REPORT FOR THE HEARING
delivered in Case 326/85 *

I — Facts

1. Article 1 (2) 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) provides that the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'the Fund') shall finance:

(a) refunds on exports to third countries, and

(b) intervention intended to stabilize the agricultural markets.

Article 2 of the regulation provides that refunds on exports to third countries granted in accordance with the Community rules within the framework of the common organization of agricultural markets shall be financed by the Fund.

Article 3 provides that intervention intended to stabilize the agricultural markets, undertaken according to Community rules within the framework of the common organization of agricultural markets, shall likewise be financed by the Fund.

Article 5 (2) (b) provides that the Commission must clear the accounts of the authorities and bodies responsible for the payment of the expenses referred to in Articles 2 and 3 before the end of the following year and on the basis of the annual accounts.

Article 1 of Regulation No 1723/72 of the Commission of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section, (Official Journal, English Special Edition (Second Series) (III), p. 109) provides that Member States must forward to the Commission annual summaries of accounts, the reports and the summary of expenditure not later than 31 March of the year following that in which the expenditure they deal with was paid. Article 8 (a) of the regulation provides that the decision to make up the accounts mentioned in Article 5 (2) (b) of Regulation No 729/70 is to cover the determination of the amount of expenditure incurred in each Member State during the year in question, recognized as chargeable to the Guarantee Section of the Fund.

2. The main elements of a common fisheries policy were set out in 1970 by Regulation No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry (Official Journal, English Special Edition 1970 (III), p. 703) and Regulation No 2142/70 of the Council of 20 October 1970 on the common organization of the market in fishery products (Official Journal, English Special Edition 1970 (III), p. 707). Articles 100 to 102 of the Act of Accession of 1972 partly confirmed and partly amended them in relation to access to fish stocks. In particular Article 102 provided that from the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, was to determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

3. Regulations Nos 2141/70 and 2142/70 were replaced by Council Regulation No 100/76 of 19 January 1976 on the common

* Language of the Case: Dutch.

organization of the market in fishery products (Official Journal, L 20, p. 1) and Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal, L 20, p. 19).

The last recital in the preamble to Regulation No 100/76 stated that the expenditure incurred by the Member States as a result of the obligations arising out of the application of the regulation was to fall on the Community in accordance with the provisions of Articles 2 and 3 of Regulation No 729/70.

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) also lays down detailed rules for the application of the system of export refunds provided for in Regulation No 100/76.

Regulation No 100/76 contained no provision similar to Article 26 (2) of Council Regulation No 3796/81 of 29 December 1981 on the common organization of the market in fishery products (Official Journal, L 379, p. 1), which was applicable from 1982. Article 26 (2) provides that intervention measures are to be financed in respect of products from a stock or group of stocks only up to the limit of any quantities allocated to the Member State in question from the total volume of allowable catches for the stock or group of stocks in question.

Article 1 of Regulation No 101/76 provided that common rules should be laid down for fishing in maritime waters and specific measures should be adopted for appropriate action and the coordination of structural policies of Member States to promote harmonious and balanced development of the fishing industry and to encourage rational use of the biological resources of the sea and of inland waters.

Article 4 provided that where there was a risk of over-fishing of certain stocks in maritime waters of the Member States referred to in Article 2, the Council, acting in accordance with the procedure provided for in Article 43 (2) of the Treaty on a proposal from the Commission, could adopt the necessary conservation measures. In particular, those measures could include restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear.

4. On 6 April 1976 the Council adopted Regulation No 811/76 temporarily authorizing certain systems of catch quotas in the fisheries sector (Official Journal, L 94, p. 1), in which it authorized Member States to limit catches of their fishing fleets in accordance with international undertakings contracted or to be contracted. The first recital to the regulation stated that 'the fishery resources of the sea would be considerably endangered if catches were not controlled; ... the rational development of the production of fishery products might be disturbed if no limit were placed on the size of landings'.

5. On 6 October 1976 the Commission sent the Council a proposal for a regulation establishing a Community system of conservation and management of fishery resources, on which the Council was not able to reach agreement, however, until 1983.

