JUDGMENT OF THE COURT
15 October 1996 *

In Case C-311/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Netherlands Raad van State for a preliminary ruling in the proceedings pending before that court between

IJssel-Vliet Combinatie BV

and

Minister van Economische Zaken

on the interpretation of Articles 42, 92 and 93 of the EEC Treaty, of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7), of Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding (OJ 1987 L 69, p. 55) and of the Guidelines for the examination of State aids in the fisheries sector (88/C 313/09) (OJ 1988 C 313, p. 21),

* Language of the case: Dutch.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. L. Murray and L. Sevón (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward (Rapporteur), J.-P. Puissochet, G. Hirsch and M. Wathelet, Judges,

Advocate General: C. O. Lenz,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— IJssel-Vliet Combinatie BV, by P. V. F. Bos, of the Rotterdam Bar,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the French Government, by E. Belliard, Deputy Head of the Legal Affairs Directorate in the Ministry of Foreign Affairs, C. de Salins, Head of Sub-Directorate in the same Directorate, and J.-M. Belorgey, Special Adviser in the same Directorate, acting as Agents,

— the Commission of the European Communities, by P. Nemitz and H. van Vliet, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of IJssel-Vliet Combinatie BV, represented by P. V. F. Bos; of the Netherlands Government, represented by J. S. van den

Oosterkamp, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; of the French Government, represented by C. de Salins and J.-M. Belorgey; and of the Commission, represented by P. Nemitz and H. van Vliet, at the hearing on 26 March 1996,

after hearing the Opinion of the Advocate General at the sitting on 23 May 1996,

gives the following

Judgment

1 By order of 1 November 1994, received at the Court on 25 November 1994, the Netherlands Raad van State (Council of State) requested a preliminary ruling under Article 177 of the EC Treaty on two questions, the second of which was amended by letter of the President of the Administrative Appeal Section of the Raad van State of 8 December 1994, on the interpretation of Articles 42, 92 and 93 of the EEC Treaty, of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7), of Council Directive 87/167/EEC of 26 January 1987 on aid to shipbuilding (OJ 1987 L 69, p. 55, 'the Sixth Directive') and of the Guidelines for the examination of State aids in the fisheries sector (88/C 313/09) (OJ 1988 C 313, p. 21, 'the Guidelines').

2 These questions have arisen in proceedings between IJssel-Vliet Combinatie BV ('IJssel-Vliet'), a company governed by Netherlands law, and the Minister van Economische Zaken (Minister for Economic Affairs, 'the Minister'), concerning an application for a subsidy for the construction of a fishing vessel, which the Minister has refused.

3 Regulation No 4028/86 lays down the structure of the common fisheries policy. According to the seventh recital in its preamble, its aims include the restructuring of the Community fleets. According to the tenth recital, that restructuring seeks to achieve a stable balance between fishing capacity and available fish stocks by eliminating excess capacity. In order to achieve those aims and to ensure the proper functioning of the common policy, the regulation envisages the use of 'public funds' (fifth recital in the preamble), which may be of Community or national origin.

4 With regard to the grant of national aids, Article 49 of Regulation No 4028/86 provides:

'Articles 92, 93 and 94 of the Treaty shall apply, in the sectors covered by this Regulation, to the national aids granted by Member States, other than those in respect of which Community financial assistance has been granted.'

5 Title VII of Regulation No 4028/86, entitled 'Adjustment of capacities', provides that Member States may grant a laying-up premium or a final cessation premium, to which the Community may contribute, for the temporary or permanent withdrawal of certain fishing vessels.

6 The Sixth Directive lays down, in the context of 'the world crisis in shipbuilding' (second recital in the preamble), certain rules concerning the grant of national aids to shipbuilding.

7 Under Article 1(a) of the Sixth Directive, the term 'shipbuilding' refers, in particular, to the building in the Community of fishing vessels of not less than 100 gross registered tons.

8 The second indent of Article 1(d) of the Sixth Directive provides that aid to shipbuilding 'may be considered compatible with the common market provided that it complies with the criteria for derogation contained in this Directive'.

9 Article 4(1) of the Sixth Directive specifies in that regard that: 'Production aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum ceiling ...'. Under Article 4(2), that ceiling is to be 'fixed by the Commission with reference to the prevailing difference between the cost structures of the most competitive Community yards and the prices charged by their main international competitors ...'.

10 Article 10(1) of the Sixth Directive provides that, in addition to the provisions of Articles 92 and 93 of the Treaty, the aids in question are to be subject to certain special notification rules. Article 10(2) stipulates that any aid scheme covered by the Directive must be authorized by the Commission before it is put into effect.

