JUDGMENT OF THE COURT (Fifth Chamber)
29 June 1994 *

In Case C-135/92,

Fiskano AB, a company established under Swedish law based at Göteborg (Sweden), represented by H. M. Fahner, of the Leeuwarden Bar, with an address for service in Luxembourg at the Chambers of T. Loesch, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented by Thomas van Rijn, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the decision of the Commission of the European Communities contained in the letter of 19 February 1992 from its Director-General, J. Almeida Serra, to the Swedish Ambassador to the European Communities, His Excellency Stig Brattström, concerning an infringement allegedly committed by a Swedish vessel in connection with the Agreement on Fisheries between the European Economic Community and the Government of Sweden signed at Brussels on 21 March 1977 and approved by the Council on behalf of the Community by Regulation (EEC) No 2209/80 of 27 June 1980 (OJ 1980 L 226, p. 1),

* Language of the case: Dutch.

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, D. A. O. Edward, R. Joliet, G. C. Rodríguez Iglesias (Rapporteur) and F. Grévisse, Judges,

Advocate General: M. Darmon,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 July 1993, at which Fiskano AB was represented by E. J. Rotshuizen, of the Leeuwarden Bar,

after hearing the Opinion of the Advocate General at the sitting on 27 October 1993,

gives the following

Judgment

1 By application lodged at the Court Registry on 25 April 1992, Fiskano AB brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the decision of the Commission of the European Communities in the letter of 19 February 1992 from its Director-General, J. Almeida Serra, to the Swedish Ambassador to the European Communities, His Excellency Stig Brattström.

2 That letter relates to infringements allegedly committed by the Swedish fishing vessel Lavön, which is owned by the applicant company.

3 The context of the letter is the Agreement on Fisheries between the European Economic Community and the Government of Sweden signed at Brussels on 21 March 1977 and approved by the Council on behalf of the Community by Regulation (EEC) No 2209/80 of 27 June 1980 (OJ 1980 L 226, p. 1). The agreement establishes the terms and conditions pertaining to fisheries of mutual concern to both parties. The conditions to be complied with by Swedish vessels fishing in Community waters are determined annually by a Council regulation.

4 From November 1989 Fiskano periodically applied for fishing licences for its vessel Lavön for 1990, 1991 and 1992.

5 On 10 December 1991 the Lavön was fishing in the Netherlands fishing zone when it was the subject of a check by the Algemene Inspectie Dienst of the Netherlands Ministry of Agriculture, the Environment and Fishing. Since the vessel was not on the list the Netherlands authorities had received from the Commission, and thus appeared not to be the holder of a fishing licence, the Netherlands authorities informed the Commission. The check subsequently carried out by the Commission disclosed that although the Lavön was on the monthly lists for January, February, March and April 1991, it was not on the monthly list for December 1991 which the Swedish authorities had sent to the Commission. Consequently, the Lavön did not have a fishing licence for December.

6 On 19 February 1992 the Commission sent to the Swedish Ambassador to the European Communities the letter which is the subject of the application; a copy reached Fiskano on 26 February 1992.

7 The letter read as follows:

'The Commission of the European Communities has been informed by the Dutch fishery control authorities that the Swedish registered fishing vessel "Lavön" was observed fishing in Dutch waters (position 54°19' North and 0°410' East) during the period of 9 — 15 December 1991.

The Commission has ascertained that the said vessel was not in possession of a licence to fish in EEC waters during the above period and consequently was engaged in illegal fishing activity.

In conformity with Article 3, paragraph 7 and 8 of Council Regulation (EEC) No 3939/90 (OJ L No 378 of 31.12.1990), the Commission would inform your authorities that the said fishing vessel will not be considered for a new fishing licence under Council Regulation (EEC) No 3885/91 (OJ L No 367 of 31.12.1991) for a period of twelve consecutive months which commenced on 15 December 1991.'

8 The applicant complained to the Commission on 30 March 1992. In a letter of 5 May 1992 the Commission stated that that complaint was unfounded. Fiskano then brought the present application.

9 The applicant alleges in particular that the Commission infringed the EEC Treaty and certain general principles of Community law. In its reply it also claims, pursuant to Article 184 of the Treaty, that Council Regulation (EEC) No 3929/90 of 20 December 1990 laying down for 1991 certain measures for the conservation and management of fishery resources applicable to vessels flying the flag of Sweden (OJ 1990 L 378, p. 48) is unlawful.

10 The Commission contends primarily that the application is inadmissible. In the alternative, it denies having infringed Community law. The Commission further argues that the plea of illegality raised by the applicant in the reply is out of time.

