JUDGMENT OF THE COURT (Fifth Chamber)
30 January 1997 *

In Case C-178/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Rechtbank van Koophandel, Antwerp, Belgium, for a preliminary ruling in the proceedings pending before that court between

Wiljo NV

and

Belgian State

on the interpretation of Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport (OJ 1989 L 116, p. 25) and on the validity of the Commission's decision of 6 May 1993 rejecting an application for exemption from the special contribution to the Scrapping Fund set up by Article 8(1)(a) of that regulation,

THE COURT (Fifth Chamber),

composed of: C. Gulmann, acting for the President of the Chamber (Rapporteur), D. A. O. Edward, J.-P. Puissochet, P. Jann and M. Wathelet, Judges,

* Language of the case: Dutch.

Advocate General: F. G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Wiljo NV, by Francis Herbert, of the Brussels Bar,

— the Commission of the European Communities, by Götz zur Hausen, Legal Adviser, and Marc van der Woude, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Wiljo NV, represented by Francis Herbert and Koenraad van den Broeck, of the Brussels Bar, and of the Commission, represented by Thomas van Rijn, Legal Adviser, acting as Agent, at the hearing on 20 June 1996,

after hearing the Opinion of the Advocate General at the sitting on 19 September 1996,

gives the following

Judgment

1 By order of 6 June 1995, received at the Court on 8 June 1995, the Rechtbank van Koophandel (Commercial Court), Antwerp, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty five questions on the interpretation

of Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport (OJ 1989 L 116, p. 25, hereinafter 'the Regulation') and on the validity of a Commission decision of 6 May 1993 rejecting an application for exemption from the special contribution to the Scrapping Fund set up by Article 8(1)(a) of the Regulation.

2 Those questions were raised in proceedings between Wiljo NV ('Wiljo') and the Belgian State concerning payment of the abovementioned special contribution into the Belgian Scrapping Fund.

3 The Regulation is intended to achieve a substantial reduction of structural overcapacity in inland waterway transport. To that end, it introduces scrapping schemes coordinated at Community level, which, according to Article 2, are to apply to cargo-carrying vessels and pusher craft.

4 Under Article 3(1) of the Regulation, each of the Member States whose inland waterways are linked to those of another Member State and the tonnage of whose fleet is above 100 000 tonnes is to set up a Scrapping Fund. According to Article 4(1), for each vessel covered by the Regulation the owner is to pay a contribution into one of those Funds.

5 In order to ensure that the effects of the scrapping scheme are not cancelled out by extra capacity coming into service at the same time, Article 8(1)(a) of the Regulation provides that, for a certain period, the bringing into service on inland waterways of newly constructed vessels is to be conditional on the owner of the new vessel scrapping a tonnage of carrying capacity equivalent to the new vessel without receiving a scrapping premium (the 'old-for-new' rule) or, if he scraps no vessel, on his paying into the Scrapping Fund a special contribution equal to the scrapping premium fixed for a tonnage equal to that of the new vessel.

6 Article 8(3) lays down certain exceptions to that rule. In particular, Article 8(3)(c) provides:

'The Commission may, after consulting the Member States and the organizations representing inland waterway transport at Community level, exempt specialized vessels from the scope of paragraph 1.'

7 In a note of 7 December 1990, the Commission defined the general criteria for assessing applications for the exemption of vessels under Article 8(3)(c) of the Regulation. According to that note, the 'old-for-new' rule need not apply to vessels 'the technical characteristics of which are so specific that, if those vessels are added to the fleet capacity ... that will not jeopardize the objectives of the Community rules'.

8 Wiljo is an undertaking engaged in the bunkering of sea-going vessels.

9 On 19 January 1993 it submitted to the Commission, under Article 8(3)(c) of the Regulation, an application for exemption for the bringing into service of a bunkering vessel, the *Smaragd*. In its application it described the vessel as a 2 500 tonne motorized tanker vessel, 100 metres long, 11.40 metres wide and 4 metres deep, and stated that it was to be used exclusively for the bunkering of sea-going vessels.

