JUDGMENT OF THE COURT
15 December 1987 *

In Case 326/85

Kingdom of the Netherlands, represented by A. Bos, Deputy Legal Adviser at the Ministry of Foreign Affairs, and G. M. Borchardt, assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, Robert C. Fischer, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for a declaration that Commission Decision No 85/464 of 28 August 1985 concerning the clearance of the accounts presented by the Kingdom of the Netherlands in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1981 (Official Journal 1985, L 267, p. 46) is void in relation to fishery products,

THE COURT,

composed of: G. Bosco (President of Chamber), acting as President, J. C. Moitinho de Almeida (President of Chamber), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, C. Kakouris, R. Joliet and F. Schockweiler, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: B. Pastor, Administrator

* Language of the Case: Dutch.

having regard to the Report for the Hearing and further to the hearing on 5 May 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 16 September 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 6 November 1985 the Kingdom of the Netherlands brought an action before the Court under the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision No 85/464 of 28 August 1985 on the clearance of the accounts presented by the Kingdom of the Netherlands in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section (hereinafter referred to as 'the Fund'), expenditure for 1981 (Official Journal 1985, L 267, p. 46), is void in so far as the Commission has failed to charge to the Fund the sums of HFL 16 691 422.52 in respect of export refunds in the fisheries sector and HFL 1 963 259.79 in respect of intervention measures in the fisheries sector.

2 The Netherlands Government submits that there has been an infringement of the rules implementing the EEC Treaty, namely Articles 2 and 3 of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) together with Council Regulation No 100/76 of 19 January 1976 on the common organization of the market in fishery products (Official Journal 1976, L 20, p. 1), Council Regulation No 110/76 of 19 January 1976 laying down general rules for granting export refunds on fishery products and criteria for fixing the amount of such refunds (Official Journal, L 20, p. 48) and Commission Regulation No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal, L 317, p. 1). The Netherlands Government also objects that the Commission did not avail itself of all the means at its disposal to prevent fish catches in 1981 from exceeding the quota. Alternatively, it claims that the

Commission's view could apply only from 27 July 1981 and that the Commission was wrong in completely equating the amount of export refunds paid in 1981 with the amount of fish caught during the same year.

3 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

4 In its first submission the Netherlands Government claims that Regulation No 729/70 allows Community financing to be refused only if there is disregard of the Community rules on the financial management or on the market policy in the fisheries sector and that the Commission's proposals to fix the total allowable catches (TACs) of certain fish stocks for 1981 and allocate them among the Member States (quotas) cannot be regarded as Comunity rules within the meaning of Regulation No 729/70.

5 The Commission contends that Community fishery conservation measures constitute Community rules as part of the common organization of the agricultural markets within the meaning of Articles 2 and 3 of Regulation No 729/70; such measures were applicable in 1981 and any measure by a Member State which is incompatible with Community law must lead to Community finance being refused if the measure has involved the Fund in expenditure.

6 According to Articles 1, 2 and 3 of Regulation No 729/70 the Guarantee Section of the Fund is intended to finance refunds on exports to third countries and intervention intended to stabilize the agricultural markets undertaken 'in accordance with the Community rules within the framework of the common organization of agricultural markets'.

7 The Court has consistently held (see the judgment of 7 February 1979 in Case 11/76 *Kingdom of the Netherlands* v *Commission* [1979] ECR 245) that those provisions permit the Commission to charge to the Fund only sums paid in accordance with the rules laid down in the various sectors of agricultural production while leaving the Member States to bear the burden of any other sums paid, and in particular any amounts which the national authorities wrongly believed themselves authorized to pay in the context of the common organization

of the markets. That strict interpretation of the conditions under which expenditure is to be borne by the Fund is necessary, moreover, in view of the aims of Regulation No 729/70. In fact if the common agricultural policy is to be applied in a manner which ensures equality between traders in the Member States the national authorities of a Member State may not, by the expedient of a wide interpretation of a given provision, favour traders in that State to the detriment of those in other States where a stricter interpretation is applied.

