

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

1 February 2000 \*

In Case T-63/98,

Transpo Maastricht BV, a company incorporated under Netherlands law,  
established in Maastricht, Netherlands,

and

Marco Ooms, of Terneuzen, Netherlands,

represented by Marius Johan van Dam, of the Rotterdam Bar, with an address for  
service in Luxembourg at the Chambers of Fernand Entringer, 34A Rue Philippe  
II,

applicants,

v

Commission of the European Communities, represented by Maurits Lugard and  
Laura Pignataro, of its Legal Service, acting as Agents, with an address for service  
in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service,  
Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of the Commission's decision of 13 February  
1998 refusing to grant the applicants, in respect of the vessel *Durance*, an

\* Language of the case: Dutch.

exemption under Article 8(3)(c) of Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport (OJ 1989 L 116, p. 25),

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: J.D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,  
Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 6 July 1999,

gives the following

## Judgment

### Facts

- 1 The aim of Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport (OJ 1989 L 116, p. 25, 'the Regulation') is to reduce the carrying overcapacity manifest in all sectors of the inland waterway transport market. To that end, provision is made for a scrapping

scheme coordinated at Community level, together with supporting measures. Under the 'old for new' rule, the owner of a new vessel imported from a third country or which leaves national waterways not linked to other waterways in the Community must, if it is to be brought into service, scrap a tonnage of carrying capacity equivalent to the new vessel without receiving a scrapping premium. Where the owner scraps no vessel, he must pay a special contribution into the special fund covering his new vessel, established for that purpose (Article 8(1)(a) of the Regulation).

- 2 Article 8(3)(c) of Regulation No 1101/89 enables the Commission, after consulting the Member States and the organisations representing inland waterway transport at Community level, to exempt 'specialised vessels' from the scope of paragraph 1.
  
- 3 On 7 December 1990, after consulting the Member States concerned, Switzerland, the authorities of the various scrapping funds, and organisations representing the inland waterway sector at Community level, the Commission drew up a note laying down general criteria for the appraisal of applications for the exemption of specialised vessels from the Regulation ('the explanatory note').
  
- 4 That note states that an exemption may be granted only if the following three conditions are concurrently satisfied:
  - the vessel must be specially designed to carry a specified category of goods and it must be unsuitable on technical grounds (without undergoing structural conversion) for the carriage of other goods;
  
  - carriage of the goods in question must be possible or permissible only on vessels which are specially fitted;

- the owner of the specialised vessel must give a written undertaking that no other goods will be carried by his vessel so long as the ‘old for new’ rule applies and he must declare that he is prepared to pay the special ‘old for new’ contribution if, for whatever reason, he wishes to use his vessel to carry other goods while the above rule is in force.
  
- 5 On 1 October 1996 one of the applicants, Transpo Maastricht, applied to the Commission for an exemption from the application of Article 8(1) of Regulation No 1101/89 under Article 8(3)(c) thereof.
  
- 6 That application related to the motor vessel *Venture*, renamed *Durance* (hereinafter ‘*Durance*’), which had been commissioned in 1955. In 1982, the *Durance* underwent the requisite alterations to enable it to carry products in powder form. In 1996 it was bought by Transpo Maastricht and was specially adapted for the carriage of dry fly ash. It was sold in 1997 to the second applicant, Marco Ooms.
  
- 7 In its application, Transpo Maastricht claimed essentially that in the event of the *Durance* being subject to the application of Article 8(1) of Regulation No 1101/89, it should be regarded as unsuitable for the carriage of categories of goods other than dry fly ash, in view of the special equipment required for the carriage of that product. It also stated that, in the event of its using that vessel for the carriage of any other kind of goods, it would be prepared fully to apply the ‘old for new’ regulation.
  
- 8 On 21 March 1997 the Working Party on Structural Improvements in Inland Waterway Transport (hereinafter ‘the Working Party’), together with the representatives of the Member States concerned, Switzerland and those countries’ scrapping funds, was consulted on the basis of the explanatory note.

9 According to the minutes of that meeting:

‘During the discussion, the delegations representing the industry raised the question whether that vessel was in fact designed for the carriage of only one category of goods and is unsuitable, without undergoing structural conversion, for the carriage of other goods. The Netherlands scrapping fund was invited to examine that question and to inform the Commission of the result of its inquiries.

