

JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

8 May 2003 *

In Case T-82/01,

Josanne Vof, established in Papendrecht (Netherlands),

Pieter van Wijnen, resident in Papendrecht,

Adrianus Jacobus van Wijnen, resident in Papendrecht,

Anigje Veen, resident in Meerkerk (Netherlands),

represented by J. van Dam and Y. Ooykaas, lawyers,

applicant,

v

Commission of the European Communities, represented by H. van Vliet and W. Wils, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Dutch.

APPLICATION for the annulment of Commission Decision SG (2001) D/286100 of 9 February 2001 refusing the applicants' request for the exemption of the vessel *Josanne* from the scope of Council Regulation (EC) No 718/1999 of 29 March 1999 on a Community-fleet capacity policy to promote inland waterway transport (OJ 1999 L 90, p. 1),

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

composed of: K. Lenaerts, President, J. Azizi and M. Jaeger, Judges,

Registrar: J. Plingers,

having regard to the written procedure and further to the hearings on 18 September 2002 and, after the reopening of the oral procedure, 30 January 2003,

gives the following

Judgment

Legal background

- 1 The aim of Council Regulation (EC) No 718/1999 of 29 March 1999 on a Community-fleet capacity policy to promote inland waterway transport (OJ 1999 L 90, p. 1) 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. Regulation No 718/1999 represents a continuation of the efforts undertaken since the adoption of Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport (OJ 1989 L 116, p. 25).

- 2 Under the first paragraph of Article 1 of Regulation No 718/1999, 'inland waterway vessels used to carry goods between two or more points by inland waterway in the Member States shall be subject to the Community-fleet capacity policy laid down in this Regulation'.

- 3 The first subparagraph of Article 2(1) of Regulation No 718/1999 provides that the regulation is to apply to 'cargo-carrying vessels and pusher craft providing transport services on own account or for hire or reward and registered in a Member State or, if not registered, operated by an undertaking established in a Member State'. Article 2(2) gives a list of vessels and other craft 'exempt from this Regulation', which include, in Article 2(2)(g), 'dredging equipment, such as hopper vessels and pontoons and floating construction plant, provided that such equipment is not used for the carriage of goods within the meaning of Article 1'.

- 4 Article 4(1) of Regulation No 718/1999 provides, in essence, that vessels covered by the regulation which are newly constructed may be brought into service

subject to the condition (the ‘old-for-new’ rule) that the owner of the vessel either scraps a certain tonnage of carrying capacity without receiving a scrapping premium or pays a special contribution to the Fund covering his new vessel.

- 5 Under Article 4(6) of Regulation No 718/1999, ‘after consulting the Member States and the organisations representing inland waterway transport at Community level, the Commission may exempt specialised vessels from the scope of paragraph 1’. The same provision adds that ‘the specialised vessels must be specially and technically designed to carry a single type of goods and technically unsuitable for carrying other goods, it must be impossible to carry this single type of goods in vessels without special technical installations and the owners of the vessels must give a written undertaking that no other goods will be carried in their vessels as long as the “old-for-new” rule applies’.

Facts giving rise to the dispute

- 6 The applicants, Josanne Vof, a partnership, and its members, operate in the market for inland waterway transport and dredging.
- 7 On 27 June 2000 they submitted a request to the Commission for exemption from payment of the abovementioned special contribution in respect of a newly constructed vessel, the *Josanne* (‘the request for exemption’).
- 8 In the request for exemption the applicants stated that the vessel was a ‘towed carrier dredger’ which was to be used mainly for ‘dredging, the extraction of sand

on the vessel itself and in tanks moored alongside, the transport of the material and the maintenance of navigable waters and waterways'. They also emphasised the specialised nature of the vessel, which was equipped with a device for suction and dredging and the treatment of sand and gravel extracted from the bottom. The applicants concluded from this that, 'because of this complex design and obstacles in the holds, the vessel is not suitable, from the technical and economic viewpoint, for the carrying of goods other than those mentioned above [sand and gravel], unless the design and equipment are radically modified'. Finally, they added that they were aware that 'if the vessel were radically altered and then used for purposes other than those described above, they [would] have to comply with the "old-for-new" rule'.

- 9 The request for exemption was accompanied by *inter alia* a copy of a draft contract between the applicants and Hevoo BV, a trading and transport company. The draft is dated 30 June 2000 and bears only the signature of the representative of Hevoo BV ('the draft contract with Hevoo'). It appears from the draft that 'in the period 2000 to 2005 inclusive [the applicants will] carry out, with the aid of the motor vessel *Josanne*, the transport of filling sand, filling earth, fouled earth and fouled dredged mud, together with all suction and dredging work on behalf of the trading and transport company HEVOO BV, from various extraction sites to various destinations in Europe, at the tariffs in force'.