8 It is common ground that during the relevant period the aforementioned Council Regulation No 100/76, and Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal 1976, L 20, p. 19), applied. According to the first recital in the preamble to Regulation No 101/76 the establishment of a common organization of the market in fishery products must be supplemented by the establishment of a common structural policy for the fishing industry. Article 1 of Regulation No 101/76 provides for common rules to be laid down for fishing in maritime waters and for specific measures to be adopted for appropriate action and the coordination of structural policies of Member States for the fishing industry to promote harmonious and balanced development of that industry within the general economy and to encourage rational use of the biological resources of the sea. Article 4 governs the procedure for adopting the conservation measures necessary to protect the maritime resources of the Member States where there is a risk of over-fishing.

9 The Court recognized in its judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 *Cornelis Kramer and Others* [1976] ECR 1279 in relation to Regulations Nos 2141/70 and 2142/70 of the Council of 20 October 1970 (Official Journal, English Special Edition 1970 (III), pp. 703 and 707), which preceded Regulations Nos 100/76 and 101/76 and are substantially the same as them in this respect, that measures restricting catches are an integral part of the general scheme introduced by those regulations and that such measures may affect the operation of other components of the system, in particular pricing. Since such measures are intended to limit the quantity of fish available for the market they will *ipso facto* affect the volume of transactions to be financed out of the Fund.

10 It follows from the foregoing considerations that fishery conservation measures are part of the Community rules for the common organization of the agricultural markets within the meaning of Articles 2 and 3 of Regulation No 729/70, since according to Article 38 of the EEC Treaty agricultural products include fishery products, and that refunds granted and intervention undertaken in breach of Community conservation measures cannot be financed out of the Fund.

11 It is accordingly necessary to consider whether in 1981 there were Community rules in relation to the conservation of the resources of the sea restricting catches.

12 The essential point about the situation in 1981 is that the Council, which pursuant to Article 102 of the 1972 Act of Accession has since 1 January 1979 been solely responsible for the adoption of conservation measures under the common fisheries policy, acting on a proposal from the Commission, adopted no such measures.

13 Council Decision No 80/993 of 28 October 1980, based on the Treaties, concerning fishery activities in waters under the sovereignty or jurisdiction of Member States and adopted on a temporary basis pending the adoption of permanent Community measures (Official Journal 1980, L 298, p. 38), laid down interim measures applicable until 20 December 1980. Those measures provided that the Member States should conduct their fishing activities in such a way as to take into account the total allowable catches (TACs) and the part thereof made available to third countries under agreements or arrangements made with them, pursuant to Council Regulation No 754/80 of 26 March 1980 concerning, for certain fish stocks occurring in the Community fishing zone, the fixing for 1980 of the total allowable catches, the share available for the Community and the means of making the catches (Official Journal 1980, L 84, p. 36) and in the Commission's proposals of 12 September and 24 October 1980.

14 At its meeting on 15 to 17 December 1980 the Council had adopted a declaration in the minutes to the effect that the Member States would conduct their fishing activities in such a way that the catches made by their ships during the interim period would take into account the TACs submitted for 1981 by the Commission to the Council in its proposals of 18 November and 16 December 1980.

15 In 1981 the Commission repeatedly amended its TAC proposals and ultimately submitted to the Council on 24 July 1981 a proposal for a regulation concerning, for certain fish stocks occurring in the Community fishing zone, the fixing of the total allowable catches for 1981 and the share available to the Community and a proposal for a regulation concerning the allocation among the Member States of the total catch possibilities available to the Community in 1981 for fish stocks or groups of them occurring in the Community fishing zone.

16 In a declaration submitted to the Council on 27 July 1981 (Official Journal, C 224, p. 1) the Commission set out the position resulting from the absence of agreement on its proposals for fixing the TACs and quotas for 1981. The Commission recalled that it had certain rights and duties under Article 155 of the Treaty, as had been confirmed by the Court in particular in its judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045. In view of the overriding public interest and as a precautionary measure pending a final decision by the Council, the Commission therefore called upon all Member States in pursuance of their rights and duties to conduct their fishing activities in such a way as to ensure compliance with the Commission's proposals. The Commission also declared that it was determined to use all the means in its power to ensure the compliance by the Member States with those proposals, which it considered in the circumstances to be legally binding upon the Member States.

17 It is apparent from the minutes of the Council meeting on 27 July 1981 that the Commission's declaration was challenged by the Council's Legal Department and by the representatives of the various Member States, and that finally the Council agreed to discuss the TACs and quotas proposed for 1981 at its next meeting.