It was agreed that if the conclusions of the Netherlands scrapping fund mean that the criteria laid down for the grant of an exemption of a vessel from the “old for new” rule are satisfied, the delegations favour exclusion of the vessel designed for the carriage of fly ash; otherwise, they are of the opinion that it should be refused.’

10 On 1 April 1997 the Directoraat-Generaal Goederenvervoer (Netherlands Directorate-General for the Transport of Goods of the Ministry of Communications and Navigable Waterways, hereinafter ‘the Netherlands Directorate-General for Transport’) asked the Scheepvaartinspectie (Netherlands Waterways Inspectorate, hereinafter ‘the Waterways Inspectorate’) to investigate whether the *Durance* had been specially designed to carry ‘only one product’.

11 By letter dated 14 May 1997, the Waterways Inspectorate replied:

‘The question you have put to us is very specialised and we do not have the necessary know-how to deal with it. We therefore asked a well-known firm to provide us with that information. We are informed as follows:

When a vessel is fitted out for the carriage in tanks of substances in powder form, the installation is carried out on the basis of the specific properties of the

substance to be carried. The design of the cargo tanks does not in principle depend on the substance. The difference lies, however, in the design of the aeration system. The differences are minimal. If a substance other than the one for which the installation was designed is carried, the system does not function optimally.’

- 12 On 23 May 1997 the abovementioned application for exemption was raised again at a meeting of the Commission, the representatives of the Member States concerned, Switzerland and the scrapping funds of those countries.
  
- 13 By letter dated 27 May 1997 the Netherlands Directorate-General for Transport gave Transpo Maastricht a report of the meeting of 21 March 1997 at which its application for exemption had been tabled. It also stated:

‘The conclusion [of the Waterways Inspectorate] (appended hereto) is not such as to enable the Commission to take a decision, in particular because it does not state whether the vessel concerned can carry only one product.

As you know, the grant of an exemption depends directly on the capability of carrying only one product.

The conclusion [of the Waterways Inspectorate] may therefore prompt the Commission to reject your application.

However, on behalf of the Netherlands (scrapping) fund, I consider that you should be given every opportunity to set out your views, so that an exemption might nevertheless be granted to you.

Both the Commission and the other Member States share this view.

I would therefore ask you to demonstrate that the vessel in question can carry only one product.'

- 14 In its letter of 18 July 1997, addressed to the Netherlands Directorate-General for Transport, Transpo Maastricht stated that it was clear from the letter of 14 May 1997 from the Waterways Inspectorate that the *Durance* had been specially adapted so that it could carry only one product and that detailed information concerning its design was unnecessary in that connection.
  
- 15 On 5 October 1997 the Director of the Netherlands Inland Waterways Transport Department of the Netherlands Directorate-General for Transport wrote to the Commission in the following terms:

'By letter of 27 May 1997 I asked Transpo Maastricht BV to establish conclusively that [the *Durance*] can carry only one special substance.

Neither the letter from the Waterways Inspectorate nor the reply from Transpo Maastricht BV of 18 July 1997 provides any real clarification of the point.

I therefore consider that, as equipped at present, the vessel in question can carry diverse substances in powder form.

It is for that reason that I am advising the Commission to give a decision to that effect.’

- 16 Transpo Maastricht wrote again to the Netherlands Directorate-General for Transport on 14 October 1977, enclosing the letter of 23 September 1996 sent to it by International Pneumatic Equipment Consultants (hereinafter ‘IPEC’). According to that letter, the *Durance* is not in fact suitable for carrying substances other than fly ash.
- 17 On 17 October 1997 the Working Party was consulted by the Commission and unanimously considered that the requested exemption should not be granted.
- 18 By letter of 13 February 1998 the Commission informed Transpo Maastricht that it was not granting it an exemption from Article 8(3)(c) of Regulation No 1101/89 relating to specialised vessels (hereinafter ‘the contested decision’).
- 19 Referring to the criteria set out in its explanatory note, the Commission stated, first, that the *Durance* had not been specially designed for the carriage of a specified category of goods and that the applicants had not demonstrated that the requisite modifications and adaptations had been carried out to convert the vessel into a specialised vessel.

