OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 11 July 1989 *

Mr President,
Members of the Court,

A — Facts

1. In the case of the Commission (hereinafter referred to as 'the applicant') against the Kingdom of the Netherlands (hereinafter referred to as 'the defendant') on which I now deliver my Opinion, the Commission is seeking, by way of an action to establish an infringement of the Treaty, a declaration that the Kingdom of the Netherlands has failed to fulfil Community obligations under the common fisheries policy.

2. In the years 1983 to 1985 the catch quotas allocated to the Netherlands were exceeded, sometimes by as much as several hundred per cent.

3. The applicant takes the view that quotas were exceeded because the prohibition of fishing provided for in Article 10(2) of Regulation No 2057/82 [1] was imposed too late and on account of a failure to fulfil the obligations incumbent on Member States in the management of quotas and the supervision of fishing activities (Article 5(2) of Regulation No 170/83, [2] Articles 1 and 6 to 10 of Regulation No 2057/82). The application is based essentially on the submission that fishing was prohibited too late.

4. The applicant claims that the Court should:

(i) declare, pursuant to the second paragraph of Article 169 of the EEC Treaty, that, owing to the exceeding of fishing quotas allocated to it for 1983, 1984 and 1985, the Kingdom of the Netherlands has failed to meet in full its obligations under Article 5(2) of Regulation No 170/83 of 25 January 1983 and Articles 1 and 6 to 10 of Council Regulation No 2057/82 of 29 June 1982, in conjunction with the Council regulations fixing the quotas for the years in question;

(ii) order the Kingdom of the Netherlands to pay the costs.

5. The defendant contends that the Court should:

(i) dismiss the application as inadmissible;

(ii) in so far as the application is admissible, dismiss it as unfounded;

* Original language: German.

1 — Council Regulation (EEC) No 2057/82 of 29 June 1982 establishing certain control measures for fishing activities by vessels of the Member States (OJ 1982, L 220, p. 1)

2 — 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)

(iii) order the Commission to pay the costs.

6. The defendant claims that the breaches of quotas occurred for reasons beyond its control, for example because of illegal catches or the late transmission of notifications of landings in foreign ports.

7. It takes the view that the application is inadmissible because it is not sufficiently precise.

8. I refer to the Report for the Hearing for an account of the facts of the case and the submissions of the parties.

B — Opinion

I — *Admissibility*

9. The defendant's principal defence is the procedural submission that the application is inadmissible because it is insufficiently precise. Therefore the question to be examined is whether the application, if well founded, can form the basis for a judgment establishing the existence of an infringement of the Treaty. The formal claims circumscribe what the applicant is seeking to have established.

10. Thus, the wording of the application in conjunction with the relevant regulations should make it appear possible that there has been a breach of an obligation by a defendant Member State in the form of an infringement of the Treaty. A number of infringements can be distinguished in the complex formulation of the application.

11. *1.* First, it is submitted that Article 5(2) of Regulation No 170/83, the basic regulation laying down Community rules for the conservation and management of fishery resources, has been infringed. The provision in question imposes an obligation on Member States to determine, in accordance with the applicable Community provisions, the detailed rules for the utilization of the quotas allocated to them. The second sentence of Article 5(2) of Regulation No 170/83 provides that detailed rules for the application of the provision may be adopted in accordance with the Management Committee procedure. Thus, infringement of Article 5(2) of Regulation No 170/83 is possible whenever national rules for managing the quotas do not comply with the Community provisions in force. A Member State's failure to adopt detailed rules may also constitute an infringement of the Treaty.

12. Consequently, Article 5(2) of Regulation No 170/83 defines a specific obligation which, if not fulfilled, can lead to defeat in the action to establish an infringement of the Treaty.

13. *2.* The applicant also contends that Articles 1 and 6 to 10 of Regulation No 2057/82 establishing certain control measures for fishing activities by vessels of the Member States have been infringed. Article 1 requires each Member State, within ports situated in its territory and

within maritime waters subject to its sovereignty or jurisdiction, to inspect fishing vessels flying the flag of, or registered in, a Member State in order to ensure compliance with all the regulations in force concerning conservation and control measures. The Member States are thereby under a general duty to carry out supervision with specific reference to the conservation and control measures. Moreover, Article 1(2) requires the Member States to take penal or administrative action if the conservation and control measures have been infringed and thereby to punish the infringement. Finally, the Member States are required to coordinate their control activities in order to make them as effective as possible.