6. On 3 November 1976 the Council adopted what is known as the 'Hague Resolution'. In Annex VI thereto it was stated that pending the implementation of

the Community measures then in preparation, the Member States would not take any unilateral measures in respect of the conservation of resources. It provided, however, that if no agreement was reached for 1977 within the international fisheries commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoided discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts. Before adopting such measures, the Member State concerned would seek the approval of the Commission, which had to be consulted at all stages of the procedures.

7. On 18 February 1977 the Council adopted Regulation No 350/77 laying down certain interim measures for the conservation and management of fishery resources (Official Journal, L 48, p. 28), applicable until 31 December 1977 at the latest.

8. At a meeting on 31 January 1978 the Council approved the Commission communication according to which, in the absence of a common system, national measures could only be taken in so far as they were strictly necessary for the conservation and management of fishery resources and were non-discriminatory and in conformity with the Treaty, and if the approval of the Commission had been sought beforehand (Official Journal, C 154, p. 5).

9. On 19 December 1978 the Council adopted interim measures applicable until the end of March 1979.

10. On 1 January 1979 the transitional period provided for in Article 102 of the 1972 Act of Accession expired. On that date power to take measures intended to conserve maritime resources was to vest fully and definitively in the Community. Because it was not able to reach agreement on the Commission's proposals, the Council adopted fresh interim measures in 1979 and in March 1980.

11. On 30 May 1980 the Council adopted a declaration concerning the common fisheries policy (Official Journal, C 158, p. 2) in which it undertook to adopt a common overall fisheries policy by 1 January 1981 at the latest. In compliance with the Treaties and in conformity with the Resolution of 3 November 1976 (the Hague Agreement) the policy was to be based *inter alia* on rational and non-discriminatory Community measures for the management of resources, the conservation and reconstitution of stocks and fair distribution of catches.

Council Decision 80/601 of 16 June 1980 (Official Journal, L 160, p. 48) refers to that declaration and adopts fresh interim measures applicable until 31 July 1980.

Council Decision 80/993 of 28 October 1980, based on the Treaties, concerned fishery activities in waters under the sovereignty or jurisdiction of Member States and was adopted on a temporary basis pending the adoption of permanent Community measures (Official Journal, L 298, p. 38); it provided for the following interim measures, applicable until 20 December 1980:

'(1) Member States shall conduct their fishing activities in such a way as to take into account the total allowable catches (TACs) and the part of the TACs made available to third countries under agreements or arrangements made with them, as given in Regulation (EEC) No 754/80, and in the Commission's amended proposals of 12

September and 24 October 1980, and shall inform the Commission in accordance with Regulation (EEC) No 753/80. The catches taken in the interim period will be offset against the allocations eventually decided upon by the Council for 1980.

(2) As regards the technical measures for the conservation and surveillance of fishery resources in geographical areas not covered by Council Regulation (EEC) No 2527/80, Member States shall apply the same measures as they applied on 3 November 1976, and other measures taken in accordance with the procedures and criteria of Annex VI to the Council Resolution of 3 November 1976.'

At its meeting on 15 to 17 December 1980 the Council 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 total allowable catches (TACs) submitted for 1981 by the Commission to the Council in its proposals of 18 November and 16 December 1980.

12. In the conservation of resources the Community had also to take into account its international obligations.

13. In 1981 the Commission repeatedly amended its TAC proposals and ultimately submitted to the Council on 24 July 1981:

(i) 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 shares available to the Community (Official Journal, C 224, p. 2);

(ii) an amendment to the proposal for a Council regulation fixing the conditions governing fishing operations when taking the total allowable catches for 1981 (Official Journal, C 224, p. 10), the proposal submitted to the Council on 6 March 1981 (Official Journal, C 224, p. 7); and

(iii) a proposal for a regulation concerning the distribution among the Member States of the total catch possibilities available to the Community in 1981 of stocks or groups of stocks occurring in the Community fishing zone (Official Journal, C 224, p. 11).

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 to fix 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 *inter alia* 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 respect by Member States of those proposals, which it considered in the circumstances to be legally binding upon the Member States.

It is apparent from the minutes of the Council meeting on 27 July 1981 (PV/Cons. 37th Fishing 197, 8682/81, pp. 8 and 9) that the Commission's declaration was challenged by the Council's legal department and various Member States, and that finally the Council agreed to discuss the TACs and quotas proposed for 1981 at its next meeting.