- 20 It also stated that Transpo Maastricht had pleaded commercial confidentiality in response to its requests for detailed technical information. The Commission inferred that the *Durance* could be used for the carriage of several kinds of goods. In that connection, it considered that the possibility that the vessel could carry what is described as a 'product which limits the emission of combustion gases' is not decisive.
- 21 The Commission concluded that the *Durance* was not sufficiently specialised to meet the criteria of its explanatory note and observed that that conclusion was corroborated by the inquiries carried out by the Netherlands Ministry of Transport.

#### Procedure and forms of order sought

- 22 By application lodged at the Registry of the Court of First Instance on 16 April 1998 the applicants brought the present action.
- 23 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber) decided to open the oral procedure and, pursuant to Article 64(3) of its Rules of Procedure, to call on the applicants and the Commission to answer a number of questions in writing before the hearing. The parties replied by letters of 16 and 17 June 1999.
- 24 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 6 July 1999.

25 The applicants claim that the Court should:

- annul the contested decision and grant them the requested exemption;
- order the defendant to pay the costs.

26 The Commission, the defendant, contends that the Court of First Instance should:

- dismiss the application;
- order the applicants to pay the costs.

## Substance

27 The applicants put forward three pleas in law alleging failure to observe, first, the criteria laid down in the explanatory note for the classification of specialised vessels, second, the *audi alteram partem* rule and, third, the principle of non-discrimination. In support of their first plea, the applicants also claim that the Commission failed to respect the policy objectives for structural improvements to inland waterway goods transport.

*The first plea: failure to observe the criteria laid down in the explanatory note for the classification of specialised vessels*

Arguments of the parties

- 28 The applicants consider, first, that there is a contradiction between the first two criteria set out in the explanatory note. The criterion concerning the prohibition of carrying the goods in question on vessels not fitted with specialised technical equipment cannot be reconciled with the requirement that the vessel in question must have been specially designed for the carriage of a specified category of goods and must be unsuitable, without undergoing structural conversion, for the carriage of other goods.
- 29 The applicants also object to the way in which the criteria set out in the explanatory note were applied by the Commission in the contested decision.
- 30 They submit, with respect to the first criterion, that the Commission's statement that the *Durance* was not specially designed for the carriage of a specified category of goods is inappropriate in so far as that vessel was converted in order to cater, first, for the carriage of products in powder form and then, more particularly, for that of fly ash.
- 31 Moreover, they claim, the Commission expressed the view in its defence (paragraph 21) that the requirement that a vessel must be technically unsuitable for the carriage of other goods does not mean that the carriage of other goods must be impossible. Accordingly, rather than determining what the vessel might possibly be able to carry it is necessary to define the kind of transport for which it is really suitable. The Netherlands Directorate-General for Transport thus misapplied the first criterion, as is apparent from its letters dated 1 April, 27 May and 5 October 1997. Similarly, the Commission, when adopting the contested

decision, wrongly considered that it was incumbent on the applicants to demonstrate that the *Durance* could carry only a specified product.

- 32 Thus, although it is true that the *Durance* can carry other types of goods, the fact remains that, according to the first criterion mentioned above, it is not suitable for that purpose. The Commission failed in that connection to take account of the letter of 14 May 1997 from the Waterways Inspectorate which states that, in the event of another substance being carried, the system would not function optimally, or the letter from Transpo Maastricht dated 18 July 1997 indicating that another product cannot be carried in an appropriate manner, or the letter from the IPEC of 23 September 1996 stating that, as a result of the modifications made to the vessel, it is unsuitable for the carriage of goods other than ash.
- 33 In that regard, the submission that it was not shown that the *Durance* had undergone alterations enabling it to carry only one type of product is incorrect. It is clear from the application for exemption that the vessel was modified for that purpose in 1996 and that 'it is fitted with special equipment for transshipment, without release of any dust, of fly ash in powder form in order to satisfy the environmental rules at present in force'. The fact that the vessel meets those criteria is also apparent from its specific technical characteristics, as listed in the letter of 14 May 1997 from the Waterways Inspectorate and that of 18 July 1997 from Transpo Maastricht, of which the Commission was aware. Moreover, the contested decision indicates that the Waterways Inspectorate, in its letter of 14 May 1997, 'lists the adaptations and modifications necessary to convert it into a specialised vessel'. Furthermore, according to the Commission's position, since the technical characteristics of the installation depend on the specific properties of the substance to be carried, it must be concluded that the *Durance*, being entrusted with the carriage of fly ash, is a specialised vessel.
- 34 Next, the Commission's argument concerning the impossibility of obtaining the technical information needed for its appraisal because of the plea of business confidentiality is unfounded. In reality, it was the firm from which the Waterways

Inspectorate sought information which raised the question of business confidentiality. In any event, the applicants are prepared, if need be, to provide any information which the Commission might require, as made clear by Transpo Maastricht in its correspondence, in particular its letter of 18 July 1997 proposing that the vessel be inspected. They stress in that connection that the Commission did not ask for any further information.

