OPINION OF ADVOCATE GENERAL GULMANN

delivered on 26 November 1992 *

Mr President,
Members of the Court,

1. This action is brought by a Spanish company, Pesqueras Echebastar SA (hereinafter 'Echebastar'), against the Commission, and concerns the Commission's failure to award Echebastar Community aid for the construction of a fishing vessel.

The action is brought:

— in pursuance of Article 175 of the EEC Treaty, claiming that the Commission's failure to award Echebastar the aid requested by the company constitutes an unlawful failure to act;

— under Article 176 of the Treaty claiming that the Commission should be ordered to grant Echebastar the aid in question; and

— in pursuance of Article 178 and the second paragraph of Article 215, claiming that the Commission is required to compensate Echebastar for the damage the company has suffered as a result of the Commission's failure to act.

* Original language: Danish.

Summary of the legal and factual aspects of the case and the arguments of the parties

2. In pursuance of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector, [1] the Commission is empowered to grant Community financial aid for a series of measures in the fisheries sector.

Title II of the regulation contains provisions on measures for the restructuring and renewal of the fishing fleet. Article 6(1) provides that the Commission may grant aid *inter alia* towards private projects for the construction of new fishing vessels. By an application received by the Commission on *30 October 1987* Echebastar requested aid for such a project.

Structural policy in the fisheries sector is implemented within the framework of *multi-annual guidance programmes* for each individual Member State. The Commission has explained that conditions in the fishing industry are different in the various Member States and that it is therefore necessary for measures concerning adaptation of the fleets to be adjusted according to the individual Member State. By a decision of 11 December 1987, [2] amended by a decision of 9 February

1 — OJ 1986 L 376, p. 7.
2 — OJ 1988 L 70, p. 27.

1990, [3] the Commission approved the multiannual guidance programme for Spain.

It may be seen from Article 2 of that decision that the Commission's approval was given on condition, *inter alia*, that Spain forwarded to the Commission twice a year information on the development of its fishing fleet. Moreover Article 5 of Regulation No 4028/86 provides that for the purpose of the monitoring of programmes Member States are to send to the Commission each year before 1 April a summary report on the state of progress of their programmes.

According to Article 6(2)(a) of the regulation it is an express *condition for the grant of Community aid* for the construction of new fishing vessels that *such projects shall form part of the multiannual guidance programme approved by the Commission.*

3. Title XI of the regulation contains rules on the procedure for the examination of projects. According to Article 35 the Commission is to take *decisions twice a year* on projects of the type in question here, that is, not later than 30 April on applications submitted not later than 31 October of the preceding year and not later than 31 October on applications submitted not later than 31 March of the current year.

The procedure for the award of Community aid is such that applications for aid are submitted to the Commission through the Member State concerned once the approval of the latter has been obtained (see Article 34 of the regulation). The Member States have previously examined the applications for aid in order to check that they fall within the framework of the multiannual guidance programme and have classified them according to a scale of priorities from 1 to 5. The Commission's processing of the applications falls into two phases. First the various applications are examined individually with a view to appraising whether they satisfy the conditions for the award of aid. Then the applications which meet the conditions are compared in order to decide which applications should be given priority. Community aid is awarded according to that order of priority until the resources available are exhausted.

It may be seen from Article 40 of the regulation that for the period 1987 to 1991 the Commission had a *total budget appropriation of 800 m. ECU* for implementation of measures in the fisheries sector. The Commission has explained that the budgetary authorities fix a maximum amount available within those limits for each financial year.

Applications which meet the conditions of the regulation for the receipt of aid but which it has not been possible to accept because the appropriations available are insufficient *are carried forward* in pursuance of Article 37(1), *once only, to the following budgetary year.*

4. The Commission has stated that in *1988* it was unable to take decisions for the award of aid because the Member States had not forwarded the information with regard to the development of their fishing fleets, which was necessary to decide whether the applications for aid which had been received came

3 — OJ 1990 L 66, p. 27.

within the guidance programmes approved for each Member State. The Commission therefore decided to extend the validity of the applications for aid examined in 1988 for an additional budgetary year.

Echebastar's application for aid was accordingly examined in the context of the two decisions for *1989*. However, the officers of the Commission informed Echebastar by letter of 22 November 1989 that the application for aid could not be granted because 'the appropriations in the budget for financing projects in 1989 were insufficient'.

As a result of the rule set out in Article 37(1), Echebastar's application was considered in the context of the two decisions for *1990*. As regards the decisions for April, the Commission has explained that it again had to refrain from taking a decision because the Member States had omitted to forward the necessary information. For the same reason the October decisions were postponed, so that for a number of Member States, including Spain, they could be taken only in December.

