of Regulation No 170/83 and Article 8(4)(ii) of Regulation No 3760/92 both specify that fishing opportunities are to be distributed between Member States in such a way as to ensure each Member State relative stability of fishing activities for each of the stocks concerned. They thus require the Commission to maintain the fishing activities of Spanish and Portuguese fishermen arising out of the bilateral agreements which the Member States concerned had entered into with Morocco and which they had 'contributed' to the Community.

28 The Commission considers that the advantages which Spanish and Portuguese fishermen derive from the principle of relative stability, which may be inferred both from Articles 167(3) and 354(3) of the Act of Accession and from Articles 4 of Regulation No 170/83 and 8(4)(ii) of Regulation No 3760/92, are in fact the counterpart to the disadvantages which they suffer because, under the same principle, there are certain Community fishing quotas to which they do not have access.

29 Finally, the Commission submits that the applicant, in so far as it argues that there is no legal basis for the contested decision, is introducing a new plea in law within the meaning of Article 48(2) of the Rules of Procedure, which must be declared inadmissible because it was only raised in the reply.

Findings of the Court

30 The question raised in this case is whether, having regard to Article 7 of the Treaty, the Commission's practice of giving fishing licence applications made by Spanish and Portuguese fishermen priority for inclusion on the lists which it submits to the Moroccan authorities pursuant to Point A.1 of Annex I to the EEC-Morocco Agreement can be justified by Articles 167(3) and 354(3) of the Act of Accession of Spain and Portugal, inasmuch as they refer to the 'continuation of fishing activities resulting (from the agreements referred to in paragraph 1)'.

31 It must be observed at the outset that the applicant in this case complains only of unfavourable treatment in comparison with Spanish and Portuguese fishermen and thus not of unfavourable treatment in comparison with fishermen who are neither Spanish nor Portuguese.

32 The Court considers that in order to settle the question in issue Articles 167(3) and 354(3) of the Act of Accession (see above, paragraph 1) must be read in the light of the other provisions of the chapters to which they belong and of the preparatory documents on the basis of which they were drafted.

33 The words which have to be interpreted are 'fishing activities' resulting from fisheries agreements concluded before accession by Spain and Portugal with non-member countries. The term 'fishing activities' — or equivalent terms, such as 'fishing', in the various language versions — occurs frequently in the chapters of the Act of Accession and in Regulation No 3760/92. It is used to refer to activities in which nationals of a particular Member State are already actually engaged.

34 The Court considers that if the authors of the Act of Accession had intended, as the applicant submits, to require the Council to continue the fishing possibilities resulting from the said agreements for the benefit of the Community as a whole, they would have used the term 'fishing possibilities' as they did in Articles 161(4) and 349(2) and (3). The latter provision demonstrates a clear distinction between fishing possibilities and fishing activities; it authorizes the Council to determine 'fishing possibilities' and a corresponding number of vessels on the basis of 'the existing situation of ... fishing activities', thus showing that fishing activities are the result of the exploitation of fishing possibilities by identifiable vessels.

35 That interpretation is corroborated by the preparatory documents to the Act of Accession which include, under the heading of Bilateral Relations, Fisheries Agreements entered into by Spain (Portugal), the following passage:

(ii) The Conference has noted the policy which the Community follows in the sphere of international fishing relations:

— It seeks to maintain fisheries rights acquired under bilateral agreements previously concluded by Member States or by the Community, to restore the Community's fishing activities and to obtain new rights of access in order to increase the overall fishing possibilities available to Community vessels. The Community will therefore follow the same approach *with a view to maintaining the activities of Spanish (Portuguese) vessels and will offer appropriate compensation to non-member countries*;

— It respects the relative stability of fishing activities.

36 That analysis of the respective scopes of the terms 'fishing activities' and 'fishing possibilities' in the Act of Accession is confirmed by an analysis of the use of the

same or equivalent terms in the different language versions of Regulation No 3760/92, in particular in Article 8(4)(ii), which specifies that 'fishing opportunities' are to be distributed between Member States in such a way as to assure each Member State relative stability of 'fishing activities' for each of the stocks concerned.

37 Articles 167(3) and 354(3) of the Act of Accession, in so far as they refer to fishing activities, therefore require the Council to continue the fishing activities in which Spain and Portugal were engaged on the basis of fisheries agreements concluded by them before their accession to the Communities.

38 It follows that, since the term 'fishing activities' used in Articles 167(3) and 354(3) of the Act of Accession refers to the activities of Spanish and Portuguese fishermen authorized under bilateral agreements concluded by Spain and Portugal before accession, it was proper to give them priority in the submission of their licence applications to the Moroccan authorities, in so far as it is not alleged that the EEC-Morocco Agreement created fishing possibilities exceeding those used by Spanish and Portuguese fishermen on the basis of the bilateral agreements referred to in Articles 167(1) and 354(1) of the Act of Accession. It further follows that Articles 167 and 354 of the Act of Accession provided the Commission with the criterion for allocation which the applicant claims that the Council failed to establish.