14. An infringement of the Treaty in relation to Article 1 of Regulation No 2057/82 could consist, for example, in an inadequate implementation of the required control measures. In order to establish an infringement it would then be necessary to specify in more detail which conservation and control measures were not adequately observed and, where necessary, what steps ought to have been taken.

15. Examples which come to mind are a failure to fulfil the obligations laid down in Article 6 to 10 of Regulation No 2057/82 such as verification of the declarations required of skippers under Article 6(1) (Article 6(2)), the duty to record landings (Article 9(1)) and notify them to the Commission within a time-limit (Article 9(2)) and to prohibit catches in good time (Article 10).

16. Even without making reference to specific conservation and control measures, it is still possible to establish that a Member State has failed to fulfil its obligations, for example, under Article 1(2) of Regulation No 2057/82, if there is no threat of penal or administrative action within the meaning of that provision or if infringements which are found to exist are not punished.

17. Article 1 of Regulation No 2057/82 imposes obligations to take action which are both direct and, in relation to Articles 6 to 10 of Regulation No 2057/82, specific and which, if not fulfilled, could constitute an infringement of the Treaty.

18. The principle that an application must be specific serves to define the subject-matter of the dispute and is intended — provided that the application is well founded — to facilitate judgment. The requirement that an application should be specific in order to be admissible is not to be subject to further conditions. However, the application made in the present action to establish an infringement of the Treaty meets the minimum procedural requirements as defined above. The submission that it is inadmissible must therefore be rejected.

19. Nevertheless, there are still a number of doubts to be cleared up regarding the subject-matter of the dispute. Inasmuch as the application seeks a declaration that the defendant has infringed Articles 1 and 6 to 10 of Regulation No 2057/82, it also covers, from a purely formal point of view, any failure to fulfil the obligations to keep proper records flowing from Article 9 of Regulation No 2057/82. The same is true for the notification to be made before the

15th of each month of the catches landed, pursuant to Article 9(2) of Regulation No 2057/82.

20. However, the entire question was expressly excluded from the subject-matter of the dispute in the reasoned opinion of 16 December 1986. That applies without reservation for 1983 and 1984. According to points 2.2 and 3.6 of the reasoned opinion, the questions concerning Article 9 of Regulation No 2057/82 were not included in the subject-matter and were consigned to other proceedings. However, the same must apply for the problems relating to the keeping of records in 1985 because at first they were left aside for the time being in point 3.1 of the reasoned opinion but then never expressly made the subject-matter of the proceedings.

21. According to the rule that the reasoned opinion in an action to establish an infringement of the Treaty delimits the subject-matter of the dispute, even for subsequent proceedings, the obligation arising under Article 9 of Regulation No 2057/82 cannot now provide a basis for a declaration in the proceedings before the Court.

22. Moreover, it was repeatedly stated in both the written and oral procedures that a separate action would be brought on the question of keeping records. Consequently, disputes over the interpretation and application of Article 9 of Regulation No 2057/82 are not the subject-matter of these proceedings to establish an infringement of the Treaty.

23. On the other hand, the question whether the facts alleged with regard to other obligations of Member States are sufficient to establish breach of the Treaty relates to the substance. In order to establish the infringement, the application would have to adduce facts which constitute an infringement of the obligations of a Member State under the relevant provisions.

II — *Substance*

24. Under the common fisheries policy, total allowable catches (TACs) are fixed and the Member States allocated quotas by stock or group of stocks. Occasionally, provisional TACs are adopted first of all and the definitive TACs and the Member States' quotas are established only later. Whatever the procedure used, however, the catch limits laid down by regulation remain binding. For the periods at issue in the present case — namely the years 1983 to 1985 — the TACs and the quotas allocated to the Member States were based on the following regulations: Regulations Nos 172/83,[3] 198/83,[4] 3220/83[5] and 3624/83[6] for 1983, Regulations Nos 320/84[7] and 3434/84[8] for 1984 and Regulations Nos 1/85[9] and 3720/85[10] for 1985.

3 — OJ 1983, L 24, p. 30.
4 — OJ 1983, L 25, p. 32.
5 — OJ 1983, L 318, p. 20.
6 — OJ 1983, L 365, p. 1.
7 — OJ 1984, L 37, p. 1.
8 — OJ 1984, L 318, p. 6.
9 — OJ 1985, L 1, p. 1.
10 — OJ 1985, L 361, p. 1.