By a letter of 18 December 1990, which reached Echebastar on *21 January 1991*, the officers of the Commission informed Echebastar that *the company's application for aid could not be granted* because the appropriations available for financing projects in 1990 were not sufficient.

On *25 January 1991* Echebastar brought an action before the Court of Justice. It appears from the application that the company had been notified before the application was submitted to the Court that the request for aid could not be granted.

5. It appears from the documents in the case that Echebastar is claiming that the Commission had a duty to award Community aid to the company. It states in that respect that it meets the conditions laid down in the regulation for the award of aid and that moreover the regulation gives it a preferential position, which in the company's view implies that it has an actual right to the award of aid.

6. As regards the said preferential position, Echebastar refers first of all to *Article 8(2)(b)* of the regulation, according to which priority is given to projects for the construction of vessels 'which are intended to replace vessels lost as a result of accident or wreck, irreparably damaged, broken up or permanently withdrawn from fishing activities in the Community'.

The Commission has stated that by the application of that priority rule it wished to ensure that owners of ships which had been accidentally lost should also receive aid under the terms of the project and that the total capacity of vessels lost should correspond to that of the new vessel. Moreover for a variety of reasons the Commission gives priority to vessels which have been accidentally lost over vessels which have been voluntarily withdrawn from fishing activities. Accordingly, as regards Echebastar's application for aid, the Commission has stated that it received a lower priority

than many other Spanish applications for aid because one of the three vessels whose definitive loss by wreck was given as a reason for the aid application did not belong to Echebastar and a second had not been lost by shipwreck but had been exported to Senegal.

7. Echebastar further alleged that it had priority by virtue of *Article 37(1)* concerning the carrying forward of applications which had not been granted to the following budgetary year and has also claimed in that respect that the fact that the Spanish General Secretariat for Sea Fisheries and the Commission informed it by letters of 12 February 1990 and 17 May 1990 respectively that a decision would be taken on the company's application in the course of the October series of decisions at the latest created a legitimate expectation that the aid requested would be awarded to the company.

The Commission, on the other hand, has stated that the rule set out in Article 37(1) simply gives a right to a fresh appraisal the following year conjointly with all the applications which may be received during the next budgetary year but in no way gives any priority over them.

8. Finally Echebastar has, in addition to the arguments already mentioned, also contended that the Commission had not exhausted the resources available either in 1989 or in 1990 and that there was consequently no justification for the company, which satisfied the conditions of the regulation, to be deprived of aid. Echebastar has endeavoured to substantiate that argument in several ways and takes as its basis the idea that, from a total appropriation of ECU 800 m. for five years, the Commission was obliged to use ECU 160 m. each year.

The Commission has stated that in 1989 ECU 145 m. were allocated for improvement and adaptation of structures in the fishery and aquaculture sector. The Commission decided to use ECU 63.45 m. of that for restructuring and renewal of the fishing fleet, which should be compared with the fact that in 1989 applications were submitted for aid for the construction of new fishing vessels amounting to ECU 344.17 m. Correspondingly, in 1990, of a total appropriation of ECU 180 m., ECU 44.15 m. were used for restructuring and renewal of the fishing fleet. Applications were submitted for ECU 328.51 m. in all. Consequently the Commission was compelled both in 1989 and in 1990 to refuse a considerable number of applications which satisfied the conditions for the award of aid.

9. In essentials, Echebastar supports its claim that the Commission's failure to award it aid constitutes an unlawful failure to act, contrary to the Treaty, on the fact that the Commission has not complied with the time-limits laid down in Article 35(1)(a) of the regulation for the taking of decisions. In Echebastar's view the Commission ought to have taken a decision to grant the company aid either by 31 October 1989 or by 30 April 1990 or, at the latest, by 31 October 1990.

The Commission has pointed out that the delays which occurred with regard to a

decision on Echebastar's application were due to the fact that Spain had not forwarded the necessary information with regard to the development of its fishing fleet. The Commission does not think, therefore, that it can be blamed for these delays. Moreover the Commission has stressed that observance of the time-limit for taking decisions is a secondary obligation in comparison with its obligation to ensure that the decisions taken are based on reliable information.

10. For a summary of the other arguments of the parties I refer the Court to the Report for the Hearing, since I shall mention them hereinafter only in so far as I find it necessary for arriving at a decision in this case.