11 Considering that the structural policies laid down in Regulation No 4028/86 and in the Sixth Directive were not 'immediately compatible', the Commission informed the Member States, by letter of 26 May 1988 ('the circular'), how it intended to apply those two measures.

12 According to the circular, no aid, either Community or national, may be granted for constructing fishing vessels intended for the Community fishing fleet unless it is consistent with the common fisheries policy. Consequently, only aid granted for the construction of fishing vessels intended for the fleets of non-member countries may be granted under the Sixth Directive.

13 Subsequently, the Commission adopted the Guidelines in order to inform the Member States how it intends to exercise, under Articles 92 and 93 of the Treaty, its power of assessment with regard to new aid. It also proposed to the Member States, pursuant to Article 93(1) of the Treaty, that they apply to their existing aid schemes the criteria laid down in the Guidelines. That proposal was notified to the Netherlands Government by letter of 30 November 1988. In that letter, the Commission asked the Netherlands Government to assure it that the criteria laid down in the Guidelines would be observed for all national aid in the fisheries sector. By letter of 31 January 1989, the Netherlands Government confirmed that the aids concerned were in conformity with the Guidelines.

14 The 'general principles' of the Guidelines include a statement, in the same terms as the circular, that State aids in the fisheries sector may be granted only if they are consistent with the objectives of the common policy in the sector. The Commission explained in that regard that it had decided not to authorize the grant of national aids under the Sixth Directive on shipbuilding for the construction of fishing vessels intended for the Community fleet.

5 By Decision 88/123/EEC of 11 December 1987 on the multiannual guidance programme for the fishing fleet (1987 to 1991) forwarded by the Netherlands pursuant to Regulation (EEC) No 4028/86 (OJ 1988 L 62, p. 28, 'the Decision'), the Commission approved that programme ('the programme'), subject to certain limitations and conditions set out in the Decision.

6 The Commission nevertheless pointed out that any financial measures in respect of the sector concerned must, in order to be approved, fall within the scope of the programme setting out the common fisheries policy with regard to the Kingdom of the Netherlands.

7 The Regeling Generieke Steun Zeescheepsnieuwbouw 1988 (Netherlands aid scheme for new construction of ocean-going vessels, 'the national aid scheme')

introduces, subject to certain conditions, subsidies for shipbuilding. Under Article 28 of the national aid scheme and in accordance with Article 10(2) of the Sixth Directive, implementation of the scheme is dependent on approval by the Commission.

18 By letter of 29 March 1988, the Commission approved the national aid scheme under the Sixth Directive. Subsequently, by letter of 26 October 1988, the Netherlands Government informed the Commission of certain proposed amendments which did not affect either the overall orientation or the aims of that scheme. Those amendments were approved by the Commission by letter of 22 December 1988 to the extent that aid to the fisheries sector complied with the Guidelines.

19 On 28 November 1988, IJssel-Vliet submitted an application to the Minister for a grant for the construction of a 6 500-ton fishing vessel. That application was refused by decision of the Minister of 1 December 1989.

20 On 28 December 1989, IJssel-Vliet lodged a formal objection to the decision of the Minister, who, by decision of 19 March 1991, dismissed that objection as unfounded. The Minister considered that the aid applied for could not be granted because it did not comply with the programme. IJssel-Vliet, relying on the Sixth Directive, appealed against that decision to the Raad van State.

21 The Raad van State stayed the proceedings and asked the Court to rule on the two following questions:

'1. In the absence of an express authorization from the Council of the European Communities, is the Commission of the European Communities, having regard to Article 42 of the Treaty establishing the European Community in conjunction with Article 49 of Council Regulation (EEC) No 4028/86 of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and

aquaculture sector, empowered under the competence given to it by Article 93 of the EC Treaty to investigate aid granted by Member States, to draw up, publish and apply as basic principles for the assessment of State aid measures, Guidelines for the Examination of State aids in the Fisheries Sector (88/C 313/09) in order to coordinate Council Regulation (EEC) No 4028/86 and the Council Directive of 26 January 1987 on aid to shipbuilding (87/167/EEC), where those Guidelines lay down not only criteria pertaining exclusively to competition policy but also criteria derived from the Community fisheries policy?

2. If Question 1 is answered in the affirmative:

Are the Member States obliged to apply the abovementioned Guidelines as basic principles when deciding on an application for aid for the building of a vessel intended for fishing? If so, what is the basis for that obligation?

Does that obligation only apply where the vessel in question is wholly or partly intended for fishing in waters under the sovereignty or jurisdiction of the Member States of the Community or waters to which the Communities' external fisheries policy relates?'