39 The applicant cannot regard that solution as contrary to the prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty. It is clear from the case-law (see in particular *Romkes* v *Officier van Justitie*, paragraph 23, *Portugal and Spain* v *Council*, paragraphs 43 and 44, Case C-71/90 *Spain* v *Council* [1992] ECR I-5175, paragraphs 28 and 29, and Case C-73/90 *Spain* v *Council* [1992] ECR I-5191, paragraphs 34 and 35) that fishermen who did not have fishing activities in a given zone may be considered not to be in the same position

as those who had fishing activities in that zone and that the difference between their situations is justification for the fact that only the latter are entitled to fish there. The requirements of the Act of Accession thus concur with those of the principle of equal treatment, the distinguishing criterion applicable being imposed by Articles 167(3) and 354(3) of the Act of Accession.

40 Nor is that conclusion weakened by the fact that it means that the Community as a whole finances the EEC-Morocco Agreement under which Spanish and Portuguese fishermen benefit preferentially. The financing of the various Community policies implementing Articles 2 and 3 of the EEC Treaty is the result of choices expressed in the Community's budget. Provided that no breach of the principle of equal treatment has been found, an individual may not derive any claim from the manner in which the Community allocates its budget resources.

41 The plea in law put forward in the reply, alleging that there is no legal basis for the contested refusal, is, for its part, a new plea in law within the meaning of Article 48(2) of the Rules of Procedure and must therefore be declared inadmissible.

42 In any event, the Court considers that plea to be unfounded inasmuch as, since the criteria, defined by Articles 167 and 354 of the Act of Accession, for selecting the requests submitted to the Moroccan authorities by the competent Community authorities left no discretion to the competent Community authority, Article 155 of the EEC Treaty gave the Commission the power to effect that selection in practice.

43 The first plea in law must therefore be rejected.

Second plea: Breach of the principle of the protection of legitimate expectations

Arguments of the parties

44 The applicant maintains that, by refusing to submit a licence application to the Moroccan authorities although a member of the Commission's staff had informed the Bundesamt that the licence had been granted, the Commission infringed the principle of the protection of legitimate expectations.

45 It adds that it had every reason to have faith in that 'oral confirmation', since it was given by the same official who had informed it that a licence had been granted for the previous quarter. The Commission may not hide behind the argument that the official in question had no power to bind the Commission, since the only relevant question is whether that official's statement created a legitimate expectation on the basis of which the Commission was under an obligation to treat the applicant as it would have done if the fishing licence had in fact been granted.

46 The Commission denies that its official made the statement alleged by the applicant, although it admits that he may have drawn up an interim report on the progress of the negotiations with Morocco which, at that time, was taking a favourable approach. In any event, it argues that a statement by a member of its staff can in no way be regarded as binding on the Commission, because the statement concerned past events and was made by an official unauthorized either to speak in the Commission's name or to bind the Commission.

47 Finally, the Commission submits, even if the facts alleged by the applicant were established, the only claim that could be made against the Commission is that it passed on inaccurate information to the applicant. It accepts that such a situation may, in certain circumstances, cause damage giving rise to a right to reparation or

even be an element in the creation of a legitimate expectation but it points out that in the present case no claim for damages has been brought before the Court, as the applicant admits, and that the applicant has not shown that its expectations actually qualified for protection in any way. It adds that any inaccurate information that may have been given to the applicant on 17 March or 27 April 1993 was rectified in any event on 5 May 1993, before the requested licence would have taken effect on 15 May 1993.

Findings of the Court

48 The allegation made against the Commission is that it provided the applicant with inaccurate information to the effect that a licence had been issued and not that it undertook to issue a licence to the applicant or submit its request to the Moroccan authorities.

49 In the absence of any undertaking by the Commission as to its future attitude towards the applicant, there can be no question of a breach of the principle of the protection of legitimate expectations obliging the Commission to 'treat the applicant as it would have done if the fishing licence had in fact been granted', as the applicant claims.

50 Furthermore, the Court notes that the applicant does not allege that it was led to take any decisions which caused it to suffer damage on the basis of the information given to it by a member of the Commission's staff.

51 The second plea must therefore be rejected.

52 It follows from all the foregoing that the application must be dismissed.

Costs

53 Under Article 87(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 applicant has been unsuccessful, the form of order sought by the Commission must be granted and the applicant ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Lenaerts Schintgen García-Valdecasas

Delivered in open court in Luxembourg on 8 March 1995.

H. Jung K. Lenaerts

Registrar President