25. The quotas allocated to the defendant were exceeded in 1983, 1984 and 1985. In some cases they were exceeded by several hundred per cent. The defendant does not dispute the fact that the quotas were exceeded. It claims, however, that they were exceeded for reasons beyond its control.[11] On the other hand, the applicant accuses the defendant of not having met in full its obligations under Community law. In that regard, it claims that the fact that quotas were exceeded is evidence that the tasks entrusted to the defendant in order to ensure that fishermen adhered to the quotas were not properly performed.

26. The applicant concedes that the exceeding of a quota cannot be regarded *per se* as a breach of the Treaty because it was the fishermen who exceeded the catch quotas and not the defendant. However, the fact that it was allowed to happen is attributable to the defendant's failure to meet in full its obligations under Community law. Therefore, from the fact that quotas were exceeded it is possible to infer that certain obligations were not fulfilled. The Community rules allegedly infringed are all mentioned and in the case of some of them it is explained how they were infringed.

27. The individual submissions

(1) Article 5(2) of Regulation No 170/83

28. It is conceivable for there to be a breach of Article 5(2) of Regulation No 170/83 whenever the national legislation laying down the detailed rules for the utilization of quotas is incompatible with provisions of Community law or whenever the Member State has failed completely to adopt such provisions.

29. However, the applicant has not specified in any way which provision in the area of the management of quotas could have infringed existing Community law. It has also failed to state which measures ought to have been adopted in order to satisfy the requirements of Article 5(2) of Regulation No 170/83.

30. Even if exceeded quotas do give rise to the suspicion that a Member State has failed to carry out adequate supervision, that is not a sufficient basis for a legal presumption that conservation and control measures have not been observed. That is particularly so since a series of obligations are intended to ensure proper management of quotas. Even if a Member State could be accused of negligence in its supervision of catches, it is not evident from such a general charge which of the individual obligations were not fulfilled. One of the factors which may alone have created the situation complained of, namely the irregularities in the recording of catches, is not part of the subject-matter of the proceedings.

31. Since it is not evident how the defendant has, in the applicant's view, infringed Article 5(2) of Regulation No 170/83, the application for a declaration that Article 5(2) of Regulation No 170/83 has been infringed must be dismissed as unfounded.

11 — In the oral procedure the defendant's representative admitted that in some instances in 1985 fishing was prohibited too late.

(2) Article 1(2) of Regulation No 2057/82

32. It is claimed in only a very general way that there has been a failure to fulfil the obligation, under Article 1(2) of Regulation No 2057/82, to take penal or administrative action against skippers who do not comply with the provisions in force concerning conservation and control measures.

33. The mere fact that a reference for a preliminary ruling has been made to the Court (in Case 46/86 [12]) in criminal proceedings shows that the defendant has adopted penal measures and has also punished infringements. The defendant was not contradicted when it claimed that approximately 3 000 similar criminal proceedings were stayed until the Court delivered its judgment in Case 46/86. Moreover, the Court is aware (from Case 2/88 [13]) that action is being taken with regard to infringements in the fisheries sector in the Netherlands. If, therefore, the defendant cannot be accused of failing to adopt any penal measures at all or of refusing to prosecute contraventions, a submission that there has been an infringement is properly proven only if concrete facts are adduced. However, it is not possible to deduce that Article 1(2) of Regulation No 2057/82 has been infringed on the sole ground that quotas were exceeded. Even if breaches of quotas are prosecuted, the illegal catches are still included in the calculation of the total volume of catches. Since, here too, the applicant has failed to produce the necessary facts, the application must be dismissed as unfounded in that respect.

(3) Article 1(2) in conjunction with Article 6(2) of Regulation No 2057/82

34. The application for a declaration that Article 1(2) and Article 6(2) of Regulation No 2057/82 have been infringed must also be dismissed as unfounded, since the applicant has not even claimed that the defendant did not verify the skippers' declarations. The mere submission that the authorities are not absolutely bound by the information supplied by skippers, made in reply to the defendant's contention that the authorities must assume that the information they receive is correct until the contrary is proven, cannot be regarded as concrete evidence of a breach of obligations.