2 In its order referring the questions, the Raad van State considers that it is in any event established that the vessel in question is intended partly for fishing in waters under the sovereignty or jurisdiction of the Member States of the Community.

3 At the hearing, moreover, IJssel-Vliet informed the Court that the vessel, which has now been built, flies the Netherlands flag.

The first question

24 The national court asks in substance whether the Commission, in exercising its powers under Articles 92 and 93 of the Treaty, could adopt guidelines requiring compliance, not only with criteria pertaining exclusively to competition policy, but also with those applicable in relation to the common fisheries policy, even if the Council had not expressly authorized it to do so.

25 IJssel-Vliet submits that, by providing in those Guidelines that aid for the construction of a fishing vessel cannot be considered compatible with the common market unless it is consistent with the objectives of the common fisheries policy, the Commission has disregarded the import of the Sixth Directive. It further submits that, contrary to the terms of the Guidelines, any aid for the construction of a fishing vessel referred to in Article 1(a) of the Sixth Directive is *ipso facto* compatible with the common market provided that it does not exceed the ceiling set by the Commission. Under that Directive, the Commission's role is confined to verifying that the condition as to the ceiling is observed. IJssel-Vliet relies in that regard on the judgment in Joined Cases C-356/90 and C-180/91 *Belgium* v *Commission* [1993] ECR I-2323.

26 It must, however, be remembered that the Sixth Directive is based on Article 92(3)(d) of the Treaty and thus concerns only one category of aids which 'may be considered to be compatible with the common market'. The relevant provisions of that Directive faithfully reproduce that wording (see the second indent of Article 1(d), and Article 4(1), of the Sixth Directive; see also, to the same effect, paragraph 32 of the judgment in *Belgium* v *Commission*, cited above).

27 Even though such aids may be considered to be compatible with the common market, it does not necessarily follow that they are. It is for the Commission to assess, under Article 93(3) of the Treaty, whether such aids meet all the conditions

required for compatibility with the common market. Article 10 of the Sixth Directive explicitly provides that Article 93 of the Treaty applies and, moreover, imposes additional notification rules.

28 Thus, even if an aid complies with the requirements of the Sixth Directive, it is not necessarily compatible with the common market.

29 In the alternative, IJssel-Vliet considers that, on the assumption that the Commission is entitled to declare an aid meeting the requirements of the Sixth Directive incompatible with the common market, it can never do so on the basis of considerations, such as those drawn from the common fisheries policy, which are extraneous to competition policy. Article 49 of Regulation No 4028/86, which makes competition policy applicable in the fisheries sector, does not allow that.

30 That is not so. Far from being a misapplication of its powers, it is essential for the Commission to take account of considerations drawn from the common fisheries policy when assessing whether aids to the fisheries sector, such as those in issue, are compatible with the common market.

31 The first paragraph of Article 42 of the Treaty, which acknowledges that the common agricultural policy takes precedence over the objectives of the Treaty in the field of competition, makes it clear that any application in this field of the Treaty provisions relating to competition is subject to account being taken of the objectives set out in Article 39 of the Treaty, namely those of the common agricultural policy (see, in that regard, Case C-280/93 *Germany* v *Commission* [1994] ECR I-4973).

32 In the fisheries sector, moreover, the common policy includes rules concerning the operation and development of the common market (see Article 38(4) of the Treaty). If the Commission were not to take account of those rules, it would run a serious risk of undermining the effectiveness of that common policy.

33 When assessing whether an aid granted to the fisheries sector is compatible with the common market, the Commission must therefore take account of the requirements of the common fisheries policy, which are indeed those of the common market.

34 The answer to the first question must therefore be that the Commission, in exercising its powers under Articles 92 and 93 of the Treaty, could adopt guidelines requiring compliance, not only with criteria pertaining exclusively to competition policy, but also with those applicable in relation to the common fisheries policy, even if the Council had not expressly authorized it to do so.

The second question

35 This question may be divided into two parts: whether the Guidelines are binding, and which vessels are subject to the rules in the Guidelines.

36 As regards the first part, Article 93(1) of the Treaty provides that the Commission, in cooperation with the Member States, is to keep under constant review the systems of aid existing in those States. It is to propose to them any appropriate measures required by the progressive development or by the functioning of the common market. That provision thus involves an obligation of regular, periodic

cooperation on the part of the Commission and the Member States, from which neither the Commission nor a Member State can release itself for an indefinite period depending on the unilateral will of either of them (see Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651).

37 The Guidelines are based on Article 93(1) of the Treaty and are thus one element of that obligation of regular, periodic cooperation from which neither the Commission nor a Member State can release itself. They also — at least as regards relations between the Commission and the Netherlands — conform strictly to the spirit of regular, periodic cooperation envisaged by the said Treaty article between the Commission and the Member States.