- 10 By letter of 1 September 2000, the Commission drew the applicants' attention to the conditions laid down by Regulation No 718/1999 for the grant of exemption. In particular, the Commission pointed out that, under Article 2(2)(g) of the regulation, the exclusion of dredging equipment from the scope of the regulation was subject to the condition that such equipment is not 'used for the carriage of goods within the meaning of Article 1 [of the regulation]'. The Commission concluded that 'without prejudice to the outcome of the examination in progress, it is clear from the documents... received that [the] *Josanne* does not appear in principle to fulfil the abovementioned conditions'. Finally, the Commission noted

that a list mentioned in the request for exemption was not in the file which had been received.

- 11 On 19 September 2000, in an attempt to make good that omission, the applicants sent to the Commission copies of the construction drawings of the *Josanne*.

- 12 By letter of 29 September 2000 the Commission informed the applicants that the drawings in question had already been enclosed with the request for exemption.

- 13 On 16 October 2000, on the basis of Article 4(6) of Regulation No 718/1999, the defendant referred the request for exemption to the Group of Experts on Community Fleets Capacity and Promotion Policy by submitting to the Group of Experts a summary of the request. The minutes of the meeting of the Group of Experts on 20 November 2000 show that they decided against exemption for the *Josanne*.

- 14 By letter of 9 February 2001 ('the contested decision') the defendant informed the applicants that it would not grant the exemption requested.

- 15 In its decision, the defendant stated that, on the basis of the information provided by the applicants, the *Josanne* could not be deemed to be dredging equipment

within the meaning of Article 2(2)(g) of Regulation No 718/1999 because, according to the draft contract with Hevoo, it was intended to carry out, in addition to suction and dredging work, the transport of filling sand, filling earth, fouled earth and fouled dredged mud. The defendant also considered that the *Josanne* did not meet the criteria laid down in Article 4(6) of Regulation No 718/1999 for the exemption of specialised vessels in view of its capacity to 'transport different types of goods', 'as putting it into service will contribute to increasing the capacity of the fleet'. The defendant added that the Group of Experts had also decided against exemption.

Procedure and forms of order sought by the parties

- 16 The applicants brought the present action by application lodged at the Court Registry on 6 April 2001.
- 17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. By way of measures of organisation of procedure, on 15 July 2002 the Court requested the parties to produce certain documents and to answer a number of questions. The parties complied with those requests.
- 18 The parties presented oral argument and replied to the oral questions of the Court at the hearing on 18 September 2002. At the hearing the applicants and the defendant lodged certain documents. The Court decided provisionally to place the documents in the file, subject to a final decision on this point. In addition, the Court asked the defendant to produce copies of decisions adopted in the years preceding the adoption of the contested decision, and all related documents,

concerning requests for exemption relating to carrier dredgers. After the defendant had complied with that request, the applicants submitted their observations on the documents and raised two new pleas in law. In those circumstances, the Court decided, by order of 13 December 2002, to reopen the oral procedure pursuant to Article 62 of the Rules of Procedure and addressed written questions to the defendant concerning the documents. The parties presented oral argument and replied to the Court's questions concerning the new pleas in law at a second hearing on 30 January 2003, in the course of which the defendant lodged certain documents.

19 The applicants claim that the Court should;

— annul the contested decision;

— order the defendant to pay the costs.

20 The defendant contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

Law

- 21 In their application, the applicants raise three pleas in law. They submit, primarily, that the contested decision infringes Article 2(2)(g) of Regulation No 718/1999. In the alternative, they claim that the decision was adopted in breach of Article 4(6) of the regulation in that, first, the Commission took the view that the *Josanne* was not a specialised vessel within the meaning of that provision and, second, that the Commission did not duly consult the Member States and the organisations representing inland waterway transport at Community level.
- 22 In their observations on the documents submitted by the defendant at the Court's request, the applicants raise two new pleas in law alleging breach of the principle of non-discrimination and of the *audi alteram partem* rule.

Plea alleging infringement of Article 2(2)(g) of Regulation No 718/1999

Arguments of the parties

- 23 The applicants submit that the defendant infringed Article 2(2)(g) of Regulation No 718/1999 in finding, in the contested decision, that the *Josanne*, in addition to dredging work, was used for the carriage of goods within the meaning of Article 1 [of Regulation No 718/1999].

