

ORDER OF THE COURT (First Chamber)

14 May 2008*

In Case C-109/07,

REFERENCE for a preliminary ruling under Article 234 EC from the prud'homie de pêche de Martigues (France), made by decision of 17 December 2006, received at the Court on 20 February 2007, in the proceedings

Jonathan Pilato

v

Jean-Claude Bourgault,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano (Rapporteur), A. Borg Barthet, E. Levits and J.-J. Kasel, Judges,

Advocate General: V. Trstenjak,
Registrar: R. Grass,

after hearing the Advocate General,

* Language of the case: French.

makes the following

Order

- 1 This reference for a preliminary ruling concerns the interpretation and the validity of Article 11a of Council Regulation (EC) No 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources (OJ 1997 L 132, p. 1), as amended by Council Regulation (EC) No 1239/98 of 8 June 1998 (OJ 1998 L 171, p. 1) ('Regulation No 894/97').

- 2 The reference has been made in the course of proceedings between two fishing-boat owners registered in the Maritime Affairs District of Martigues, Mr Pilato and Mr Bourgault, concerning the use by the latter of a fishing device known as a '*thonaille*'.

Legal context

Community legislation

- 3 Article 11a of Regulation No 894/97 provides:

'1. From 1 January 2002, no vessel may keep on board, or use for fishing, one or more drift-nets intended for the capture of species listed in Annex VIII.

2. From 1 January 2002, it is prohibited to land species listed in Annex VIII which have been caught in drift-nets.

3. Until 31 December 2001, a vessel may keep on board, or use for fishing, one or more drift-nets referred to in paragraph 1 after receiving authorisation from the competent authorities of the flag Member State. ...'

4 Among the species listed in Annex VIII to that regulation is, inter alia, bluefin tuna.

National legislation

5 The prud'homie de pêche de Martigues (Martigues Industrial Tribunal for Matters relating to Fishing) is governed by the Decree of 19 November 1859 concerning rules on coastal fishing in the fifth maritime district, as amended by Decree No 90-95 of 25 January 1990 (JORF, 27 January 1990, p. 1155) ('the 1859 Decree').

6 In accordance with Article 5 of the 1859 Decree, Members of the Industrial Tribunals are boat-owning fishermen who have practised that occupation for a year in the district served by the industrial tribunal of which they are seeking to become a member.

7 According to Article 7 of that decree the Members of the Industrial Tribunals are chosen from among members of the community who have been involved in fishing activities for 10 years.

8 Article 17 of that decree provides:

‘The responsibilities of Members of Industrial Tribunals for Matters relating to Fishing are to be as follows:

1. They have sole jurisdiction, exclusively and without recourse to appeal, review or cassation by a higher court, over all disputes between fishermen, arising out of fishing incidents, operations and provisions relating thereto, to the extent of their jurisdiction.

Accordingly, and in order to avoid, in so far as possible, disputes, damages or accidents, they are specifically authorised, under the authority of the Commissioner for Maritime Registration:

To govern use of the sea and of State-owned maritime property among fishermen;

To determine shifts, rotations, allotments or leasings, mooring stations and points of departure in relation to each type of fishing;

To establish the order in which the fishermen must draw their day and night nets;

To fix the times of day and night when certain fishermen must give way to others;

Finally, to take all the administrative and precautionary measures which, on account of their diversity and number, are not laid down in the present decree.

2. They shall administer the affairs of the community.
3. They shall, in accordance with Article 16 of the Law of 9 January 1852, cooperate in the investigation and the finding of coastal fishing violations.'

- 9 Article 18 of the 1859 Decree provides that Members of the Industrial Tribunals, before taking up their posts, are to swear, before the justice of the peace for their place of residence, an oath in the following terms:

'I swear to fulfil loyally the duties of a Member of the Industrial Tribunals for Matters relating to Fishing and to enforce as the need arises the rules relating to coastal fishing, to comply with the orders which are given to me by my superiors and to point out violations of the rules without dislike or bias towards the offenders.'