- 35 The applicants also take exception to the Commission's assessment that the *Durance* is not sufficiently specialised. It is clear from that assessment that the Commission recognises that the vessel is specialised, but it has not drawn the necessary inferences and has not given details of the insufficiency, thereby setting obscure 'levels of specialisation'.
- 36 As regards the second criterion in the explanatory note, the Commission, according to the applicants, indicated in paragraph 21 of its defence that it requires that the goods carried should themselves be of a specific kind. However, no such condition is laid down by Article 8(3)(c) of Regulation No 1101/89, which relates only to specialised vessels and not to specific goods. Moreover, in earlier decisions the Commission considered that the carriage of ash should enjoy an exemption under Article 8(3)(c) of Regulation No 1101/89 and that, accordingly, ash constitutes a specific type of goods and not a category of goods. Therefore, by relying in support of their application for exemption on the fact that the *Durance* carries dry fly ash, the applicants gave further details relating to the Commission's criteria.
- 37 Finally, the applicants claim that the Commission failed to observe the objectives of the policy for improving inland waterway transport of goods.

38 They maintain, in that connection, that the Commission is wrong to take the view in the contested decision that the *Durance* contributed ‘to increasing the capacity of the fleet covered by the structural improvement rules in Regulation No 1101/89’. The *Durance* carries only fly ash and there is no overcapacity in that segment of the market. Finally, that segment contributes to alleviating congestion caused by goods vehicles on the roads which previously were used for carrying that substance.

39 Thus, the exclusion of the vessel at issue from the scope of Article 8(1) of Regulation No 1101/89 is in line with the objectives laid down by that regulation.

40 The applicants offer to prove their statements by all legal means, in particular the evidence of witnesses and experts.

41 The Commission states, first, that the first two criteria in its explanatory note are not contradictory but, on the contrary, reinforce each other. The requirement that the vessel concerned must be fitted with certain specific items of equipment does not mean that it must be unable to carry different kinds of goods. The Commission also denies that the authorities called on to give an opinion on the requested exemption applied criteria different from those laid down in its explanatory note.

42 Secondly, the Commission states that the *Durance*, notwithstanding its specific technical characteristics, cannot be regarded as a specialised vessel in view of the fact that it can carry several types of goods. According to the Commission, the applicants did not demonstrate that the *Durance* could carry only one category of goods, even though asked to do so by the Netherlands Directorate-General for Transport by letter of 27 May 1997 and notwithstanding the misunderstanding regarding business secrecy.

- 43 The Commission also criticises the applicants for interpreting the first criterion broadly, as allowing use of the vessel concerned for the carriage of other categories of goods. That interpretation is incompatible with the aim of Regulation No 1101/89 and the dicta of the Court of First Instance in Case T-155/97 *Natural van Dam and Danser Container Line v Commission* [1998] ECR II-3921, from which it appears that, by way of derogation from the general rules applicable, Article 8(3)(c) of Regulation No 1101/89 must be interpreted restrictively.
- 44 The Commission also submits that the applicants have not demonstrated that the *Durance* complied with the environmental protection rules governing exclusive carriage of fly ash.
- 45 Moreover, contrary to the applicants' assertions, the letter of 14 May 1997 from the Waterways Inspectorate to the Netherlands Directorate-General for Transport shows that the *Durance* can carry several types of goods. Similarly, the general references to technical characteristics contained in the letter of 18 July 1997 from Transpo Maastricht cannot affect that conclusion. The circumstances of the *Durance* are comparable to those of the *VOF Challenger*, for which the exemption requested was not granted because it was capable of carrying several kinds of goods in powder form. Furthermore, the adaptations and modifications described in IPEC's letter of 23 September 1996, even if they were carried out — that not having been established — would not alter the fact that the vessel in question is capable of carrying several types of goods.
- 46 Finally, the Commission rejects the applicants' allegation that different degrees of specialisation are being introduced. Only application of the criteria laid down in the explanatory note, in particular the requirement that the vessel in question must be unsuitable for the carriage of other categories of goods, justifies, in this case, refusal of exemption.