10 By letter of 6 May 1993, addressed to Wiljo and signed by a Member of the Commission, Wiljo was informed that, following consultation with the representatives of the Member States and the Group of Experts on Structural Improvements in Inland Waterway Transport, it considered that the vessel was technically suitable for the transport of all kinds of liquid loads, that it did not differ greatly, as regards

its construction and equipment, from conventional tanker vessels and that it therefore contributed to the capacity of the fleet which was subject to the Regulation. It had therefore decided, on the basis of Article 8(3)(c) of the Regulation, to refuse to grant the requested exemption and to send a copy of the letter to the authorities managing the Belgian Scrapping Fund.

11 In consequence of that decision, the Belgian authorities demanded from Wiljo, by letter of 1 October 1993, a special contribution to the Scrapping Fund pursuant to Article 8(1)(a) of the Regulation.

12 By application of 6 April 1995, Wiljo brought an action against that decision before the Rechtbank van Koophandel.

13 According to the order of the national court, Wiljo maintains that it is not obliged to pay the special contribution, on the ground that the *Smaragd* is a bunkering vessel which has been specially equipped and which is used exclusively for the bunkering of sea-going vessels and that it is not comparable with an ordinary tanker vessel. For that reason, it considers that the Commission's decision of 6 May 1993 is in conflict with the general scheme of the Regulation and contains no proper technical analysis of the characteristics and equipment of the vessel.

14 In the light of those arguments, the Rechtbank van Koophandel has referred the following questions to the Court for a preliminary ruling:

'1. Regard being had to the aim, the general objective and the specific purport of Council Regulation No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport, does the concept "specialized vessels" in

Article 8(3)(c) of the Regulation in question refer to vessels which, as a result of their specific construction and equipment or of their specific use, do not increase the cargo capacity or the tonnage of inland waterway transport and are therefore not of such a nature as to affect the structural over-capacity of carriage of goods on the linked inland waterway networks of the Member States?

2. Regard being had to the principle of proportionality, does not the criterion of "technical suitability for carriage of goods by inland waterway" applied by the Commission of the European Communities in its decision of 6 May 1993, which makes even vessels which are not actually used for transport on the linked inland waterway networks of the Member States subject to the obligation to make a contribution in the framework of the "old-for-new" rule, conflict with the objective and purport of Council Regulation No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport?

3. Regard being had to the aim, the general objective and the specific purport of Council Regulation No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport, is a purely theoretical suitability of a vessel for inland transport, in the sense that it could be made suitable for inland transport only after laborious and expensive and therefore economically unrealistic conversion or that use of the vessel for inland waterway transport would be wholly unprofitable because the vessel is not designed or equipped for inland transport, sufficient for it to be subject to the obligation to make a contribution in the framework of the "old-for-new" rule?

4. Regard being had to the aim, the general objective and the specific purport of Council Regulation No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport, can the decision of the Commission of the European Communities of 6 May 1993 be regarded as applicable to the *Smaragd* since it subjects to the obligation to pay the single contribution in the framework of the "old-for-new" rule a vessel which is especially designed, constructed and equipped as a bunkering vessel with the exclusive purpose of

supplying sea-going ships with fuel and is not particularly suitable or intended for carriage for a third party, or even on its own account, of fuel products on inland waterways and hence does not increase the cargo capacity of shipping or tonnage of inland transport?

5. Does not the application by the Commission of the criterion of technical suitability instead of the actual use of the vessel constitute an infringement of the prohibition of discrimination since, in accordance with the criterion used by the Commission for vessels operating in Belgium, the Netherlands, Luxembourg, Germany and France, the single contribution is due in certain cases although the vessel is not actually used for inland waterway transport and does not therefore contribute to increasing the tonnage of inland waterway transport whereas the single contribution on the putting into service of a vessel in the other Member States is due only if that is justified by its actual use (on the network of linked Community waterways)?'