38 In the first place, the Guidelines, which are not the first to have been applicable in the sector under consideration, are an updating of previous guidelines and thus fall within the framework of regular, periodic review of the fisheries sector.

39 Secondly, although the Commission retains control, the review was carried out in cooperation with the Member States. They were consulted — in the case of the Netherlands Government, by letters of 30 March and 6 May 1988 — on the draft Guidelines and the Commission indicated, by letter of 30 November 1988 to the Netherlands Government, that when approving the final text of the Guidelines it had taken account of the observations made by the Member States.

40 Thirdly, it is clear from the letter of 30 November 1988 that the spirit of cooperation between the Commission and the Member States has been maintained throughout the existence of those Guidelines. In that letter, the Commission asked the Netherlands Government to assure it that the criteria laid down by the Guidelines would be observed in respect of all aids in the sector. In response, the Netherlands Government confirmed, by letter of 31 January 1989, that aids granted to the fisheries sector were in conformity with the Guidelines (see paragraph 13, above). When it did so, the Netherlands Government was applying the national aid scheme, which must therefore be deemed to have been covered by that confirmation.

41 As regards the treatment of aids to the fisheries sector, therefore, it is clear from the documents before the Court that the Commission and the Netherlands Government established a framework of cooperation in accordance with Article 93(1) of the Treaty from which neither could release itself.

42 Furthermore, in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 35, the Court recognized that a 'discipline' of the same legal nature as the Guidelines, whose rules were accepted by the Member States, was binding.

43 In the present case, the Commission approved the amendments to the national aid scheme only to the extent that aid granted by the Netherlands Government for the construction of fishing vessels complied with the Guidelines. In those circumstances, by putting the amendments into effect, the Netherlands Government accepted the rules laid down in the Guidelines. In accordance with the *CIRFS* judgment, cited above, those Guidelines are binding on that Member State.

44 Thus, as a result of the obligation of cooperation laid down by Article 93(1) of the Treaty and of its acceptance of the rules laid down in the Guidelines, a Member State, such as the Netherlands, must apply the Guidelines when deciding on an application for aid for the construction of a vessel intended for fishing.

45 As regards the second part of the second question, it is clear from paragraphs 14 and 3 above that the Guidelines apply to aid for the construction of fishing vessels intended for the 'Community fishing fleet' and that the common policy implemented by the Guidelines seeks to achieve the restructuring of the 'Community fleets'.

46 It must therefore be determined whether a vessel such as that in issue is to be considered as intended to form part of one of the Community fleets.

47 As the Advocate General has pointed out at point 58 of his Opinion, one of the criteria for application of the common policy relating to the Community fleets is the flag under which the vessel sails. A vessel flying the flag of a Member State has access at any time to the Community's fishing resources, whether in waters under the sovereignty or jurisdiction of the Member States of the Community or in those covered by the external fisheries policy, and is also subject to the measures of control provided for by common policy rules.

48 A vessel flying the flag of a Member State must therefore be considered to form part of one of the Community fleets, irrespective of the area in which it fishes.

49 The answer to the second question, taken as a whole, must therefore be that a Member State, such as the Netherlands, which is subject to the obligation of cooperation under Article 93(1) of the Treaty and which has accepted the rules laid down in the Guidelines must apply those Guidelines when deciding on an application for aid for the construction of a fishing vessel intended to form part of one of the Community fleets, irrespective of the area in which it fishes.

Costs

50 The costs incurred by the Netherlands and French Governments and the Commission of the European Communities, which have 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,

in answer to the questions referred to it by the Netherlands Raad van State, by order of 1 November 1994, hereby rules:

1. The Commission, in exercising its powers under Articles 92 and 93 of the EEC Treaty, could adopt the Guidelines for the examination of State aids in

the fisheries sector (88/C 313/09), which require compliance, not only with criteria pertaining exclusively to competition policy, but also with those applicable in relation to the common fisheries policy, even if the Council had not expressly authorized it to do so.

2. A Member State, such as the Netherlands, which is subject to the obligation of cooperation under Article 93(1) of the Treaty and which has accepted the rules laid down in the Guidelines must apply those Guidelines when deciding on an application for aid for the construction of a fishing vessel intended to form part of one of the Community fleets, irrespective of the area in which it fishes.

Rodríguez Iglesias Mancini Murray Sevón

Kakouris Kapteyn Gulmann Edward

Puissochet Hirsch Wathelet

Delivered in open court in Luxembourg on 15 October 1996.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President