In a letter to the Member States dated 28 July 1981 the Commission drew attention to 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, but also to require all Member States to take steps to comply with those proposals. The Commission stated that its position was dictated by the necessity of controlling fishing activity in the interim period; 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 the Commission. 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 the general rule was respected in the interim period.

14. On 17 September 1981 the Netherlands Government amended its decision of 1980 provisionally restricting the volume of catches of sea fish other than sole and plaice to prohibit catches of mackerel in Zones III and IV and, in certain conditions, restricted catches to 22 000 tonnes in Zones VI, VII and VIII. The Commission approved that national conservation measure.

15. From 1 January 1982 to 31 March 1982 fishing activities in Community waters were again governed by an interim Council decision, Decision 81/1052 of 29 December 1981 (Official Journal, L 379, p. 52), which required the Member States to take into account the TACs proposed by the Commission on 24 July 1981. Subsequently the Council adopted other provisional measures for 1982.

16. On 25 January 1983 the Council adopted Regulation No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (Official Journal, L 24, p. 1). Article 3 provides for the fixing of the TACs and Article 4 for the distribution of the available share of the TACs between Member States. In application of that regulation the Council subsequently fixed the necessary TACs and quotas. However, it did not fix them for 1981.

17. The Commission informed the Government of the Netherlands by letter of 13 December 1983 that expenditure incurred by the Netherlands in 1981 in the amount of HFL 16 688 198 for export refunds on frozen mackerel was not eligible for financing by the Fund because it had not been incurred in accordance with Community law. At the end of its letter the Commission invited the Government of the Netherlands to confirm that its observation regarding the amount of the refunds was correct.

18. On 29 May 1984 the Commission informed the Government of the Netherlands that intervention measures amounting to HFL 1 963 259.79 incurred by the Netherlands in 1981 was also ineligible for financing.

19. The Netherlands Government replied on 20 June 1984 that the rules governing refunds had not been infringed; neither

Regulation No 100/76 nor Regulation No 3796/81 contained restrictions on the payment of refunds. As far as the intervention measures were concerned, Article 26 of Regulation No 3796/81 was not applicable until 1 June 1982 and Regulation No 100/76 did not contain any such restriction. The Netherlands Government also pointed out a number of factual errors.

20. By Decision 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 (Official Journal, L 267, p. 46), the Commission refused financing for export refunds in the fisheries sector amounting to HFL 16 691 422.52 and intervention payments in the fisheries sector amounting HFL 1 963 259.79.

21. The Commission communicated its decision to the Kingdom of the Netherlands by letter of 5 September 1985.

II — Written procedure and conclusions of the parties

1. The application of the Kingdom of the Netherlands was lodged at the Court Registry on 6 November 1985.

2. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

3. The *Kingdom of the Netherlands*, the applicant, concludes that the Court should:

Annul Commission Decision 85/464 of 28 August 1985 in so far as it holds that the accounts presented by the Kingdom of the Netherlands for 1981' in relation to export refunds in the fisheries sector amounting to HFL 16 691 422.52 and intervention payments in the fisheries sector amounting to HFL 1 963 259.79 are not eligible for Community financing.

4. The *Commission*, the defendant, concludes that the Court should:

(i) Dismiss the action as unfounded;

(ii) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The application lodged by the Kingdom of the Netherlands under Article 173 of the EEC Treaty is based on breach of the rules governing the application of the Treaty. The applicant considers that the Commission's interpretation of Articles 2 and 3 of Regulation No 729/70 and, correspondingly, of Regulations Nos 100/76, 110/76 and 2730/79, is incorrect.

The principal arguments adduced by the Kingdom of the Netherlands in support of its application relate to refunds and intervention and to the conduct of the Commission, whose position regarding quotas in that respect is rejected by the Netherlands; in the alternative, it argues that the Commission's decision is only partially correct as regards 1981, in particular as regards the date on which the Commission's proposals were put forward.

A — *Principal arguments*

1. The Kingdom of the Netherlands submits that in 1981 there was no common fisheries policy as now exists; in particular, there was no real common policy on conservation. However, it concedes that in the circumstances obtaining at the time the

Commission had the power to require Member States to adopt conservation measures in accordance with its proposals.

(a) *Refunds and intervention*

However, the applicant rejects the argument that conservation measures and market policy should follow the same path. The regulations governing them have entirely different purposes: conservation is based on considerations of biology entirely separate from market policy. The applicant maintains that expenditure incurred in accordance with the rules of market policy must be eligible for Community financing.