- 10 Article 22 of the 1859 Decree, which deals with the dismissal of Members of the Industrial Tribunals, is worded as follows:

'Members of the Industrial Tribunals for Matters relating to Fishing may be relieved of their duties by the Director of Maritime Registration following a preliminary investigation conducted by the Administrator for Maritime Registration.

The dissolution of an industrial tribunal may be decided upon by the Minister responsible for Merchant Shipping following a proposal from the Director of Maritime Registration. ...

Any Member of the Industrial Tribunals who is dismissed shall not be re-elected within a period of three years from the date of his dismissal.

...'

11 Article 24 of the 1859 Decree which governs the inter partes procedure before the Industrial Tribunal for Matters relating to Fishing, provides, inter alia, that the members of the tribunal panel are to deliberate in private.

12 The first subparagraph of Article 25 of the 1859 Decree provides that '[t]he decisions of the Industrial Tribunals shall have immediate effect'.

13 Article 26 of the 1859 Decree states:

'The Administrator for Maritime Registration or his deputy shall, when he considers it appropriate, attend the hearings and the deliberations of the tribunal, but only in order to ensure that the hearing and the deliberations are being conducted appropriately.'

14 Finally, Article 27 of the 1859 Decree provides that '[w]hen two Industrial Tribunals claim jurisdiction over the same matter, the dispute on jurisdiction is brought, by the proper authority, before the Director of Maritime Registration'.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 15 It is clear from the order for reference that on 12 June 2006 the Chair of the prud'homie de pêche de Martigues recorded the presence, on board Mr Bourgault's boat, of a fishing device known as a '*thonaille*' with the help of which Mr Bourgault had caught 15 bluefin tuna.
- 16 On 6 December 2006, Mr Pilato brought a complaint before the prud'homie de pêche de Martigues against Mr Bourgault in which Mr Pilato claimed that since the '*thonaille*' constituted a 'drift-net' within the meaning of Article 11a of Regulation No 894/97, its use is prohibited. Mr Pilato then claimed that Mr Bourgault's capture of 15 bluefin tuna with a prohibited fishing device caused him injury in so far as illegally caught fish, with lower costs than those for fish caught under lawful conditions, was put on the market. On those grounds, he requested the prud'homie de pêche de Martigues to rule on compensation for the loss that he suffered on account of the unfair competitive practice employed by Mr Bourgault.
- 17 On 17 December 2007, at the hearing before the prud'homie de pêche de Martigues, while accepting the allegations made against him, Mr Bourgault, first, disputed that the '*thonaille*' was a drift-net within the meaning of Article 11a of Regulation No 894/97 and, second, called into question the validity of that provision.
- 18 It is in those circumstances that the prud'homie de pêche de Martigues decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) Should Article 11a of ... Regulation No 894/97 ... be interpreted as also prohibiting nets which do not drift or hardly drift by reason of a floating anchor to which they are attached?

- (2) Is Article 11a(1) and (2) of ... Regulation No 894/97 ... valid to the extent to which:
- (a) it appears to pursue a strictly environmental objective, although the legal basis on which it is founded is Article 43 of the EC Treaty (now Article 37 EC);
 - (b) it does not define a drift-net and therefore does not clearly define the scope of that term;
 - (c) it is not clearly reasoned;
 - (d) it does not take account of available scientific and technical data, of the environmental conditions in the various regions of the Community, or of the benefits or costs which arise from the prohibition which it establishes;
 - (e) it is disproportionate to the objective being pursued;
 - (f) it is discriminatory since it treats very different geographic, economic and social situations in the same fashion;

- (g) it does not establish any exemption for small-time fishermen who fish with devices such as the “*thonaille*”, which, apart from the fact that it is traditional in the Mediterranean, is vital for that part of the population who practise it, and is, moreover, very selective.’