- 47 As regards the second criterion, the Commission considers that the generic term 'product in powder form' covers a wide range of products. Vessels which, like the *VOF Challenger*, carry products in powder form have systematically been required to comply with the 'old for new' rule.
- 48 Third, with respect to its alleged failure to observe the objectives of the policy of improving inland waterway goods transport, the Commission points out, first, that the criteria set out in the explanatory note were decided upon at the request of the Member States concerned, Switzerland, the authorities of the various scrapping funds and organisations representing the inland waterway sector at Community level which approved them and that, since then, those criteria have been applied on numerous occasions.
- 49 Second, the objectives of Regulation No 1101/89 are to eliminate structural overcapacity in the inland waterway sector by means of scrapping measures and to maintain supply and demand by applying the 'old for new' rule. In that connection, only vessels meeting all three criteria in the explanatory note can be exempted from that rule.
- 50 Third, the Commission points out that the question whether or not there is overcapacity in the segment of the market concerned is irrelevant since Regulation No 1101/89 is a general regulation because it relates to inland waterway transport as a whole. The request for exemption could only be granted if the criteria for the application of Article 8(3)(c) of that regulation were complied with.
- 51 The Commission also states that the sole aim pursued by the 'old for new' rule is to improve the inland waterway transport sector by reducing existing overcapacity, and the transfer of certain goods from road to river transport does not in any way justify the grant of an exemption.

52 Finally, the Commission states that, in the letter dated 16 December 1996 sent to it by Transpo Maastricht, the latter stated that the *Durance* was not operating on the network of waterways linking Belgium, Germany, France, Luxembourg, the Netherlands and Switzerland when Regulation No 1101/89 entered into force, thereby confirming that at that time that regulation was not applicable to that vessel.

## Findings of the Court

53 The Court notes first of all that, pursuant to Article 8(1)(a) of Regulation No 1101/89, the 'old for new' rule is applicable to vessels which leave national waterways not linked to other waterways in the Community. However, it is clear from the letter dated 16 December 1996 from Transpo Maastricht to the Commission that when Regulation No 1101/89 entered into force the *Durance* was not operating on the network of national waterways linked to other waterways in the Community. Moreover, in these proceedings the applicants have not disputed the fact that when the regulation in question entered into force the *Durance* was not subject to it. It is consequently clear that the *Durance* is subject to the general rules contained in Article 8(1)(a).

54 In the contested decision, the Commission took the view that the applicants had not shown that the modifications and adaptations needed to make the vessel in question a specialised vessel had been carried out.

55 It is therefore necessary to consider whether the information produced by the applicants to the Commission shows that the technical modifications in question were carried out. It must be borne in mind, in so doing, that in proceedings for annulment under Article 173 of the Treaty (now, after amendment, Article 230 EC), the legality of a Community measure falls to be assessed solely on the basis of the information which was available to the Commission when it adopted the measure (see, for example, Joined Cases T-371/94 and T-394/94 *British Airways*

*and Others v Commission* [1998] ECR II-2405, paragraph 81, and Case T-87/96 *Assicurazioni Generali and Unicredito v Commission* [1999] ECR II-203, paragraph 70).

- 56 It may be true that the application for exemption dated 1 October 1996 states that ‘the vessel is fitted with special equipment for the transshipment, without release of dust, of fly ash in powder form in order to meet the environmental standards at present in force’.
- 57 However, contrary to the applicants’ contention, it is not apparent from the letter of 14 May 1997 from the Waterways Inspectorate to the Netherlands Directorate-General for Transport or from the letter from IPEC to Transpo Maastricht of 23 September 1996 that the *Durance* was fitted with such equipment.
- 58 In fact the letter of 14 May 1997 contains a description in general terms of the technical characteristics required of a vessel fitted out for the carriage in tanks of substances in powder form and gives no indication that the *Durance* is fitted with such equipment (see the relevant extract in paragraph 11 above).
- 59 For its part, IPEC’s letter to Transpo Maastricht dated 23 September 1996 states:

‘Further to your request, we are sending you our observations on the adaptations and modifications required on the [*Durance*], which you have purchased, to render it suitable for the transport of fly ash, having regard to the following specifications and activities.