18 In a letter to the Member States dated 28 July 1981 the Commission reminded the Member States of its declaration and added that it believed it was obliged not merely to approve or disapprove, in the light of its proposals, national measures as and when they might be submitted to it, but also to require all Member States to take steps to comply with those proposals; pending the next meeting of the Council the Commission intended to give its approval to catches which amounted to not more than three-quarters of the amount of the quotas proposed by it. The Commission called upon all Member States to indicate not later than 24 August 1981 the measures which they proposed to take in order to ensure that this general rule was observed in the interim period.

19 On 17 September 1981 the Netherlands adopted certain measures restricting mackerel catches in certain areas and the Commission approved that conservation measure. No measures were adopted with regard to other kinds of fish.

20 The Court has had occasion to state the applicable Community law on the subject in its previous judgments, most recently in the judgment of 5 May 1981 referred to above. The present case, however, differs from the situation described in that judgment inasmuch as the Council took no interim decision for 1981 and all that issued from it was the declaration in the minutes of the Council meeting on 15 to 17 December 1980 that the Member States would conduct their fishing activities in such a way that the catches would take into account the TACs submitted for 1981 by the Commission to the Council in its proposals of 18 November and 16 December 1980.

21 The Court held in its judgment of 5 May 1981, referred to above, that where the Council had failed to act, Article 5 of the Treaty required Member States to facilitate the Community's accomplishment of its task and to refrain from any measures likely to jeopardize the achievement of the aims of the Treaty; Article 5 imposed on Member States special duties of action and abstention where the Commission, in order to meet urgent conservation needs, had submitted to the Council proposals which, although they were not adopted by the Council, represented a basis for concerted Community action. The Court also declared that this was a field reserved to the powers of the Community, within which Member States might henceforth act only as trustees of the common interest; Member States could not, therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which might be required by the situation except as part of a process of collaboration with the Commission. Member States had a duty not to lay down national conservation measures incompatible with the objections, reservations or conditions which might be formulated by the Commission.

22 The Court thus accepted that, where the Council had failed to adopt the conservation measures necessary to protect fish stocks, such measures, designed to answer urgent needs, might be agreed upon by means of a process of cooperation between the Member States and the Commission in order to enable the Community to meet its responsibilities.

23 It is common ground that no such process of cooperation was initiated in 1981 between the Netherlands and the Commission, other than for mackerel, since the Netherlands did not respond to the Commission's invitation to adopt the measures needed to ensure compliance with its proposals. In those circumstances, and without its being necessary to rule on the legal consequences of that lack of cooperation on the part of a Member State, it must be found that the proposals unilaterally made by the Commission in relation to the fishing quotas to be allocated to the Netherlands cannot be regarded as Community rules.

24 Moreover, as the Court has repeatedly held, Community legislation must be certain and its application foreseeable by those subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them.

25 It follows from the foregoing that in the present case there were in 1981 no rules of Community law within the meaning of Articles 2 and 3 of Regulation No 729/70, disregard of which could justify the Commission's refusal to charge to the Fund the export refunds and intervention payments which are the subject of the action.

26 Moreover, it has not been denied that the expenditure was actually incurred by the Netherlands. Commission Decision No 85/464 of 28 August 1985 must therefore be declared void as claimed in the application and there is no need to consider the applicant's other submissions and arguments.

Costs

27 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs if they have been asked for. The Kingdom of the Netherlands has not asked for the Commission to be ordered to pay the costs. It follows that although the Commission has been unsuccessful the parties must bear their own costs.

On those grounds,

THE COURT

hereby:

(1) Declares that Commission Decision No 85/464 of 28 August 1985 on the clearance of the accounts presented by the Kingdom of the Netherlands in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1981, is void in so far as the Commission has failed to charge to the Fund the sums of HFL 16 691 422.52 in relation to export refunds in the fisheries sector and HFL 1 963 259.79 for intervention payments in the fisheries sector.

(2) Orders the parties to bear their own costs.

Bosco Moitinho de Almeida Koopmans Everling

Bahlmann Galmot Kakouris Joliet Schockweiler

Delivered in open court in Luxembourg on 15 December 1987.

P. Heim
Registrar

A. J. Mackenzie Stuart
President