Case 55/86 R

Asociación Provincial de Armadores de Buques de Pesca de Gran Sol de Pontevedra (Arposol)

v

Council of the European Communities

(Fishing — Measures implementing the Act of Accession of Spain and Portugal)

Summary

Application for interim measures — Suspension of operation of a measure — Conditions for granting — Serious and irreparable damage
(EEC Treaty, Art. 185; Rules of Procedure, Art. 83 (2))

ORDER OF THE PRESIDENT OF THE COURT
22 April 1986 *

In Case 55/86 R

Asociación Provincial de Armadores de Buques de Pesca de Gran Sol de Pontevedra (Arposol), whose registered office is in Vigo, represented by José Luis Meseguer Sánchez, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

* Language of the Case: Spanish.

V

Council of the European Communities, represented by its Agent, Yves Chrétien, with an address for service in Luxembourg at the office of Jörg Käser, European Investment Bank, boulevard Konrad-Adenauer,

defendant,

APPLICATION for the suspension of the operation of Council Regulation (EEC) No 3781/85 of 31 December 1985,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By application lodged at the Court Registry on 26 February 1986, the applicant association [hereinafter referred to as 'Arposol'] brought an action under Article 173 of the EEC Treaty for a declaration as to the nullity of Council Regulation (EEC) 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 L 363 of 31.12.1985, p. 26).

2 That regulation provides in particular that the competent authorities of the Member States are without delay to notify the Commission and the flag Member State or the Member State of registration of any infringement of the rules on access to waters and resources contained in Articles 163, 164, 165, 349, 351 and 352 of the Act of Accession, identifying the vessel concerned and indicating the circumstances of the infringement and any penal, administrative or other measures taken, and any court decision relating to such infringement. If any such decision is notified or any other infringement of the rules is recorded, the flag Member State may not thereafter enter the vessel concerned on the draft periodical lists which it submits to the Commission for a period laid down in the regulation, which varies

according to whether general or certain types of specialized fishing activities are involved, whether the infringement concerned is a first or a further infringement and whether fishing without authorization or some other infringement is involved. In the case of fishing without authorization, the regulation also provides that the Member State may refuse entry on a draft periodical list for the same periods to another vessel fitted out by the owner or charterer of the first vessel which, when the infringement occurred, appeared on a periodical list.

3 The provisions of the Act of Accession concerning fishing vessels belonging to the members of Arposol are Articles 154 to 166 and Annex IX. Those articles lay down very detailed rules applicable to fisheries during the transitional period for vessels flying the flag of Spain in the waters falling under the sovereignty or within the jurisdiction of the Member States of the Community as constituted prior to the accession of Spain and Portugal. Annex IX contains a list of the names of 300 vessels which are authorized to engage in fishing activities in certain zones. However, only 150 standard vessels — of which 70 are assigned to ICES Division VII, which is of particular interest to Arposol — are authorized to engage in fishing activities simultaneously. Those vessels are the ones appearing on a periodical list adopted by the Commission on the basis of a draft list submitted by the Spanish authorities.

4 Under Article 185 of the EEC Treaty, actions brought before the Court of Justice do not have suspensory effect. However, the Court may, if it considers that the circumstances so require, order that application of the contested measure be suspended and it may prescribe such other interim measures as may be necessary.

5 For interim measures such as those now applied for to be granted, Article 83 (2) of the Rules of Procedure prescribes that applications for their adoption must state the factual and legal grounds establishing a *prima facie* case for the interim measures applied for and the circumstances giving rise to urgency.

6 According to well-established case-law of the Court, the urgency of an application for the adoption of interim measures, as referred to in Article 83 (2) of the Rules of Procedure, must be assessed in the light of the extent to which an interlocutory order is necessary in order to avoid serious and irreparable damage to the party applying for the interim measure.

7 Arposol relies upon four submissions of fact and law which, in its opinion, justify suspension of the operation of the contested regulation. In the first place, the possibility of withholding authorization for the vessel concerned to fish for a specified period creates a new penalty applicable to the persons responsible. That penalty, which is in breach of the principle of unity of jurisdiction, since both the Member State with territorial jurisdiction and the flag Member State are entitled separately to impose penalties for the same offences, is also contrary to the general principle *non bis in idem*, whereby no one may be punished twice for the same offence. Moreover, the measure deprives the operators concerned of the opportunity to defend themselves against the imposition of a penalty by applying either to an authority of the Member State or to a court. Furthermore, the regulation is unclear as to the conditions for the application of the severer penalty which may be imposed in the event of a further infringement.

8 Arposol states that the immobilization of a vessel for four months would entail costs equivalent to 100 000 ECU (European Currency Units), a loss which would be difficult to make good if the Court were subsequently to declare the contested regulation void. The crew of the vessel would also suffer a considerable loss of wages, even if they received unemployment benefit. For a crew of 18 members, the loss would be 32 000 ECU or 58 000 ECU if the crew did not receive unemployment benefit.