(4) Article 1(1) in conjunction with Article 9 and other provisions of Regulation No 2057/82

35. Consideration of the question of admissibility has already established that any failure on the part of the defendant to fulfil obligations under Article 1(1) in conjunction with Article 9 of Regulation No 2057/82 was not part of the subject-matter of the dispute and cannot therefore be the subject-matter of the judgment. Since Articles 6, 7 and 8 of Regulation No 2057/82 do not lay down any further obligations for Member

12 — Judgment of 16 June 1987 in Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2671, at p. 2681.

13 — Pending case — Juge d'instruction de Groningue.

States but enact directly applicable provisions for skippers of fishing vessels, there remains to be considered only a failure to fulfil an obligation under Article 1(1) in conjunction with Article 10 of Regulation No 2057/82.

36. In his address to the Court in the oral procedure, the applicant's representative stated that the late prohibition of fishing was the main submission of the application. However, as the application has not been formally restricted, despite the President's suggestion, the Court must in its judgment also rule on the alternative submissions. An opinion on them therefore needed to be given.

(5) Article 1(1) in conjunction with Article 10(2) of Regulation No 2057/82

37. The first sentence of Article 10(2) of Regulation No 2057/82 provides that each Member State is to fix the date on which the quota allocated to it is to be deemed to be exhausted.

38. Under Article 10(3) the Commission is to fix, following notification by the Member State or on *its own initiative*, the date on which a Member State's quotas are deemed to have been exhausted. That provision may — at least in part — be regarded as a power which overlaps with the Member State's obligation under paragraph (2). The circumstances in which it is appropriate for the Commission to act on its own initiative need not be ascertained here since the Commission's power under Article 10(3) does not change — in any event, not fundamentally — the obligation of a Member State to take action under Article 10(2).

39. The applicant maintains that the defendant infringed the obligation under Article 10(2) of Regulation No 2057/82 to prohibit fishing in good time, which, in its view, led to the breaches of quotas at issue. It bases its argument first of all on the submission that Article 10(2) of Regulation No 2057/82 imposes an obligation with regard to the result to be achieved, so that from the mere fact that quotas were exceeded it can be deduced that an obligation was not fulfilled. Therefore, the alleged failure to fulfil an obligation need not be more specifically defined.

40. That view cannot be accepted. The applicant itself concedes that it is not possible to succeed in an action to establish an infringement of the Treaty solely on the ground that a quota has been exceeded because it is not the Member State itself, or rather its organs, which overfished but its fishermen. The Member State's fault consists in inadequate control of fishing activities.

41. In a system for the management and observance of quotas which is composed of a number of obligations, it is not possible to single out one individual obligation whose observance determines the success or failure of the entire system. Even if all the obligations are fulfilled, there is no guarantee of success, which is evident from the fact that additional Community regulations were

adopted [14] to perfect the system. Therefore, if it is inappropriate to regard Article 10(2) of Regulation No 2057/82 as laying down an obligation with regard to the result to be achieved, it is necessary to establish a specific failure by the defendant to fulfil an obligation under that provision. The timing of a Member State's decision to close fishing is determined by the purpose of the measure, namely the observance of the quotas. Therefore the timing must take account of catches still to be expected, late notifications of landings in foreign ports, the time needed for publication and possible difficulties in transmitting information to the fishermen concerned. It is not permissible to delay the decision until it is clear that the quotas are all but exhausted. That is clear from the wording of the provision: 'Each Member State shall determine the date from which ... catches ... shall be *deemed* to have exhausted the quota applicable to it.' The wording indicates notional determination. Logically, the period between notional and actual exhaustion of the quotas is to be regarded as room to manoeuvre enabling account to be taken of the elements of uncertainty already mentioned.

42. The defendant denies that it failed to fulfil its duty to exercise care in connection with prohibiting catches in good time. It claims that it took account of the uncertainties in its decision and always prohibited catches before the quotas were completely exhausted. The fact that quotas were still exceeded was due to circumstances over which it had no control, such as non-observance of the prohibition which had already been imposed.

14 — See Council Regulation No 2241/87 of 23 July 1987 (OJ 1987, L 207, p. 1) and Council Regulation No 3483/88 of 7 November 1988 (OJ 1988, L 306, p. 2).

43. During the proceedings, the applicant admitted that it was possible for illegal catches to have increased the final volume of catches without the defendant being open, as a result, to the accusation that it incorrectly applied Article 1(2) of Regulation No 2057/82. That situation was, however, due to insufficient supervision and insufficient prosecution of infringements.