The applicant points out that neither Article 23 of Regulation No 100/76 which was applicable, nor Article 25 of the subsequent regulation, Regulation No 3796/81, contain restrictions on the financing of export refunds, in contrast to Article 26 of Regulation No 3796/81, which does include such a restriction as regards intervention payable from 1982 onwards. Regulation No 2730/79, likewise, does not contain any conditions requiring that the fish to be exported fall within the authorized quota. The applicant submits that the Commission cannot impose that additional condition in the absence of further legislation by the Community legislature.

The Commission's argument that the position was governed solely by Articles 2 and 3 of Regulation No 729/70 ignores Regulation No 100/76 on the common organization of the market in fishery products and the fact that that regulation contains no restrictions on financing. It would also lead to extreme uncertainty: Community financing could be refused solely on the ground that a rule of Community law had been breached, regardless of the specific provisions governing the matter.

The applicant maintains that the judgment of 7 February 1979 in Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, relied upon by the Commission, is not decisive in this case because the common organization of the market in fisheries contains no restrictions of the kind referred to by the Commission. The Court's judgment does not show that payment is impossible in the event of a breach of Community law. It is only impossible if the breach of the Treaty would actually disturb the functioning of the market organization, which was not so in this case.

The applicant submits that the reference to the judgments of 7 February 1979 (*France* v *Commission* Joined Cases 15 and 16/76 [1979] ECR 321) and 27 February 1985 (*Italy* v *Commission* Case 56/83 [1985] ECR 703) seems hardly relevant in view of the fact that those cases were concerned with additional State aid which was incompatible with Community law.

The applicant points out that quotas were introduced in order to conserve stocks: they cannot be used to influence competition. In any event there was no distortion of competition in this case. In 1981 no Member State ceased fishing for mackerel and it is not true that economic advantages were given in some States and not in others.

The applicant maintains that any request for a refund which met the conditions applicable ought to have received a favourable reply and the claimant could pursue that claim before the courts in order to obtain his refund; the applicant would not have been in a position to ensure that fish caught in excess of the quotas was not included. In any event, the condition imposed by the Commission that the quota should not have been exceeded would have to have been the subject of proper controls. There is no provision for such controls, however, in the Community rules and the

Member States themselves could not have imposed additional conditions regarding payment of refunds. The applicant points out that the condition that the fish be in free circulation and of good merchantable quality is a condition the observance of which may easily be checked by the paying institution, unlike the condition regarding observance of the quotas which makes it necessary to determine to which State the quota actually belongs. That is not possible to do in practice. The suggestion regarding confiscation of the goods would also be difficult to apply in practice.

The situation is similar as regards intervention. Here too, Regulation No 100/76 contained no restriction regarding the financing of intervention measures. The adoption of the limit laid down by Article 26 of Regulation No 3796/81 with effect from 1982 merely underscores the fact that there was no similar limit prior to 1981 and that intervention measures in the fisheries sector were wholly eligible for Community financing. There is no apparent reason why that provision should relate solely to internal transactions.

(b) *The conduct of the Commission*

The Kingdom of the Netherlands considers that the Commission itself failed to use all the means at its disposal to prevent quotas being exceeded.

The monthly declarations ought to have enabled the Commission to foresee such a development and to introduce rules to prevent it by reducing or abolishing refunds, as it did in 1984, and it is not equitable to pass the entire responsibility for exceeding quotas on to the Member States, who were not in a position to adapt their measures in due time, when clearing the accounts of the Fund some three or four years after the event. The Commission's conduct is hard to reconcile with the observations made by the European Parliament in 1985 regarding the Fund's accounts, when it asked the Commission to notify problems as and when they arose in order to enable the Member States, if necessary, to remedy errors before they produced serious consequences.

It is also apparent from the reply given in 1983 by the Commission to the European Court of Auditors that the Commission did not take a firm stand until it was too late and that the applicant could not have known the Commission's view of the matter until the Commission issued its letter of 13 December 1983. The Commission's reliance on its declaration of 27 July 1981, in which it stated that it would use all the means in its power to ensure that its proposals were respected, is misplaced.