The legal background

11 The essential features of the legal background to the present application should first be noted.

12 Under Article 1 of the Agreement on Fisheries with Sweden, each party is to grant access to fishing vessels of the other party to fish within its area of fisheries jurisdiction. Article 2 provides that fishing rights are to be subject, as appropriate, to catch quotas determined annually.

13 Under Article 3, 'Each Party may require that fishing in its area of fisheries jurisdiction by fishing vessels of the other Party shall be subject to licence. The competent authority of each Party shall, as appropriate, communicate in due time to the other Party the name, registration number, and other relevant particulars of the fishing vessels which shall be eligible to fish within the area of fisheries jurisdiction of the other Party. The second Party shall thereupon issue such licences in a manner commensurate with the possibilities for fishing ...'

14 Under Article 5 of the Agreement, each party is to take all necessary measures to ensure compliance by its vessels with the provisions of the agreement and the other relevant regulations. Similarly, within its area of fisheries jurisdiction, each party may take such measures, in conformity with international law, as may be

necessary to ensure compliance with the provisions of the Agreement by vessels of the other party.

15 Article 7 provides for consultations and, if necessary, arbitration in the event of a dispute concerning the interpretation or application of the Agreement.

16 With respect to infringements of the rules on licences, the Community and Sweden agreed for 1991 that each party should 'submit to the other Party the names and characteristics of the other Parties' vessels which will not be authorized to fish in its fishing zone the next month(s) as a consequence of an infringement of its rules' (Agreed record of conclusions of consultations on licence arrangements, Brussels, 26, 27 and 28 November 1990, point 2.6).

17 The conditions under which Swedish vessels can fish in Community waters are determined annually by a Council regulation. The regulation for 1991 was the abovementioned Regulation No 3929/90. The conditions in question relate primarily to catch quotas and zones where fishing is authorized.

18 According to Article 3(1) of Regulation No 3929/90, fishing is permitted 'only where a licence has been issued by the Commission on behalf of the Community at the request of the Swedish authorities'. The practice in this respect is that at the start of the year the Swedish authorities transmit to the Commission a 'base list' of vessels eligible for licences during the year in question. The Swedish authorities then send to the Commission each month a monthly list of the vessels for which they apply for licences for the month in question. After receiving the monthly list, the Commission confirms to the Swedish authorities that the vessels on that list hold licences authorizing them to fish in Community waters during the month in

question. The Commission also communicates that list to the Member States, who have primary responsibility for monitoring compliance with the rules.

19 Article 3(7) and (8) of Regulation No 3929/90 provides that 'licences shall be withdrawn in the event of any failure to meet the obligations laid down in this Regulation' and that 'for a period not exceeding 12 months, no licence shall be issued for any vessel in respect of which the obligations laid down in this Regulation have not been met'.

20 Finally, Article 4 of that regulation states that:

'Where an infringement is duly found to have taken place, the Member States shall without delay inform the Commission of the name of the vessel concerned and of any action they have taken.

The Commission shall submit, on behalf of the Community, to Sweden the names and characteristics of the Swedish vessels which will not be authorized to fish in the Community's fishing zone the next month(s) as a consequence of an infringement of Community rules.'

Admissibility

21 The Commission disputes the admissibility of the application, arguing that the letter in question constitutes a notification to the Swedish authorities in the context of the Agreement on Fisheries with Sweden, and has no binding legal effects on that State, which is responsible for taking the necessary measures, including poss-

ible penalties, in order to ensure compliance by its vessels with the provisions of the Agreement. Consequently, the Commission considers that the letter in issue does not contain a decision as defined in Community law and is not of direct and individual concern to the applicant.

22 That argument cannot be accepted.

23 It is indeed true that the Commission's letter was addressed to Sweden in the context of the Agreement on Fisheries with that State.

24 Nevertheless, as is evident from its very wording, the letter in question informed the Swedish authorities of a penalty imposed on the vessel Lavön, which would not be considered for a new fishing licence for a period of 12 consecutive months from 15 December 1991.

25 It is also apparent from the wording of the letter that that measure had been taken pursuant to Article 3(7) and (8) of Regulation No 3929/90. Those provisions, the text of which is set out in paragraph 19 above, give the Commission power to impose penalties on those committing infringements and give it a measure of discretion in the exercise of that power.

26 Thus, independently of the consequences of the letter in question for Sweden under the provisions of the Agreement on Fisheries, the letter contains a decision which is of direct and individual concern to the applicant as owner of the vessel on which the penalty was imposed.