The alleged failure to act

11. The Commission contends that Echebastar's claim that the Commission unlawfully failed to take a decision granting the company the aid for which it had applied should be dismissed as inadmissible. By way of introduction the Commission has stated that its letter of 18 December 1990 constituted a definition of its position with regard to Echebastar's application and the reasons on which it was based, and that the conditions under Article 175 of the Treaty for bringing an action for failure to act are therefore not met.

Echebastar contends that its claim must be accepted as admissible because the period of two months prescribed by the second paragraph of Article 175 of the Treaty within which the Commission must define its position expired on 2 December 1990 and because the letter of 18 December 1990 constitutes neither a formal decision nor a definition of its position within the meaning of Article 175. Echebastar has stated that the letter implies only that the decision regarding the project at issue was postponed to a subsequent date, and it amounts to a mere letter for information which cannot be the basis of a claim for annulment.

12. In my view the Commission's contention that the application should be dismissed as inadmissible must be upheld.

The Commission's letter of 18 December 1990 is a notification that a decision has been taken on the matter. It is expressly stated that the application for aid cannot be granted and the reason given for the refusal is that the resources available for financing projects for 1990 were insufficient.

It is therefore a legal act which, irrespective of its nature or form, had legal consequences for Echebastar and which could therefore have been made the subject of an action for annulment under Article 173 of the Treaty. [4]

The questions of whether the Commission was justified in notifying Echebastar of its refusal by means of a letter signed by the director of the relevant directorate, whether there is a sufficient statement of the reasons on which the decision is based and whether the alleged failure to observe the time-limits for taking a decision affect the possible content of the decision are not relevant for

4 — See the judgment of the Court in Case 22/70 *Commission* v *Council* ('AETR') [1971] ECR 263 in which the Court declared that 'an action for annulment must ... be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects'.

deciding whether the action for failure to act is admissible. Those are questions which must be considered when deciding whether the decision taken is unlawful and should therefore be annulled. [5]

The fact that the Commission took a decision in the matter before the action for failure to act was brought must, according to the Court's case-law, result in the action's being dismissed as inadmissible. That case-law applies irrespective of the fact that Echebastar, by its action for failure to act, is claiming not only that the Commission was obliged to define its position on Echebastar's application, but also that it was obliged to take a positive decision awarding it aid. It may be seen from the case-law of the Court relating to Article 175 that:

'it is clear from the context, especially from the first paragraph, that by its use of the phrase "has failed to address to that person any act", the article refers to failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned'. [6]

On that basis the Court dismissed the action for failure to act as inadmissible on the ground that the institution in question had taken a decision in the matter, so that the conditions for initiating proceedings under Article 175 were not met.

In this case the Commission defined its position on the question of whether Echebastar was entitled to receive aid. Even though that decision had a content and was adopted in a form other than those desired by Echebastar, it must in my view lead to a dismissal of the action for failure to act as inadmissible.

13. That result is not affected by the question of whether the Commission's decision in this case was adopted, as the Commission claims, within the period of two months prescribed by the second paragraph of Article 175 of the Treaty, or whether, as Echebastar claims, it was taken only after the expiry of that period. What is decisive is, in my view, that the refusal was received before the proceedings were brought. [7] The Commission's decision means that there is no longer a failure to act within the meaning of Article 175 of the Treaty and the action for failure to act had accordingly already lost its purpose before the action was brought. The purpose of the period of two months prescribed by

5 — There is a misunderstanding of the content of Article 37(1) of the regulation when Echebastar claims that it follows from that provision that the only consequence of the Commission's letter is that the company's application is carried over for reconsideration in the following year. It is stated expressly in Article 37(1) that an application may be carried over to the following budgetary year once only. As far as Echebastar was concerned, that possibility had therefore already been exhausted with the Commission's decision notified to Echebastar on 22 November 1989. Moreover, it may be noted that any possibility of carriage forward to the following budgetary year does not, in my view, deprive a decision not to grant aid in the current year of its nature of a measure engendering legal effects.

6 — See the judgment in Case 8/71 *Komponistenverband* v *Commission* [1971] ECR 705, paragraph 2. The same form of words recurs in the judgments in Joined Cases 166 and 220/86 *Irish Cement Limited* [1988] ECR 6473 and in Joined Cases C-15 and 108/91 *Josef Buckl & Söhne and Others* v *Commission* [1992] ECR I-6061, paragraph 17.