9 In addition, the regulation is discriminatory because the rules apply only to Spanish vessels authorized to fish in ICES Divisions V b, VI, VII and VIII a, b and d, by virtue of Articles 158 and 160 of the Act of Accession. Consequently, although the measure in question purports to be general in character and to apply to all Community vessels, it discriminates against Spanish vessels and other Community vessels operating in the ICES Divisions mentioned above.

10 There is also economic discrimination in so far as the inactivity of certain Spanish vessels would lead to a shortfall in the supply of fresh fish to the Spanish market, which would be made up by exports from non-Spanish Community undertakings.

11 Arposol also states that there is discrimination as between Spanish vessels, depending on whether they fish in the divisions mentioned above or in ICES Divisions VIII c and IX, which comprise Spanish waters, since the measures envisaged in the regulation do not apply to the latter divisions. Finally, Spanish vessels are discriminated against by comparison with Portuguese vessels in Portuguese waters and Spanish waters.

12 In its observations, the Council contends in the first place that the application is inadmissible, since the regulation in question cannot be regarded as a decision adopted in the guise of a regulation but rather is of general application and purely legislative in character. Moreover, in view of the relevant case-law of the Court, Arposol has no interest in bringing an action to defend the interests of its members.

13 The Council maintains that the regulation in question does not deprive Spanish vessels of their right to engage in fishing activities. Under the arrangements laid down in the Act of Accession in respect of fishing during the transitional period, the right to fish at any given time is granted only to the vessels appearing on a periodical list. The penalty envisaged by the regulation could be applied only if two conditions were fulfilled, namely the existence of an infringement of the rules on fishing and a finding, made in accordance with the provisions in force in the competent Member State, that it had been committed.

14 The Council denies that non-appearance on a periodical list gives rise to irreparable damage. The cessation of fishing activity in Community waters is certainly a lost opportunity but that situation is a result of the simple application of the Act of Accession. The Council is of the opinion that any owner of a vessel who considers that he has suffered damage may still bring court proceedings for compensation for the loss caused by any illegal measure.

15 The Council rejects the allegation of discrimination. Regulation No 3781/85 applies not only to Spanish fishermen in the waters of the original Member States but also to the fishermen of the other Member States in Spanish waters. This is apparent from the Act of Accession, Article 164 (2) of which provides that the specialized fishing activities of vessels flying the flag of 'a present Member State' in the waters falling under the sovereignty or within the jurisdiction of Spain are to be carried out in accordance with the same access and control procedures as those

specified for Spanish vessels authorized to carry out their fishing activities in the fishing zones of 'the present Member States'. As regards the other fishing activities carried out under Article 164 (1) of the Act of Accession, as explained in the second recital in the preamble to Regulation No 3781/85, the arrangements to be applied to the vessels concerned are comparable to those applicable to the non-specialized fishing activities of vessels flying the flag of Spain in waters falling under the sovereignty or within the jurisdiction of 'the present Member States'.

16 The parties presented oral argument at the sitting on Monday 14 April 1986.

17 At that sitting the Agent for the Council declared the Council's intention to ask the Court, under Article 91 of the Rules of Procedure, to give a separate decision on the question of admissibility. According to the Court's practice in dealing with applications for interim relief, it is unnecessary to consider in detail the question of the admissibility of the main action in this order.

18 The President of the Court is of the opinion that Arposol has not established that irreparable damage would be suffered by its members if a measure suspending the operation of the contested regulation were not granted. The penalty provided for in the regulation will only be imposed if a Spanish vessel infringes the applicable rules on fishing. Accordingly, the owner and the skipper need only comply with the applicable rules in order to avoid incurring the penalty provided for in the regulation. Even though at the beginning of the year there may have been some confusion regarding the applicable rules, the applicant acknowledges that the owners and skippers of vessels are now familiar with them.

19 It also seems that legal certainty is adequately ensured by the system of control and of penalties provided for in the combined provisions of the Act of Accession and the contested regulation. In the first place, if a vessel is discovered committing an infringement by the authorities of a Member State with territorial jurisdiction, any penalty imposed by the courts of that Member State will be imposed in accordance with the procedure in force in that State, so that procedural safe-

guards, rights of appeal and the possibility of requesting the Court of Justice for a preliminary ruling will be available. Similarly, as regards exclusion from the periodical list, it would appear that it is possible at both national and Community level to challenge the periodical list. Thus, if the penalty of exclusion from the list is imposed unlawfully, the owner is not deprived of all remedy.

20 In view of the foregoing considerations, it is unnecessary to give a decision on the allegations of discrimination against Spanish vessels, which will be dealt with in the main proceedings. It is sufficient to take note of the fact that the Council rejects those allegations.

21 Since the applicant has not established the existence of irreparable damage, there is no reason to grant the measures applied for.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

(1) The application is dismissed;

(2) The costs are reserved.

Luxembourg, 22 April 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President