44. If the alleged breach of the Treaty is denied, according to the established case-law of the Court, it falls to the applicant to prove that the Treaty obligation was not fulfilled. [15] 'It is [the applicant's] responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled ...'. [16] On the question of the burden of proof, the applicant takes the view that the breach of quotas justifies a presumption that there has been a breach of obligations. That view must be rejected for the same reasons as those militating against interpreting Article 10(2) of Regulation No 2057/82 as giving rise to an obligation to achieve a specific result. Since various legal obligations are intended to ensure that the quotas are adhered to and, secondly, illegal catches, even when they have been made the subject-matter of criminal proceedings, are also included in the total volume of catches, so that it is not evident from the total volume which catches were made before the prohibition was imposed and which were made after it was imposed, the exceeding of the quotas cannot justify a presumption of a breach of obligations under Article 10(2) of Regulation No 2057/82. Moreover, in Case

15 — Judgments of 25 May 1982 in Case 96/81 *Commission* v *Kingdom of the Netherlands* [1982] ECR 1791, paragraph 6, of 15 January 1986 in Case 121/84 *Commission* v *Italian Republic* [1986] ECR 107, paragraph 12, of 22 September 1988 in Case 272/86 [1988] ECR 4875, paragraph 17, and of 25 April 1989 in Case 141/87 [1989] ECR 943, paragraphs 16 and 17.

16 — Judgment in Case 96/81, cited above, paragraph 6.

96/81, the Court stated that when providing evidence that an obligation has not been fulfilled the Commission may not 'rely on any presumption'.[16]

45. The evidence annexed to the application shows only the total volume of catches for 1983 and 1984 so that it is not possible to ascertain whether the defendant prohibited catches in good time.

46. The applicant would also have been able to substantiate its submission on the basis of published facts and figures alone. In accordance with Article 9(2) of Regulation No 2057/82, before the 15th of each month, the Commission has available figures for catches made in the preceding month. The decision to prohibit fishing for a stock or group of stocks is generally published in official journals, in the Netherlands in the *Staatscourant*. On the basis of that information alone it ought to be possible to say whether the prohibition of catches of individual stocks or groups of stocks is appropriate to the known volume of catches. If a detailed submission of that kind were made, it would be up to the defendant to discharge the burden of proof.

47. The figures which were submitted as evidence for 1985 are a different matter. They enable it to be assessed whether the prohibition of catches was imposed and published in good time. The table shows that both the timing of the decision to prohibit fishing and the interval before publication were at least in part flawed and therefore unlawful.

48. For example, in 1985 the quota for cod for Zones II a and IV was 28 380 tonnes. We are told that the prohibition was imposed on 10 November on the basis of 28 310 tonnes, but published only on 22 November and, as is evident from the publication itself, came into force on 23 November.

49. Assuming that a decision could have been properly taken on the basis of 28 310 tonnes,[17] a 14-day delay in its entry into force is surely excessive. In such a case, the date of the decision itself no longer matters since it constitutes merely an internal measure for those concerned and, as such, does not produce legal effects of any kind.

50. The prohibition of catches of plaice is mentioned as a further example of the incorrect application of Article 10(2) of Regulation No 2057/82. In Zones II a and IV, catches were prohibited on 28 November on the basis of 79 839 tonnes with a quota of 79 540 tonnes. Thus, when the decision was taken, the quota had already been exceeded. After the decision was published on 28 November and entered into force on 29 November catches of 90 950 tonnes were recorded.

51. Those examples should suffice to show that in 1985 the defendant failed to exercise care for the purposes of Article 10(2) of Regulation No 2057/82. The defendant's

16 — Judgment in Case 96/81, cited above, paragraph 6

17 — In other words, when 99 75% of the quota had been exhausted

representative admitted at the hearing that in some cases the prohibition of fishing had been imposed too late.

52. Accordingly, it may be concluded that, at least in 1985, the defendant failed to fulfil its obligations under Article 10(2) of Regulation No 2057/82.

Costs

53. Since the applicant has failed on almost all points because of the insufficiency of the facts alleged and for lack of proof of the relevant facts, the applicant should be ordered to pay the costs under Article 69(3) of the Rules of Procedure.

C — Conclusion

54. I propose that the Court should rule as follows:

'(1) By failing to impose and publish in good time the prohibition of fishing for individual stocks or groups of stocks in 1985, the Kingdom of the Netherlands has infringed Article 10(2) of Regulation No 2057/82.

(2) The remainder of the application is dismissed.

(3) The Commission is to bear the costs.'