The jurisdiction of the Court

- 19 At the outset, it is necessary to determine whether the prud’homie de pêche de Martigues is a court or tribunal within the meaning of Article 234 EC and whether the Court therefore has jurisdiction to rule on the questions referred to it.
- 20 Without formally submitting a plea of lack of jurisdiction, the Council of the European Union and the Commission of the European Communities express a number of doubts about the judicial nature of the body making the reference, with regard, in particular, to the conditions for the dismissal of the Members of the Industrial Tribunals for Matters relating to Fishing, to the content of the oath that they must swear before taking up their posts and to the fact that the industrial tribunal is required to exercise some of its duties under the authority of the Commissioner for Maritime Registration.
- 21 The French Government contends, in contrast, that the prud’homie de pêche de Martigues fulfils all the criteria established by Community case-law to qualify as a ‘court or tribunal of a Member State’ within the meaning of Article 234 EC and, in particular, the condition regarding the independence of the body making a reference.
- 22 In that regard, it should be borne in mind that, according to settled case-law, in order to determine whether the body making a reference is a court or tribunal for

the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, inter alia, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23; Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29; and Case C-246/05 *Häupl* [2007] ECR I-4673, paragraph 16).

- 23 As regards, more specifically, the independence of the body making a reference, that condition presumes that the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them (Case C-506/04 *Wilson* [2006] ECR I-8613, paragraph 51 and the case-law cited).
- 24 The Court has also had occasion to indicate that those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (see, to that effect, *Dorsch Consult*, paragraph 36; Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, paragraphs 20 to 23; C-17/00 *De Coster* [2001] ECR I-9445, paragraphs 18 to 21; and *Wilson*, paragraph 53). In that regard, in order to consider the condition regarding the independence of the body making the reference as met, the case-law requires, inter alia, that dismissals of members of that body should be determined by express legislative provisions (see, to that effect, *Köllensperger and Atzwanger*, paragraph 21, and Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 41).
- 25 In this case, it is clear, first, from reading the 1859 Decree and from the observations submitted to the Court that the members of the Industrial Tribunals are subject, at least for some of their activities, to supervision by the administration.

- 26 It is explicit from Article 17(1) of the 1859 Decree that the Members of the Industrial Tribunals carry out a series of duties 'under the authority of the Commissioner for Maritime Registration'. A member of that same administration is also responsible, under Article 27 of that decree, for resolving possible jurisdictional disputes between Industrial Tribunals for Matters relating to Fishing.
- 27 Moreover, it should be pointed out that Article 18 of that decree requires the Members of the Industrial Tribunals to swear an oath in which they promise, *inter alia*, to 'comply with the orders which they are given by their superiors'.
- 28 Second, it does not appear that the process of dismissing a Member of the Industrial Tribunals is subject to specific guarantees which remove any reasonable doubt as to the imperviousness of that body to external factors.
- 29 Thus, in accordance with Article 22 of the 1859 Decree, the Members of the Industrial Tribunals can be dismissed by the Director of Maritime Registration after a simple preliminary investigation, without that provision, or any other provision of that decree, specifying the grounds on which a dismissal might be decided upon.
- 30 In those circumstances, the *prud'homie de pêche de Martigues* cannot be regarded as meeting the condition as to the independence of the body making a reference, as defined in the case-law set out in paragraphs 23 and 24 of this Order.
- 31 It follows from the foregoing that the *prud'homie de pêche de Martigues* is not a court or tribunal within the meaning of Article 234 EC. Accordingly, it must be held, applying Articles 92(1) and 103(1) of the Rules of Procedure, that the Court clearly has no jurisdiction to rule on the questions referred.

Costs

- ³² Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the prud'homie de pêche de Martigues, the decision on costs is a matter for that body. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby orders:

The Court of Justice of the European Communities clearly has no jurisdiction to rule on the questions referred by the prud'homie de pêche de Martigues by decision of 17 December 2006.

[Signatures]