

EDITORIAL COMMENTS

De libertate maris Communitatis

The unanimous agreement on a Common Fisheries Policy (CFP) which was finally reached in the Council in January 1983 is a major economical, political and legal event. Its long term economical and political importance becomes apparent when one realizes that the CFP is the first common policy through which the Commission allocates a rare natural resource – fish. Its short term legal significance results from the fact that the consensus eliminates the element for a major institutional crisis which would have opposed one Member State, Denmark, against all – or at least most – other Member States and the Commission.

The following lines will be devoted to these institutional and legal aspects which can only be sketched out in this comment.

The basic elements of the conflict are fairly well known:

1. During the second half of 1982, after several years of discussions, particularly on the thorny issue of restrictive access to coastal waters, a consensus between nine Member States emerges in the Council on the lines of the Commission's proposals. Only Denmark remains opposed to these proposals. Compromise solutions offered by the Commission are considered by the Danish Government to be insufficient and unacceptable.
2. The negotiating position of the Danish Government seems to be rather strong; the derogations from the principle of free access defined in Article 100 (6 mile zone) and Article 101 (12 mile zone) of the Act of Accession are limited until 31 December 1982 if not replaced by a Council regulation (the Commission has proposed to generalize the 12 mile zone, exceptionally authorized by Article 101 of the Act of Accession; this proposal is blocked together with all the other

parts of the fisheries packet). Danish fishermen seem to be able to fish 'up to the beaches' from 1 January 1983 onwards.

3. The nine other Member States, led by France, Germany, the United Kingdom and the Netherlands, developed a plan for a counter-attack; if the Council has not agreed on a CFP by December 1982 they will adopt national measures which will transform the proposal of the Commission into national law. The Commission is expected to authorize these national measures in accordance with the case-law of the Court of Justice (Case 804/79, *Commission of the European Communities v. United Kingdom*. Judgment of 5 May 1981, (1981) E.C.R. 1045). National measures will include restriction on access to coastal waters, *i.e.*, each Member State will oblige its own fishermen to stay out of the coastal waters of other Member States; these measures are also supposed to be approved by the Commission.
4. The Commission does not commit itself to support such a global strategy. Instead, following its conscience as guardian of the Treaty and its general attitude towards majority voting at the last meeting of the Fisheries Council in December 1982, it requests the Council to vote. The constellation is comparable to the situation on 18 May 1982 when the Council adopted by a narrow majority vote the agricultural prices for 1982 – 1983.¹ This time the Danish Government (which holds the chair!) opposes the vote invoking 'very important interests'. Though the British Minister contests this (arguing that no vital interest can be at stake as the Danish Government itself has recommended the exception of the final compromise to the Market Committee of the *Folketing*), he accepts the Danish refusal to vote; the same attitude is taken by the Greek representative in the Council. What differs from the situation on 18 May 1982 is the position of the French Minister who this time lines up with the opponents to the vote.
5. As the attempt to proceed by a vote fails, the Commission is obliged to request the adoption of national measures by all Member States in order to protect the fisheries resources in Community waters. As mentioned before, the Commission does not commit itself to approve all

1. The vote on the agricultural prices was dealt with in the Editorial Comment, 3 CML Rev. 1982, 371.

national measures which are in accordance with its proposals: it declares that it will proceed on the basis of a case by case study.

Immediately after the failure of the Fisheries Council Member States begin to notify national measures. These measures include provisions restricting access to coastal waters in accordance with the proposal of the Commission; the Commission is requested to approve these measures.

In the first week of January 1983 Mr. Kirk, a Danish member of the European Parliament and owner of several fishing vessels, started a fishing expedition to British coastal waters in order to test the legality of the British access restrictions. Several days later he was arrested; brought before the Court of Northfield he requested the judge to ask the Court of Justice for a preliminary ruling. His request was rejected and instead he was fined £ 30.000.

On 5 January 1983 the Commission meets for the first time after the Christmas holidays. Confronted with notifications of national measures from some but not all of the Member States, and in view of the extremely complex legal problems, particularly in respect to access, the Commission opts for a holding operation.

The Commission decides to authorize provisionally the national measures notified by France, Germany, Ireland, Italy, the Netherlands and the U.K. The decision states expressly that the approval shall be without prejudice to any subsequent Commission decision in which the substance of the measures notified shall be assessed!²

The motivation is bold and went beyond the – already far-reaching – case-law of the Court of Justice: it is essentially based on public order!

The next day the first of three trilateral meetings between the President of the Council, Mr. Genscher, the Commission (twice Vice-President Ortoli, third time President Thorn) and the Danish Minister of Foreign Affairs, Mr. Ellermann-Jensen, takes place. The Danish Minister announces two distinct legal actions: the first against the British measures to be brought under Article 170 of the EEC Treaty and the second against the Commission's decision of 5 January 1983 in accordance with Article 173 of the Treaty.

Fortunately, the three trilateral meetings prove to be successful. The Danish Government accepts the package deal, which it refused on

22 January 1982, in a slightly amended form.

On 25 January 1983 the Council unanimously adopts this ammended package deal, thereby opening a new era for a full-fledged Community policy, the CFP.

As a consequence of the political compromise the Danish Government will certainly drop its request under Article 170 of the EEC Treaty against the U.K.; it will certainly never ask the Court of Justice to annul the Commission decision of 5 January 1983; it seems very likely that the proceedings against Mr. Kirk will be settled so that the Court of Justice will not be asked to give a preliminary ruling on the legality of the British measures and the validity of the Commission decision of 5 January 1983.

Even more important is the fact that the Commission is dispensed from taking a stand on the legal merits of the national measures notified after the failure of the Fisheries Council in December 1982, and particularly on the legality of the restrictions on access to coastal waters. The reader will realize the complexity of this issue when he recalls that:

1. The provision of Articles 100 and 101 of the Act of Accession which expired on 31 December 1982 belongs to the most difficult concessions made during the accession negotiations;
2. It took several years to recognize that the Council had the power under Article 143 of the Treaty to establish a similar regime for the period following 31 December 1982;
3. The existing case-law of the Court of Justice (which permits Member States to take national measures with the approval of the Commission) is limited to the conservation of fish. Are restrictions on access to coastal waters necessary for the conservation of fish or are they primarily intended for protecting the local fishermen? If these restrictions could not be justified by the necessity of conservation of fisheries resources, would the Court of Justice go a step further and allow the Member States – with the approval of the Commission – to take national measures for the protection of local fishermen, or

would the Court of Justice deny such a power, taking into account that the absence of a Council decision resulted from a refusal to vote even though a vote was perfectly possible?

These few considerations make what was at stake apparent: the consequences of the so-called Luxembourg compromise. The Danish Government was wise to finally accept a political deal. Otherwise it might have lost more than a few thousand tons of fish.