7 — It may be noted that a decision which is adopted only after proceedings are brought can, in my view, only have the result that there is no need to give judgment in the case in so far as the applicant has thereby received what he wished for. See the judgment in Case 377/87 *Parliament* v *Council* [1988] ECR 4017 ('budgetary procedure'), and my Opinion delivered on 8 July 1992 in Joined Cases C-15 and 108/91 *Josef Buckl & Söhne* at section 16. In the meantime the Court has declared in its judgment in that case that even a decision refusing the legal act desired by the applicant, adopted after the initiation of the action for failure to act, implies that there is no need to proceed to judgment in the case.

the second paragraph of Article 175 is to give the Commission the opportunity to put an end to the alleged failure to act and the action for failure to act cannot therefore be brought before that period has expired. The expiry of the period, however, does not entitle the applicant to a declaration of a failure to act in cases in which that failure ceased before the action was brought. The Court has held that an applicant who has accordingly the opportunity to bring an action for annulment, has no longer a legal interest in an action for failure to act. [8]

14. I shall propose that the Court dismiss the action for failure to act as inadmissible on those grounds and I think it is therefore unnecessary to give an opinion on the Commission's remaining arguments.

The claim that the Commission be ordered in pursuance of Article 176 of the Treaty to grant aid to Echebastar

15. This claim must be rejected as inadmissible, since the Court has no jurisdiction to deliver a judgment to that effect. Under Article 175 the Court is empowered only to declare that there has been an unlawful failure to act, whereupon the institution in question is required under Article 176 of the Treaty to take the necessary measures to comply with the judgment of the Court.

The claim for compensation

16. Echebastar has claimed compensation under the second paragraph of Article 215 and under Article 178 for the damage it has suffered by reason of the Commission's failure to act. In its application Echebastar has stated that the claim for compensation covers both the damage the company has suffered as a result of not being awarded Community aid and the damage resulting from the fact that it has itself had to finance the Community aid from the day on which it should have been awarded. In its reply, Echebastar has estimated its loss at the amount corresponding to interest on the amount of aid, calculated from the day on which Echebastar thinks it should have been awarded.

17. It is possible to understand the reply as meaning that Echebastar has limited its claim for compensation to cover only the loss suffered as a result of the fact that the company itself has had to finance the Community aid. Such a limitation is logical in so far as the company has lodged a separate claim for payment of the Community aid itself under Article 176 of the Treaty.

On the assumption that the claim for compensation has been thus limited in the reply, that leaves only the question of a claim for the payment of interest on the late payment of Community aid and consequently of a purely ancillary claim as compared with the principal 'claim for payment'.

8 — In its judgment in Joined Cases 5 to 11 and 13 to 15/62 *San Michele* v *High Authority* [1962] ECR 449 the Court stated, with regard to an action for failure to act under the ECSC Treaty that:
'it is not disputed that the decision reached the applicants before they brought their action for failure to act.
In these circumstances, the applicants had no legitimate grounds for complaining of a failure to act which no longer existed at the time the actions were brought, since their legal protection was sufficiently assured by the possibility of making an application for annulment of the decision under Article 33 of the Treaty.
Consequently, the actions for failure to act must be ruled to be inadmissible owing to lack of legal interest.'

If the claim is to be understood in that way, it may be rejected for the simple reason that no decision can be taken on the principal claim.

18. If it is assumed that the claim for compensation includes also the damage suffered as a result of the fact that in the company's view the Commission has unlawfully failed to award it Community aid, it is necessary to consider first the significance of the fact that the action for failure to act, brought at the same time, must be dismissed, and that Echebastar has not brought proceedings for the annulment of the Commission's refusal to award the company aid.

The Court has previously decided that:

— 'the action for damages ... was established by the Treaty as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions for its use, conceived with a view to its specific purpose. It would be contrary to the independent nature of this action as well as to the efficacy of the general system of forms of action created by the Treaty to regard as a ground of inadmissibility the fact that, in certain circumstances, an action for damages might lead to a result similar to that of an action for failure to act under Article 175', [9]

— 'an action for damages ... differs from an action for failure to act in that its end is not the adoption of a particular measure but compensation for damage caused by an institution in the performance of its duties'. [10]

In similar judgments the Court has established the independent nature of the action for damages as against the action for annulment. [11]

The fact that the Court has stressed that the action for damages is an independent legal remedy implies that such an action may be declared admissible even though the Court has not had occasion to establish an action for failure to act or for annulment the existence of the alleged unlawful failure or measure.

However, that does not mean that that case-law also implies that the claim for damages in this case may be regarded as admissible.