...

The result of such modifications would be that the vessel would no longer be suitable for the carriage of [any] cargo other than fly ash.

We hope that the foregoing is helpful and that the above can be implemented by us jointly.'

60 Thus, that letter likewise does not show that the technical modifications referred to were carried out.

61 In that connection, the applicants' interpretation, in their answers to the questions put to them by the Court, which they reiterated at the hearing, to the effect that the last sentence of the letter dated 23 September 1996 concerns a vessel other than the *Durance*, cannot be accepted. Although the applicants produced in support of that view a letter from IPEC dated 16 June 1999 stating that the sentence at issue related to another vessel of the same owner, there is absolutely nothing in the letter dated 23 September 1996, in which only the *Durance* is mentioned, to show that it could have related to another vessel.

62 Consequently, the Commission was right to take the view that the applicants had not shown that technical equipment of such a kind as to enable the *Durance* to be classified as a specialised vessel within the meaning of Article 8(3)(c) of Regulation No 1101/89 had been fitted.

63 Furthermore, the applicants have not shown, and have not even claimed, that the conversion work carried out on the *Durance* in 1982 made it a specialised vessel

within the meaning of Article 8(3)(c) of Regulation No 1101/89. They asserted, in their application to this Court, that ‘this vessel must be considered in its present state, namely after conversion and fitting out so as to carry fly ash’.

- 64 It follows that the applicants’ arguments that there is a contradiction between the first two criteria of the explanatory note and that the criteria were misapplied in this case cannot be upheld.
- 65 Finally, the allegation that the relevant Commission officials had been invited to inspect the *Durance*, in particular in the letter dated 18 July 1997 from Transpo Maastricht, is contradicted by the very content of that letter and by the applicants’ statements at the hearing to the effect that they never issued any such invitation.
- 66 As regards the allegation that the criteria applied by the Commission in the contested decision were not appropriate to the Community policy of improving inland waterway transport, it must be remembered that the Commission was entitled to consider, in the contested decision, that the applicants had not shown that the technical modifications which, in their view, would make the vessel in question a specialised vessel had been carried out.
- 67 In those circumstances, it is unnecessary to consider whether, as contended by the applicants, the criteria applied by the Commission conflict with the objectives of the policy of improving inland waterway transport pursued by that regulation.
- 68 The first plea in law must therefore be rejected.

*The second plea in law: breach of the principle audi alteram partem*

Arguments of the parties

- 69 The applicants claim, first of all, that they were unaware of the existence of the explanatory note.
- 70 They also criticise the Commission for relying on a decision of a Working Party on Structural Improvements in Inland Waterway Transport which unanimously opposed the grant of the exemption applied for. They query the appropriateness of the involvement of that working party on the ground that, under Article 8(3)(c) of Regulation No 1101/89, the Member States and the organisations representing inland waterway transport at Community level must be consulted.
- 71 The applicants' also claim that they had no knowledge of the letter dated 5 October 1997 sent to the Commission by the Netherlands Directorate-General for Transport indicating that, according to the letter from the Waterways Inspectorate of 14 May 1997 and the reply from Transpo Maastricht dated 18 July 1997, the *Durance* was capable of carrying several categories of goods. The applicants call for that letter of 5 October 1997 to be produced, claiming that its conclusion is incorrect. Moreover, it is, in their view, clear from the minutes of the meeting of the Working Party on Structural Improvements in Inland Waterway Transport of 17 October 1997 that not only was the letter from the Netherlands Directorate-General for Transport used in an improper manner but also that that directorate applied a criterion other than that laid down by the Commission.
- 72 The Commission replies that the criteria laid down in its explanatory note were decided upon in close collaboration with the Member States, the funds and the

national organisations in the sector (including the Netherlands scrapping fund). It considers that those operating in the inland waterways sector, including therefore Transpo Maastricht, have been aware of them since 1990. Also, the same criteria are evident in the correspondence between the various parties involved in the procedure for examination of the application for exemption at issue, as is the importance of those criteria for the grant of such exemption.