The applicant adds that it was open to the Commission to bring proceedings against the Kingdom of the Netherlands under Article 169 of the Treaty for failure to fulfil its obligations if it was of the opinion that the provisions of the Treaty had not been complied with. It did not do so, and it is not appropriate to attach financial consequences to an alleged breach of Community law years after the expenditure was incurred. By such conduct the Commission is also depriving a Member State of the procedural guarantees afforded by Article 169 of the Treaty. The judgment of 7 February 1979 (Joined Cases 15 and 16/76, cited above) does not dispose of that argument. In that judgment the Court merely stated that the procedure for failing to fulfil obligations

and the procedure relating to the clearance of accounts were not related since they pursued different aims and were governed by different rules.

The applicant also objects that the Commission's conduct justifies the conclusion that the Commission may decide entirely at whim whether or not to impose the financial penalty provided for by Regulation No 729/70 for an infringement of Community law which it considers to have been committed, when in fact that regulation makes refusal of Community financing a penalty solely applicable in respect of failure to fulfil the relevant Community rules on financing.

The applicant considers that the Commission has a certain amount of discretion to exercise as regards the nature and gravity of a breach of the Treaty. That is clearly demonstrated by the procedure to be followed in clearing accounts, in which the summary report is accompanied by various addenda expressing different views.

2. The Commission considers it useful, before replying to the applicant's arguments, to set out its views concerning the legally binding nature of its proposals on TACs and quotas, although that has not been challenged by the applicant, since the validity of the contested decision depends on the binding nature of the proposals.

The Commission points out that in its declaration of 27 July 1981 it expressly referred to the case-law of the Court of Justice. It referred not only to the judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, but also to the judgment of 10 July 1980 in Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, as it did in its summary report.

(i) In paragraph 25 of its judgment of 10 July 1980 in Case 32/79 (cited above) the Court defined the obligations of the Member States as follows: 'Both Article 102 of the Act of Accession and Council Regulation (EEC) No 101/76, in particular Article 4 thereof, in the same way as Annex VI to the Hague Resolution and the Council Regulation of 31 January 1978, are based on the twofold assumption that measures must be adopted so as to meet established conservation needs and that if those measures cannot be introduced in good time on a Community basis the Member States not only have the right but are also under a duty to act in the interests of the Community.'

(ii) In its judgment of 5 May 1981 in Case 804/79 (cited above), the Court stated that failure of the Council to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field (paragraph 20) and that conservation measures must be defined by means of all the available elements of law, even though fragmentary, and by having regard to the structural principles on which the Community is founded. Those principles require the Community to retain in all circumstances its capacity to comply with its responsibilities, subject to the observance of the essential balances intended by the Treaty (paragraph 23). In paragraph 25 of its judgment the Court referred to the Commission's proposals with regard to the interim measures adopted by the Council, and several times mentioned the

Commission's role when the Member States adopted conservation measures (paragraphs 27, 28 and 30 to 32); in paragraph 31 it referred to the obligation on all Member States in the circumstances to undertake detailed consultations with the Commission and to seek its approval in good faith, and their duty not to adopt national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.

In view of those judgments the Commission considers itself justified in having informed the Member States in 1981 that in the light of Articles 5 and 155 of the EEC Treaty it regarded its proposals as binding on them in the circumstances obtaining at the time. The Council has frequently stressed the fact that the biological resources of the sea would be greatly threatened by uncontrolled catches and the Commission's proposals for 1981 were based on scientific opinions obtained from international organizations and the opinions of the Commission's own Scientific and Technical Committee for Fisheries; the proposals also took into account the Community's international obligations. It was logical for the Commission to have stated in its declaration of 27 July 1981 that it regarded its proposals as legally binding and to have demanded that Member States apply them without more ado. To have first asked the Member States to consult the Commission as to the conservation measures they planned to adopt and then to have communicated to them its objections, reservations or conditions would have been poor management on the part of the Commission. It would unnecessarily have delayed even more the introduction of the requisite conservation measures, since Member States could assume that the Commission would approve only measures compatible with its proposals, and would in any case have had little effect on the Member States who omitted to adopt the necessary measures. The Commission points out that the Council itself stated in its declaration of 15 and 17 December 1980 that Member States must apply with regard to fishing the TACs proposed by the Commission for 1981.

