ORDER OF THE COURT (Fifth Chamber)
13 September 2000 *

In Case C-341/97,

Commission of the European Communities, represented by H. van Vliet, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, with an address for service in Luxembourg at the French Embassy, 8 B Boulevard Joseph II,

intervener,

* Language of the case: Dutch.

Kingdom of the Netherlands, represented by M.A. Fierstra, Director of the European Law Department of the Ministry of Foreign Affairs, acting as Agent, 67 Bezuidenhoutseweg, The Hague,

defendant,

APPLICATION for a declaration that, by adopting on 16 December 1992 the Verordening voorkoming Introductie van Uitheemse Toxische Dinoflagellaten (Regulation for the Prevention of the Introduction of Foreign Toxic Dinoflagellata), the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC),

THE COURT (Fifth Chamber),

composed of: L. Sevón, President of the First Chamber, acting for the President of the Fifth Chamber, P.J.G. Kapteyn, P. Jann, H. Ragnemalm and M. Wathelet (Rapporteur), Judges,

Advocate General: G. Cosmas,
Registrar: L. Hewlett, Administrator, subsequently R. Grass, Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 2 December 1999,

having regard to the order of 16 December 1999 reopening the procedure, requiring the production of additional documents and requesting the parties to make submissions concerning the admissibility of the action,

having regard to the additional documents produced and the parties' submissions concerning the admissibility of the action,

after hearing the Opinion of the Advocate General,

makes the following

Order

1 By application lodged at the Court Registry on 30 September 1997, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by adopting on 16 December 1992 the Verordening voorkoming Introductie van Uitheemse Toxische Dinoflagellaten (Regulation for the Prevention of the Introduction of Foreign Toxic Dinoflagellata; 'the contested regulation'), the Kingdom of the Netherlands has failed to fulfil its obligations under Articles 30 and 36 of the EC Treaty (now, after amendment, Articles 28 EC and 30 EC).

2 By order of the President of the Court of 20 March 1998, the French Republic was granted leave to intervene in support of the Commission. However, no submissions were lodged by the French Republic.

3 In the course of the hearing, which took place on 2 December 1999, the Netherlands Government raised for the first time the objection that the action as a whole was inadmissible on the ground that it had not been in a position to submit observations on the contested regulation before receiving, on 20 October 1994, a reasoned opinion concerning that regulation, since the letters of formal notice it had received related solely to earlier legislation.

4 By order of 16 December 1999, the Court, acting pursuant to Article 60 of the Rules of Procedure and in order to give a ruling on the admissibility of the action for failure to fulfil obligations, reopened the procedure and requested the parties to produce certain letters which they had exchanged and to submit written observations on the question of inadmissibility.

The pre-litigation procedure

5 It appears from the file, including the additional documents produced by the parties following the order reopening the procedure, that on 1 August 1991 the Commission sent the Netherlands Government a first letter of formal notice concerning the non-compliance with Community law of two Netherlands measures, the Importregeling Levende Oesters 1988 (Rules for the Importation of Live Oysters 1988) and the Importregeling Verse Mosselen 1988 II (Rules for the Importation of Fresh Mussels 1988 II). In their reply of 7 November 1991, the Netherlands authorities stated that these measures had been repealed and

replaced by the Besluit behandeling Tweekleppige Weekdieren Afkomstig uit Vreemde Wateren of 25 February 1991 (Decree on the Treatment of Bivalve Molluscs from Foreign Waters; 'the 1991 Decree'). Consequently, on 18 May 1993 the Commission sent the Netherlands Government a further letter of formal notice claiming that the 1991 Decree also contravened Article 30 of the Treaty.

6 In the meantime, the Netherlands authorities had once again amended the legislation on the subject. On 16 December 1992 the management of the Produktschap voor Vis en Visprodukten (the Fish and Fish Products Board; 'the Produktschap') adopted the contested regulation, which aims to prevent the introduction of foreign toxic dinoflagellata into Netherlands waters. This regulation, which came into force on 1 January 1993, is the subject of the present action for failure to fulfil obligations.

7 The text of the contested regulation, then in draft form, had been received by the Commission on 6 May 1992 pursuant to Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (OJ 1983 L 109, p. 8), as amended by Council Directive 88/182/EEC of 22 March 1988 (OJ 1988 L 81, p. 75) ('Directive 83/189').

8 Directive 83/189 lays down an information procedure requiring the Member States to communicate any draft technical regulation to the Commission, which must immediately notify the other Member States of the draft it has received (Article 8(1)). Once a Member State has forwarded a draft technical regulation, the Commission and the other Member States may make comments to it in that regard, and it must take such comments into account as far as possible in the

subsequent preparation of the technical regulation (Article 8(2)). Under Article 9(1) of Directive 83/189, a Member State must postpone the adoption of a draft technical regulation for six months from the date of notification if the Commission or another Member State delivers a detailed opinion, within three months of that date, to the effect that the measure envisaged must be amended in order to eliminate or reduce any barriers which it might create to the free movement of goods.