15 According to the Commission, there is no need to rule on the questions or at least some of the questions referred to the Court because they call in question, directly or indirectly, the validity of its decision of 6 May 1993. The owner of a vessel intended to be used on inland waterways whose application for an exemption under Article 8(3)(c) of the Regulation has been rejected by the Commission may no longer call in question the validity of that rejection in an action brought against a national measure implementing that decision once the time-limit prescribed by Article 173 of the EC Treaty for applying for its annulment has expired. The Commission refers, in particular, to the judgment in Case C-188/92 *TWD Textilwerke Deggendorf* v *Germany* [1994] ECR I-833.

16 Wiljo contests that view. It maintains that the national authorities have primary responsibility for administering the Fund and that it was therefore reasonable for it to assume that the Commission's decision could be challenged in proceedings against those authorities before the national courts, particularly in view of the Commission's statement, in its letter of 6 May 1993, that a copy of the decision was to be sent to the Belgian authorities.

17 Wiljo refers here to the judgment in Joined Cases 133/85 to 136/85 *Rau Lebensmittelwerke and Others* v *BALM* [1987] ECR 2289, in which the Court ruled that the possibility of bringing a direct action under Article 173 of the Treaty against a decision of a Community institution does not preclude the possibility of bringing an action before a national court against a measure adopted by a national authority for the implementation of that decision, on the ground that the latter decision is unlawful.

18 Lastly, Wiljo observes that the judgment in *TWD Textilwerke Deggendorf*, cited above, was delivered after the time-limit for bringing an action for annulment of the Commission's decision of 6 May 1993 had expired.

19 It is settled law that a decision adopted by a Community institution which has not been challenged by its addressee within the time-limit laid down by Article 173 of the Treaty becomes definitive as against him (see, in particular, the judgments in Case 20/65 *Collotti* v *Court of Justice* [1965] ECR 847, Case 156/77 *Commission* v *Belgium* [1978] ECR 1881 and Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraphs 9 and 10). Such a rule is based in particular on the consideration that the periods within which legal proceedings must be brought are intended to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely.

20 This rule, which applies to the addressees of a decision, such as Wiljo, was reiterated in the judgment in *TWD Textilwerke Deggendorf*, in which the Court held that the principle established in the cases referred to above could, in certain circumstances, also apply to a recipient of State aid forming the subject-matter of a Commission decision addressed directly to the Member State alone in which the recipient was established.

21 In essence, the Court held that a recipient of aid could not plead the invalidity of a decision, addressed by the Commission to a Member State, notified by that State to the recipient and ordering that Member State to recover the aid granted to the

recipient, in proceedings brought before the national courts against the implementing decision taken by the authorities of that State where the recipient of the aid had failed to apply under Article 173 of the Treaty for annulment of the Commission's decision and where he could undoubtedly have done so. To find otherwise would enable the recipient of the aid to overcome the definitive nature which a decision necessarily assumed, by virtue of the principle of legal certainty, once the time-limit laid down by Article 173 for bringing proceedings had expired.

22 As regards the argument based on the judgment in *Rau Lebensmittelwerke and Others*, cited above, it is sufficient to recall that it was rejected by the Court in paragraph 20 of its judgment in *TWD Textilwerke Deggendorf* on the ground that it was clear from the Report for the Hearing in *Rau* that each of the plaintiffs in the main proceedings had brought an action before the Court of Justice for annulment of the decision in question and that the Court did not therefore rule, and did not have to rule, in that judgment on the time-barring effect of the expiry of the period in which proceedings had to be brought.

23 In the present case, it is not disputed that Article 8(3)(c) of the Regulation gives the Commission sole power to exempt specialized vessels, that Wiljo requested it to adopt a decision pursuant to that provision, that Wiljo did not apply under Article 173 of the Treaty for annulment of the Commission's decision of 6 May 1993 which was addressed to it, even though it could undoubtedly have done so, and that it has instead brought proceedings before the national court challenging the implementation of the Commission's decision by the Belgian authorities.