Finally, the Commission points out that the sole purpose of its declaration of 27 July 1981, in which it stated that its proposals were legally binding, was to reaffirm and define the obligations of the Member States as a result of the Council's failure to act, in accordance with the case-law of the Court of Justice.

(a) *Refunds and intervention*

The Commission contends that the applicant's distinction between conservation policy and market policy is artificial and irrelevant. Together with structural policy, those two policies comprise the common fisheries policy which embraces, under Articles 39 and 40 of the EEC Treaty, all economic activity in that sector, at the levels of both production and marketing. Conservation measures are, of course, also based on biological considerations, but their purpose is directly connected with the general economy of the fisheries sector. Community conservation measures fall squarely within the ambit of Community rules under the common organization of the agricultural markets within the meaning of Articles 2 and 3 of Regulation No 729/70, which alone determine the legal position.

Articles 2 and 3 of Regulation No 729/70 have always been interpreted as meaning that expenditure must have been incurred strictly in compliance with the Community rules.

The Court has held that Articles 2 and 3 of Regulation No 729/70 permit the Commission to finance only payments made in conformity with the rules laid down in the various market sectors for agricultural products. The general purpose of Regulation No 729/70 also supports that strict interpretation, as the Court held *inter alia* in paragraph 9 of its judgment of 7 February 1979 in Case 11/76 (cited above).

The Commission submits that the applicant's argument to the effect that Regulation No 729/70 permits the refusal of Community financing only if the financial rules applicable to payment of export refunds and intervention payments have been infringed finds no support in the regulation itself and runs counter to the case-law of the Court of Justice. In its judgment of 7 February 1979 in Joined Cases 15 and 16/76 and in that of 27 February 1985 in Case 56/83 the Court considered infringements of the Treaty which lay outside the financial rules governing payments for which financing had been requested. Both judgments indicate that the Court accepted the principle that any act of a Member State incompatible with Community law could give rise to refusal of Community financing, provided that that act caused the Fund expense. In the judgment of 7 February 1979 in Joined Cases 15 and 16/76 the Court also noted, in paragraph 28, that the Commission had no discretion to exercise in relation to the clearing of accounts, and it pointed out in paragraph 31 that additional national measures would be liable to prejudice equal treatment and thereby distort competition between Member States.

The Commission submits that a Member State which permits its fishermen to exceed the quotas unquestionably confers upon them a considerable advantage, and the resulting distortion of competition will be aggravated if the fishing in excess of the quotas also creates additional expense to be charged to the Fund. The argument that in 1981 no Member State halted mackerel fishing so that there was no distortion of competition is irrelevant, because the same reasoning would lead to the conclusion that State aid prohibited by Article 92 of the EEC Treaty would cease to be prohibited if all the Member States agreed to it.

The Commission emphasizes that it is not so much a question of whether the breach of the Treaty disrupted the common organization of the market, but rather whether it led to unnecessary and unjustifiable expense in the form of refunds and intervention payments. It would be arbitrary and unjust to consider when clearing accounts solely the consequences attaching to breaches of Regulation No 100/76, whilst ignoring breaches of other provisions contained in the common fisheries policy.

The Commission submits that Member States who permit their fishermen to exceed the quotas allocated to them, or at least do not prevent them from exceeding them, are in breach of the Community obligations imposed on them by the common fisheries policy, which was introduced in order to achieve the aims laid down in Article 39 of

the EEC Treaty, in accordance with Articles 40 and 43 of the Treaty.

The Commission denies that its view results in great uncertainty in the law with significant and inequitable financial consequences for the Member States. The Commission maintains that there is no legal uncertainty, at least as regards Community law. Each Member State knew that it must arrange the management of its quotas appropriately and the duty to ensure that quotas were adhered to was entirely separate from any consequences failure to observe that obligation might have as regards clearance of their accounts. The reference to the observations made by the European Parliament are irrelevant for the same reasons.

The fact that exceeding quotas could lead to a reduction in the amount financed by the Fund could not have been a complete surprise for Member States in view of the Commission's practice, supported by the Court of Justice, of taking into account for the purposes of the Fund not only correct application of the so-called 'financial' provisions concerning the payment of refunds and intervention, but also the possibility of breaches of the Treaty in other respects. It was therefore incumbent upon the Member States to restrict as much as possible the financial damage resulting for them from over-fishing. The only uncertainty on which the applicant could have relied was a factual one, namely whether or not the Commission would in fact reduce financing as a result of quotas having been exceeded. Uncertainty in that respect could not, however, relieve the applicant of its obligations in the matter.