27 The fact that, according to the Commission's interpretation of the Agreement, the Swedish authorities could have imposed other penalties following the letter does not exclude the direct and individual effect of the contested decision with respect to the applicant.

28 Similarly, the fact that it was possible for Sweden to challenge the measure taken by the Commission by means of the consultations or arbitration procedure provided for in Article 7 of the Agreement has no effect on the applicant's right to institute proceedings to challenge a decision which is of direct and individual concern to it.

29 Finally, the fact that — according to the Commission — the Swedish authorities had already decided a month before the letter at issue that the Lavön would not be considered for the grant of a licence to fish in Community waters during 1992 does not alter the legal characterization of the effects on the applicant of the contested decision.

30 It follows that the application must be declared admissible.

Admissibility of the plea in law alleging that Regulation No 3929/90 is unlawful

31 In its reply Fiskano raised the plea, pursuant to Article 184 of the Treaty, that Regulation No 3929/90, and more particularly Article 3(8) thereof, was unlawful. It argues *inter alia* that the Council did not have power to adopt that regulation, and that the delegation to the Commission of the power to impose penalties, provided for in the regulation, is contrary to Community law and the case-law of the Court of Justice.

32 That plea must be declared inadmissible under Article 42(2) of the Rules of Procedure, which provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

33 As the Advocate General explained in paragraphs 51 to 55 of his Opinion, the wrong number in the reference to the regulation in question in the letter at issue (Regulation No 3939/90 instead of Regulation No 3929/90) did not prevent the applicant from identifying the regulation and thus raising the plea of illegality at the commencement of the proceedings.

Substance

34 The applicant's first argument is that the contested decision infringes various principles and rules of Community law, in that it imposed a penalty on it despite the fact that it had acted in good faith throughout and the vessel Lavön had, contrary to what the applicant believed, fished without a licence as a result of irregularities for which the Swedish authorities were solely responsible. It argues that by virtue in particular of Article 7(1) of the Agreement, the Commission should first have made enquiries of the Swedish authorities.

35 That argument must be rejected.

36 There is no rule of Community law and no principle which imposes on the Commission the duty, or confers on it the power, to monitor the exercise by the Swedish authorities of their own powers with a view to determining the fishing vessels flying the Swedish flag in respect of which applications are made to the Community for fishing licences.

37 Such a duty cannot be based on Article 7(1) of the Agreement, which merely provides for consultations between the parties on questions relating to the implementation and proper functioning of the Agreement.

38 The applicant's second argument is that by not giving Fiskano an opportunity to submit its observations before the decision was adopted, the Commission infringed the general principle of observance of the right to be heard.

39 It must be stressed in this respect that observance of the right to be heard is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question (see *inter alia* the judgments of the Court in Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263 ('Meura'), Case 40/85 *Belgium* v *Commission* [1986] ECR 2321 ('Boch'), Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, Case 301/87 *France* v *Commission* [1990] ECR I-307 ('Boussac Saint Frères'), Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959 ('Tubemeuse') and Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565).

40 It follows from that case-law that observance of the right to be heard requires that any person on whom a penalty may be imposed must be placed in a position in which he can effectively make known his view of the matters on the basis of which the Commission imposes the penalty.

41 It is not disputed that before adopting the decision at issue the Commission did not give Fiskano any opportunity to submit observations. That failure constitutes an infringement of the applicant's right to be heard.

42 In order to justify that failure, the Commission relies on the international law context of the letter at issue.

43 That argument, which is based on the incorrect premise that the Commission did not impose a penalty on the applicant, has already been rejected by the Court in its examination of the admissibility of the application.

44 In those circumstances, and without there being any need to examine the other pleas in law raised, the contested decision must be annulled on the ground of infringement of the applicant's right to be heard.

Costs

45 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.

46 In formulating its application for annulment the applicant did not ask for the defendant to be ordered to pay the costs. Consequently, the parties must bear their own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Annuls the decision of the Commission of the European Communities contained in the letter of 19 February 1992 from its Director-General, J. Almeida Serra, to the Swedish Ambassador to the European Communities, His Excellency Stig Brattström, concerning an alleged infringement by a Swedish vessel in the context of the Agreement on Fisheries between the European Economic Community and the Government of Sweden;**

2. **Orders the parties to bear their own costs.**

Moitinho de Almeida Edward Joliet

Rodríguez Iglesias Grévisse

Delivered in open court in Luxembourg on 29 June 1994.

R. Grass

Registrar

J. C. Moitinho de Almeida

President of the Fifth Chamber