24 It follows from all those considerations that, by virtue of the principle of legal certainty, the national court is bound by the Commission's decision of 6 May 1993 addressed to Wiljo, according to which the *Smaragd* is not a specialized vessel within the meaning of Article 8(3)(c) of the Regulation.

25 It is therefore necessary to examine whether the sole purpose of the questions referred to this Court is to enable the national court to resolve the question of the validity of the Commission's decision of 6 May 1993, or whether those questions also relate to the interpretation of the provisions defining the scope of the Regulation.

26 Wiljo maintains that at least the first and third questions must be treated as concerning the definition of the scope of the Regulation and not the validity of the Commission's decision. It contends that a vessel such as the *Smaragd* is not covered by the Regulation, so that the decision of the Belgian authorities demanding payment of the special contribution to the Scrapping Fund is contrary to the Regulation and that such a challenge to the legality of the decision of the Belgian authorities must be determined by the national courts, which for that purpose may refer questions to this Court for a preliminary ruling on the interpretation of the Regulation.

27 That argument cannot be accepted. As the Advocate General observes in points 14 and 15 of his Opinion, all of the national court's questions must be construed as relating exclusively, either directly or indirectly, to the validity of the Commission's decision of 6 May 1993.

28 As is clear from the order for reference, Wiljo maintained before the Rechtbank van Koophandel, first, that the *Smaragd* was used solely for the bunkering of seagoing vessels and was not comparable with an ordinary tanker vessel so that the Commission's decision was incompatible with the general aim of the Regulation, and, second, that it did not contain any proper technical analysis of the vessel's characteristics and equipment. Clearly, therefore, Wiljo is contesting before the national court the validity of the Commission's decision, on the ground that it is contrary to the Regulation. This is confirmed by a reading of Wiljo's application to the Rechtbank van Koophandel, in which it refers expressly to Article 8(3)(c) of the Regulation and submits that, for the reasons stated, the Commission's decision cannot be considered valid.

29 Thus it is clear that the national court's questions, which are identical to those set out by Wiljo in its application, are in fact designed to enable that court to appraise that argument and to rule on the validity of the Commission's finding, arrived at in its decision, that the *Smaragd* did not qualify as a specialized vessel within the meaning of Article 8(3)(c).

30 In those circumstances, to alter the substance of the questions referred for a preliminary ruling in the way proposed by Wiljo would be incompatible with the Court's function under Article 177 of the Treaty and with its duty to ensure that the Governments of the Member States and the parties concerned are given the opportunity to submit observations under Article 20 of the EC Statute of the Court, bearing in mind that, under that provision, only the order of the referring court is notified to the interested parties (see, in particular, the judgment in Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6, and the order in Case C-191/96 *Modesti* [1996] ECR I-3937, paragraph 5).

31 The answer to the questions referred to the Court must therefore be that, where a Commission decision has been addressed to the owner of a vessel, finding that his vessel is not a specialized vessel within the meaning of Article 8(3)(c) of the Regulation, and the addressee has not brought an action under the fourth paragraph of Article 173 of the Treaty against the decision within the time-limit prescribed, that decision is binding on the national court.

Costs

32 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Rechtbank van Koophandel, Antwerp, by order of 6 June 1995, hereby rules:

Where a Commission decision has been addressed to the owner of a vessel, finding that his vessel is not a specialized vessel within the meaning of Article 8(3)(c) of Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport, and the addressee has not brought an action under the fourth paragraph of Article 173 of the EC Treaty against the decision within the time-limit prescribed, that decision is binding on the national court.

Gulmann Edward Puissochet

Jann Wathelet

Delivered in open court in Luxembourg on 30 January 1997.

R. Grass J. C. Moitinhho de Almeida

Registrar President of the Fifth Chamber