The Commission submits that fish caught in excess of a quota was ineligible for financing as a result of Articles 2 and 3 of Regulation No 729/70, and the absence in 1981 of special rules governing the consequences of over-fishing in regard to Community financing was irrelevant. It would be both superfluous and unusual to make specific provision for the consequences as regards the Fund of such breaches, which might be termed 'external' breaches.

As regards Article 26 (2) of Regulation No 3796/81, the Commission submits that it is irrelevant to this case because it did not enter into force until 1982. It also maintains that, even if that provision had the significance attributed to it by the applicant, that would constitute a non-retroactive alteration of the pre-existing legal situation. But the Commission denies that Article 26 has that significance. The provision would seem to be primarily intended to make it clear that Member States must refuse any compensation by way of intervention for fishermen or producers' organizations for fish caught in excess of the quotas; it would therefore seem to be concerned principally with legal relations between Member States and their fishermen and producers' organizations. That would also explain why the provision deals only with intervention and not refunds. However, there is nothing in that argument to show that, in the absence of Article 26, Member States were not entitled to refuse financing for intervention measures connected with fish clearly caught in excess of quotas. It is unlikely that a Member State could be obliged under the Community provisions concerning refunds to pay refunds for fish caught in breach of a prohibition on fishing.

The Commission submits that the applicant's argument that when an exporter is entitled to a refund that refund must be unconditionally covered by Community financing is based on the misconception that

Regulation No 729/70 is concerned solely with financial rules. The correct application of the financial and technical rules is a necessary, but not sufficient, condition for the grant of Community financing. When a Member State has infringed other Community provisions and thus caused extra expense it forfeits its right to Community financing independently of whether or not it may recover monies from the recipients of the refund or intervention payments. The clearance of Member States' accounts is an internal matter between the Member States and the Community and the sole decisive criteria for the grant of Community financing is whether the Member State has fulfilled its Community obligations.

The Commission is aware that owing to the existence of free trade between Member States it is not always possible to determine with certainty whether products declared with a view to obtaining refunds have originated within the quota in force for the relevant Member State. It maintains, however, that it kept that factor in mind in making its calculations and that it invited the Member States to adjust its figures during the consultation procedure. The applicant did not do so and thus tacitly approved the Commission's figures.

(b) *The Commission's conduct*

As regards the complaint listed under the heading of the Commission's conduct, the Commission repeats its assertion that each Member State is responsible for ensuring that the quota allocated to it is duly and properly observed, and it is also best placed to ensure that. It is not true that the monthly declarations enable the Commission to follow refund payments; the declarations contain only general figures and do not specify the period in which the fish was exported, or the TAC and quota area and period in which the fish was caught. In addition, the figures could only properly be checked, and should only be checked, when the accounts were cleared. Only then was the Commission in a position to determine the precise financial consequences to be attached to fishing in excess of the quotas.

In order to dispose of any misunderstanding as to where the burden of proof lies, the Commission reviews the provisions governing the procedure for clearing accounts. In the first place, Regulations Nos 729/70 and 1723/72 make it the duty of the Member State, in principle, to justify its expenditure, as the Court has recognized *inter alia* in its judgments of 7 February 1979 (Joined Cases 15 and 16/76, cited above) and 12 July 1984 in Case 49/83 *Luxembourg* v *Commission* [1984] ECR 2931. Secondly, those regulations indicate that the Commission need only show, in order to disallow expenditure by a Member State, that it was partially or wholly not incurred in accordance with Community law. In the present case the Commission considers that it must show that the breach of the Treaty could have engendered expense which would not have been incurred had the breach not been made, and it need not specify what that extra expense was. The Commission considers that it is clear that the quantities of fish in question could not have been exported or been the subject of intervention payments because they would not have been available had the quotas not been exceeded.

Thirdly, Member States' accounts are cleared on the basis of the documents which

they submit to the Commission before it takes a decision. The validity of that decision can therefore only be assessed in the light of the information available to the Commission when it took the decision.

The Commission points out that in order to ensure the maximum legal protection it added to the procedure already provided for a lengthy exchange of views, an exchange which was pursued right up to its conclusion with the Netherlands authorities.