- 73 The Commission also points out that it is not bound by the views of the Member States and organisations representing inland waterway transport, nor is it required to disclose to the applicant the minutes of the meeting held with them before giving a decision on the application.
- 74 In any event, it is clear from the brief reports of the meetings of the representatives of the Member States and the representative organisations concerned, held on 21 March and 23 May 1997, that, if the criteria were not satisfied, the requested exemption could not be granted — and, at its meeting of 17 October 1997, the Working Party on Structural Improvements in Inland Waterway Transport took the view that the *Durance* was capable of carrying goods other than fly ash.
- 75 As to whether the proper procedure was followed, the Commission observed that it consulted the Working Party on Structural Improvements in Inland Waterway Transport, which is made up of representatives of the Member States and of the organisations representing inland waterway transport at Community level.
- 76 The Commission contends finally that, contrary to the applicants' assertion, their views and the letters dated 14 May, 18 July and 14 October 1997 were brought to the attention of those taking part in the meeting of 17 October 1997. It was therefore in full knowledge of the facts that the latter unanimously proposed that the Commission should not grant the exemption applied for.

## Findings of the Court

- 77 First of all, the applicants' argument claiming ignorance of the existence of the explanatory note cannot be upheld.
- 78 It is clear from the application for exemption dated 1 October 1996 that Transpo Maastricht was aware of the three criteria defined in that note by the Commission in collaboration with the Member States and the trade organisations in those States.
- 79 The application for exemption mentions, in that connection, the following points:

'Cargo of that kind cannot be carried by vessels not fitted with special equipment because of its powdery nature...

In view of the equipment fitted, the vessel is unsuitable for the carriage of other kinds of cargo.

In the alternative, we declare that, if Article 8(1) should be applicable to the vessel, we are fully prepared to give effect to the "old for new" rule in the event of our nevertheless carrying, for any reason whatsoever, another type of cargo aboard the [*Durance*].'

- 80 With regard more particularly to the last paragraph quoted above, the applicants stated, in reply to a question put to them by the Court, that it was intended to meet the requirements of the third criterion in the explanatory note.
- 81 Next, it must be observed that the applicants' argument alleging infringement of Article 8(3)(c) of Regulation No 1101/89, in so far as the Member States and the organisations representing inland waterway transport were not consulted, likewise has no basis.
- 82 The Commission produced the conclusions of the Working Party's meeting of 21 March 1997 and of its meeting of 23 May 1997 with the representatives of the Member States concerned, Switzerland and the scrapping funds of those countries at which the application for exemption at issue was examined and the Netherlands scrapping fund was asked to take certain action.
- 83 The following points are also clear from the minutes of the meeting of that working party of 17 October 1997:

'Applications for exemption of three vessels were examined on [the] basis of a note from Commission staff. An application for exemption of a fourth vessel was tabled during the meeting.

The Member State and trade delegations are of the opinion that all four applications for exemption should be refused:

...

(c) Tanker for the transport of fly ash: this application was examined at the meetings of 21 March 1997 and 23 May 1997; at the latter meeting, the Netherlands [scrapping] fund was asked to check whether the vessel could be used for the carriage of other products in powder form. In a letter dated 5 October 1997 to the European Commission, the Netherlands [scrapping] fund stated that it had still not had a clear answer from the vessel's owner but had concluded that the vessel, as at present fitted out, is capable of carrying other kinds of products. The delegations take the view that the application for exemption should not therefore be granted.'

84 It is thus clear that the Commission, in accordance with Article 8(3)(c) of Regulation No 1101/89, consulted the Member States and trade organisations concerned for the purposes of the contested decision.

85 Finally, the applicants criticise the Commission for not forwarding to them the letter from the Netherlands Directorate-General for Transport dated 5 October 1997.

86 However, the Commission is not under any obligation to give details to any person seeking an exemption of the views expressed by the Member States and the organisations representing inland waterway transport which, under Article 8(3)(c) of Regulation No 1101/89, have an advisory role (see *Natural van Dam and Danser Container Line*, cited above, paragraph 51).

87 It is clear that it is in the context of that advisory opinion that, at the meeting of 21 March 1997 of the Working Party on Structural Improvements in Inland Waterway Transport, it was decided to invite the Netherlands scrapping fund to check whether the *Durance* displayed the technical characteristics of a specialised vessel and to inform the Commission of the results of its inquiries. In response to

that request, the Netherlands Directorate-General for Transport approached the applicant company and the Waterways Inspectorate. In the abovementioned letter of 5 October 1997, the Netherlands Directorate-General for Transport informed the Commission of the results of its inquiries.