19. As I have said, Echebastar has drawn up its claim for damages as a claim for compensation for the damage caused by the Commission's failure to act. It is true that the case-law cited above means that a dismissal of the action for failure to act brought at the same time does not in itself mean that the action for damages must be dismissed. However, it is in my view decisive that in this case

9 — Judgment in Case 4/69 *Lütticke* v *Commission* [1971] ECR 325, paragraph 6.

10 — See the judgment in Case 153/73 *Holtz & Willemsen* v *Council* [1974] ECR 675, paragraph 4.

11 — See the judgment in Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, in which the Court stated *inter alia* in paragraph 3 that «the action for damages ... differs from an application for annulment in that its end is not the abolition of a particular measure, but compensation for damage caused by an institution in the performance of its duties».

I am proposing that the Court should dismiss the action for failure to act on the ground that at the time at which the action was brought there was no unlawful failure to act since in fact the Commission had taken a decision in the matter. That finding must, as I see it, lead at the same time to the dismissal of a claim for damages based on liability for an unlawful failure to act.

20. However, the question is whether the Court can reasonably dismiss the action for damages solely on the consideration just mentioned. However the claim for damages is formulated, the substance of this action seems to be that Echebastar thinks that the Commission is liable for damages because its refusal of the company's application for aid is unlawful. It is therefore necessary to consider whether the action for damages, seen in this light, may be regarded as admissible.

I think there are good grounds for regarding an action for damages with that content as inadmissible in spite of the fact that it is in principle independent of an action for annulment. The salient point in this case is that the alleged injurious conduct is the Commission's individual refusal of the applicant's request for aid, and that the compensation claimed corresponds to the unpaid aid with interest from the day on which the applicant thinks the aid should have been paid. In my opinion it would, in such a situation, conflict with the system of legal remedies established by the Treaty to accept that the action for damages may be used to achieve the result desired by the applicant.

That limitation of the field of application of the action for damages may be substantiated in two ways, of which I prefer the first, but I shall also mention the second.

21. The first such way is based on the fact that if the company's claim for damages is sustained, Echebastar will be placed in the same situation as if the Commission had awarded the aid sought and will therefore achieve a result which in my view could not have been achieved on the basis of an action for annulment. In my opinion it may be taken as fundamental that a judgment annulling the Commission's refusal is not tantamount to a finding that in a situation such as this the Commission has a positive duty to grant an application. As the Commission must necessarily exercise a discretion in deciding which applications may be granted, a finding that it has acted unlawfully will only imply that the Commission has a duty to rectify the errors which have occurred in dealing with the application and to exercise its discretion afresh on that basis.

As I see it, an action for damages cannot be used to establish a Commission 'duty to pay' which could not be achieved by an application for annulment.

22. The second possible reason for rejecting the claim for damages is that this case may be regarded as covered by the special exception to the principle of the independent nature of an action for damages which the

Court laid down in its judgment in Case 25/62 *Plaumann* v *Commission*, [12] the content of which the Court clarified in its judgment in Case 175/84 *Krohn* v *Commission*. [13] In that case the Commission had contended that Krohn's claim for compensation should be rejected, relying upon the *Plaumann* judgment and claiming that 'an application for compensation cannot be brought if it would nullify the legal effects of an individual decision which has become definitive'. [14] The Court rejected the Commission's objection, referring to the autonomous nature of an action for damages and stating that the existence of an individual decision which has become definitive cannot act as a bar to the admissibility of such an action. However, the Court continued as follows:

'The decision cited by the Commission relates solely to the exceptional case where an application for compensation is brought for the payment of an amount precisely equal to the duty which the applicant was required to pay under an individual decision, so that the application seeks in fact the withdrawal of that individual decision' (paragraph 33).

It may be claimed that this action for damages constitutes such an exceptional case. By its claim for damages Echebastar is seeking payment of the amount for which the company had applied and hence the indirect annulment of the individual decision consisting in a refusal of the company's application for aid. In these special circumstances it would not, in my view, be incompatible with the case-law of the Court concerning the fact that the action for damages, which is in principle of an independent nature, to regard the claim for damages as inadmissible.

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23. In view of the foregoing considerations I shall suggest that the Court dismiss the action as inadmissible and order the applicant to pay the costs.

12 — [1963] ECR 95. In that judgment the Court stated as follows:
'the contested decision has not been annulled. An administrative measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage upon those whom it affects. The latter cannot therefore claim damages by reason of that measure. The Court cannot by way of an action for compensation take steps which would nullify the legal effects of a decision which, as stated, has not been annulled'.

13 — [1986] ECR 753.

14 — See paragraph 30.