The Commission submits that the applicant misunderstands the nature of that consultation, however, when it maintains that the Commission enjoys a certain discretion in determining the nature and significance of any breach of the Treaty. The consultations may result in the Commission amending its initial conclusions, but only in the light of explanations and additional information supplied by the Member State.

The Commission maintains that the complaint that it failed to initiate against the Netherlands the procedure provided for in Article 169 of the Treaty is unfounded in view of paragraphs 22 to 28 of the Court's judgment of 7 February 1979 in Joined Cases 15 and 16/76, cited above. It was entirely proper to deal with the consequences of the Treaty in question in the context of Articles 2 and 3 of Regulation No 729/70.

The Commission points out that it indicated clearly, by means of its declaration of 27 July 1981, that it was determined to use all the means in its power to ensure that Member States abided by its proposals, which it considered in the circumstances to be legally binding upon them.

B — *Alternative arguments*

1. In the alternative, the Kingdom of the Netherlands submits that the Commission's view can only be partially valid for 1981. By its declaration of 27 July 1981 the Commission sought to make its proposals binding only provisionally, pending a decision by the Council. The Commission's intention could not have been to substitute them for a decision by the Council, which could, in fact, still have taken a decision later in the year, based this time on the specific requirements of the Member States. Moreover, the Commission approved both the provisional rules adopted by the Netherlands early in 1981 and the amendment to them in September 1981.

The applicant maintains that until the adoption of the declaration of 27 July 1981 there had been no limit on its catches other than the national limit which, logically, established no link between rules restricting catches and export refunds. Were the existence of such a link to be admitted, it could not be applicable before 27 July 1981 and all the refunds granted until then were rightly paid.

The applicant then observes that it was not equitable for the Commission to have drawn a straight parallel between the amount of refunds paid in 1981 and the amount of fish caught in the same year. It would be reasonable to suppose that early in 1981 refunds were being paid for exports carried out in 1980; in addition, refunds were paid for fish caught earlier and stocked as deep-frozen fish. Moreover, the Commission did not take into account fish coming from areas not subject to quotas, of which there was a considerable amount in 1981. The

Commission's decision should therefore be amended in that respect.

Finally, the applicant raises the general question of whether the Commission's policy of imposing financial sanctions on the Member States, to use the term employed by the European Court of Auditors, has sufficient regard for the peculiar circumstances obtaining in the fisheries sector. The problems connected with restricting catches and checking the observance of such restrictions do not justify regarding such restrictions simply as obligations designed to achieve a precise end, which the Member State may be required to discharge in full. That argument deserves consideration particularly in view of the fact that in this case the period in question was one in which neither the Commission nor the Member States had yet acquired sufficient experience of the matter.

2. The *Commission* replies that the link between measures restricting catches and Community financing of refunds was established not by the declaration of 27 July 1981, but by Article 2 of Regulation No 729/70.

According to the Commission, the duty of the Member States to adopt, if the Council fails to act, the necessary conservation measures and in doing so to take into account any objections, reservations or conditions which may be imposed by the Commission, rests on Articles 5 and 155 of the Treaty. Viewed in the light of the case-law of the Court of Justice, the Community obligation to apply the necessary conservation measures once approved by the Commission did therefore exist for Member States throughout 1981.

The Commission's view is that the applicant ought to have supplied proof of its allegations regarding the quantities already fished in 1980 during the consultation procedure with figures, as other Member States did, so that the Commission could have adjusted its calculations. The Commission does not deny that it ought to have taken into account catches coming from zones not subject to quotas, provided that the applicant supplied it with the necessary information during the consultation procedure.

In the absence of challenge, with proof in the form of figures, presented before the decision on the clearance of the Netherlands accounts, the Commission considers that its calculations of the extra expenditure attributable to various instances of fishing in excess of quotas must be regarded as having been accepted *de facto*, so that any proof to the contrary is now inadmissible.

Finally, the Commission submits that restricting catches makes it necessary for Member States to adopt the implementing and supervisory measures necessary to guarantee achievement of the desired end, and that the Kingdom of the Netherlands has been applying similar restrictions on catches for many years, particularly in connection with obligations related to international fishing organizations; it is therefore not correct to allege that it lacked experience in the matter.

F. Schockweiler
Judge-Rapporteur