- 88 That letter cannot therefore rank any higher than a mere advisory opinion, a conclusion which is not affected by the fact that the Commission considered, in the contested decision, that that letter of 5 October 1997 corroborated its assessment.
- 89 It must therefore be held that the Commission was not required to forward the letter of 5 October 1997 to the applicants.
- 90 It follows from all the foregoing that the second plea in law must be rejected.

*The third plea in law: breach of the principle of non-discrimination*

Arguments of the parties

- 91 The applicants state that the Commission has in the past granted exemptions under Article 8(3)(c) of Regulation No 1101/89 for vessels of the same type having the same special technical features. It is clear therefore that the *Durance*, like all those vessels, is not contributing to increasing the existing overcapacity and displays the characteristics of a specialised vessel.

- 92 The applicants therefore call for production by the Commission of the decisions granting such exemptions and submit that they have been the victims of discrimination.
- 93 They add that their application for exemption is not comparable to that relating to the *VOF Challenger*, which was rejected by the Commission, since that vessel was suitable for the carriage of several kinds of goods (cement, fly ash, powdered limestone and quicklime). They also state that the Commission has excluded from the scope of the 'old for new' rule several vessels used to carry fly ash.
- 94 In conclusion, the applicants offer to prove their statements by all legal means, in particular the evidence of witnesses and experts.
- 95 The Commission replies that it has previously rejected applications comparable to those of the applicants and in that connection it has produced a recent rejection decision relating to the *VOF Challenger*. It points out, however, that the number of applications for exceptions to the 'old for new' rule remains limited, a situation which in its view is accounted for by the view taken by the owners of vessels that they do not qualify for an exemption.
- 96 The Commission emphasises that 13 vessels registered in Belgium have had Regulation No 1101/89 applied to them and that their owners paid in respect of them the special 'old for new' contribution. It adds that, by two decisions of 23 May 1990 and 3 May 1991, it took the view that exemptions under Article 8(3)(c) should be granted for two vessels, the applicants having demonstrated that the criteria of the explanatory note had been satisfied.

## Findings of the Court

- 97 The applicants allege, in this plea, infringement of the principle of non-discrimination in that the Commission granted exemption under Article 8(3)(c) of Regulation No 1101/89 to the owners of vessels displaying the same special technical features as the *Durance*. They request that the Commission produce the decisions concerned.
- 98 However, when a vessel does not display the characteristics of a specialised vessel within the meaning of Article 8(3)(c) of Regulation No 1101/89, an exemption under that article cannot be allowed on the ground that it was allegedly granted for another vessel displaying the same technical specifications when the Court has not even been called on to examine the case of the latter vessel (see, by analogy, Case T-49/95 *Van Megen Sports Group v Commission* [1996] ECR II-1799, paragraph 56, and Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-1307, paragraph 197).
- 99 Accordingly, it is not necessary for the Court to require the Commission to produce decisions adopted by it in the past in the same legal framework in relation to other vessels.
- 100 In any event, the fact that the Commission may, in earlier cases, have considered that an exemption from Article 8(3)(c) of Regulation No 1101/89 was applicable cannot, a priori, deprive it of the right to take a different decision in a new case where the requirement laid down in the abovementioned article is not satisfied.

- 101 Since the Commission rightly considered that the applicants had not established that the technical modifications which, in their view, converted the vessel into a specialised vessel had in fact been carried out, the plea alleging infringement of the principle of non-discrimination must be rejected.
- 102 Finally, it is unnecessary to allow the applicants to prove their assertions by all legal means. It is clear from the documents before the Court that they were in a position to establish the truth of their statements in the procedure by which the Commission examined the application for exemption, and in particular an opportunity to do so was given by the Netherlands Directorate-General for Transport in its letter of 27 May 1997 addressed to Transpo Maastricht (see relevant extract mentioned in paragraph 13 above).
- 103 It follows from all the foregoing that the application must be dismissed in its entirety.

## Costs

- 104 Under Article 87(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;
2. Orders the applicants to pay their own costs and to bear those incurred by the Commission jointly and severally.

Cooke

García-Valdecasas

Lindh

Delivered in open court in Luxembourg on 1 February 2000.

H. Jung

Registrar

R. García-Valdecasas

President