9 By detailed opinion of 6 August 1992, the Commission contended, pursuant to Article 9(1) of Directive 83/189, that the contested regulation, which was then still in draft form, would be contrary to Article 30 of the Treaty if it were adopted without the Commission's comments having been taken into account. The Commission's letter drew the Netherlands Government's attention to the fact that, if the draft technical regulation were adopted without the Commission's objections being taken into account, the Commission would regard the detailed opinion as equivalent to a letter of formal notice under Article 169 of the Treaty and would treat the Netherlands Government's reply pursuant to Article 9(1) of Directive 83/189 as the observations provided for by Article 169 of the Treaty.

10 On 17 May 1993 the Netherlands Ministry of Agriculture sent the Commission the final text of the contested regulation, which had been adopted without the slightest amendment of the draft previously communicated to it.

11 By letter of 13 July 1993, the Permanent Representative of the Netherlands to the European Union, first, informed the Commission that the Produktschap had withdrawn the 1991 Decree on 1 January 1993 and contended that the letter of formal notice of 18 May 1993 had therefore become devoid of purpose.

12 Secondly, with regard to the contested regulation, the Permanent Representative stated that, following the notifications given in accordance with Directive 83/189 and the Commission's detailed opinion of 6 August 1992, a meeting had taken place on 24 November 1992 between the Netherlands authorities and representatives of DG VI and the Legal Service of the Commission. The Commission is said to have indicated at the meeting that the provisions of the contested regulation did not, after more detailed examination, appear to it to be disproportionate in the light of Article 36 of the Treaty and that it saw no further obstacle to the draft, as notified, becoming an adopted regulation.

13 On 20 October 1994 the Commission sent the Kingdom of the Netherlands a reasoned opinion stating that the contested regulation had been adopted without account being taken of the objections in its detailed opinion of 6 August 1992. With regard to the meeting of 24 November 1992, the Commission representatives had not, so far as the Commission was aware, conceded that the contested regulation was justified in relation to Articles 30 and 36 of the Treaty. The Commission therefore concluded that, while it regretted any misunderstanding on the part of the Netherlands authorities, it had to abide by the position it had taken in its detailed opinion.

The parties' views on the admissibility of the action

14 The parties differ as to whether the detailed opinion of 6 August 1992, delivered by the Commission pursuant to Article 9(1) of Directive 83/189, is a proper formal notice for the purpose of Article 169 of the Treaty.

15 According to the Netherlands Government, a detailed opinion within the meaning of Article 9(1) of Directive 83/189 cannot be described as a formal

notice meeting the requirements of Article 169 of the Treaty inasmuch as it relates only to draft legislation and is not delivered in a situation where a Member State has already failed to fulfil an obligation arising under the Treaty.

16 The Commission contends that there is nothing in Article 169 to prevent the detailed opinion provided for by Article 9(1) of Directive 83/189 from constituting a formal notice. There is no provision requiring the formal notice under Article 169 to be given in a specific form. Article 169 merely provides that the Member State concerned must be given the opportunity to submit its observations, which was done by the letter of 6 August 1992. The letter delimited the subject-matter of the dispute and indicated to the Netherlands authorities the factors enabling them to formulate their observations and prepare their defence.

Findings of the Court

17 It follows from the function assigned to the pre-litigation stage of proceedings for failure of a State to fulfil its obligations that the purpose of the letter of formal notice is, first, to delimit the subject-matter of the dispute and to indicate to the Member State, which is invited to submit its observations, the factors enabling it to prepare its defence (Case C-289/94 *Commission* v *Italy* [1996] ECR I-4405, paragraph 15) and, second, to enable the Member State to comply before proceedings are brought before the Court (Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraphs 23 and 24).

18 Also, in order for a letter of formal notice to be issued, a prior failure by the Member State concerned to fulfil an obligation owed by it must be alleged.

19 However, it is clear that, at the time when a detailed opinion under Directive 83/189 is delivered, the Member State to which it is addressed cannot have infringed Community law, since the measure exists only in draft form.

20 The contrary view would result in the detailed opinion constituting a conditional formal notice whose existence would be dependent on the action taken by the Member State concerned in relation to the opinion. The requirements of legal certainty, which are inherent in any procedure capable of becoming contentious, preclude such incertitude.

21 In view of the foregoing considerations, the Commission's action for failure to fulfil obligations must be dismissed as inadmissible under Article 92(2) of the Rules of Procedure in the absence of a formal notice meeting the requirements of Article 169.

Costs

22 Under Article 69(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. As the Kingdom of the Netherlands has applied for costs and the Commission has been unsuccessful, the latter must be ordered to pay the costs. The French Republic is to bear its own costs pursuant to Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT (Fifth Chamber)

hereby orders:

1. **The action is dismissed as inadmissible.**

2. **The Commission of the European Communities shall pay the costs.**

3. **The French Republic shall bear its own costs.**

Luxembourg, 13 September 2000.

R. Grass — Registrar

L. Sevón — For the President of the Fifth Chamber