- 24 According to the applicants, by virtue of Article 2(2)(g), it is for the Commission, not for the persons seeking an exemption, to establish that a carrier dredger is nevertheless subject to Regulation No 718/1999 on the ground that it is used for carrying goods within the meaning of Article 1 of the regulation. In that connection, the Commission could not have legitimately concluded from the request for exemption and its annexes that the *Josanne* was used for the carriage of goods within the meaning of that provision.
- 25 First, the applicants refer to an expert report drawn up on 3 April 2001, attached to their application.
- 26 Secondly, they state that, contrary to the Commission's observation in the contested decision, the draft contract with Hevoo, which, incidentally, they had not signed, does not show that the *Josanne* would be used for carrying goods within the meaning of Article 1 of Regulation No 718/1999. Nor does the fact that the draft mentions that the *Josanne* would be used at different sites in Europe mean that it would carry sand and earth across the whole of Europe.
- 27 In this connection, the applicants assert that dredging work inherently involves the removal of the dredged material by the same vessel, from the place of extraction to the place where it is discharged. The applicants stress that a dredger does not 'normally' provide transport services other than transport to a discharge area. According to the applicants, that kind of transport is quite different from 'the carriage of goods within the meaning of Article 1 [of Regulation No 718/1999]' referred to in Article 2(2)(g) of the same regulation. The transport of dredged material by carrier dredgers is a market entirely different from commercial transport, that is to say, 'the carriage of goods within the meaning of Article 1 [of Regulation No 718/1999]', for which coffer barges are generally used, not carrier dredgers like the *Josanne*.

- 28 The applicants conclude from this that the *Josanne* does not add new capacity to the supply available on the market for the inland waterway transport of sand and earth. On the contrary, by dredging, the *Josanne* creates a cargo which can be carried by coffer barges and it thus increases the supply on that market. Likewise, the applicants deny that obtaining the exemption requested for the *Josanne* would give them an advantage of some kind over their competitors. In that connection, they repeat that the commercial transport of goods, such as sand and earth, is customarily carried out by coffer barges. Because of the specialised nature of the *Josanne* and its high construction cost (which was approximately EUR 500 000 more than that of a coffer barge), from a commercial viewpoint it was absolutely impossible to envisage carrying such goods on the *Josanne*.
- 29 In reply to a written question from the Court, the applicants argued that the specialised nature of the *Josanne* for dredging work alone was clear from a document entitled 'list of specific characteristics of the dredging, loading and unloading installation' ('list of specific characteristics') which they submitted to the Commission with their request for exemption, but without keeping a copy.
- 30 The defendant contends that Article 2(2)(g) of Regulation No 718/1999 provides for a derogation from the general scheme established by that regulation and it must therefore be narrowly construed, having regard to the aims of the regulation. The defendant also contends that persons requesting exemption must prove that all the conditions laid down for allowing the exception are fulfilled. Referring to the request for exemption and the draft contract with Hevoo, the defendant claims that, in the present case, the applicants have not adduced such proof and therefore the defendant could not grant them an exemption. Furthermore, citing an exchange of correspondence with the applicants, the defendant denies that it received a copy of the list of specific characteristics during the administrative procedure.

Findings of the Court

- 31 Under Article 2(2)(g) of Regulation No 718/1999, that regulation does not apply to ‘dredging equipment, such as hopper vessels and pontoons and floating construction plant, provided that such equipment is not used for the carriage of goods within the meaning of Article 1’. ‘Carriage of goods’ is defined by Article 1 of the regulation as covering transport ‘between two or more points by inland waterway in the Member States’.
- 32 In the contested decision the defendant did not deny that the *Josanne* constituted ‘dredging equipment’ within the meaning of that provision. On the other hand, the defendant considered that the applicants had not shown that the *Josanne* was not used for ‘the carriage of goods within the meaning of Article 1 [of Regulation No 718/1999]’.
- 33 First of all, it must be observed that, as the defendant points out, since Article 2(2)(g) of Regulation No 718/1999 provides for a derogation from the general scheme established by that regulation it must be narrowly construed, having regard to the aims of the regulation (see Case T-155/97 *Natural van Dam and Danser Container Line v Commission* [1998] ECR II-3921, paragraph 31). The defendant is likewise correct in contending that it is for those requesting an exemption under Regulation No 718/1999 to show that all the conditions laid down for the application of that derogation are fulfilled (Case T-63/98 *Transpo Maastricht and Ooms v Commission* [2000] ECR II-135, paragraph 62).
- 34 Second, it must be observed that 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 (*Transpo Maastricht and Ooms v*

Commission, cited above, paragraph 55). Consequently the expert report of 3 April 2001, which was submitted to the Court by the applicants and which was drawn up only after the contested decision was adopted, cannot be taken into account in assessing the legality of the contested decision. With regard to the list of specific characteristics which the defendant denies that it received and of which the applicants maintain they did not keep a copy, the Court finds that this document is mentioned in the list of annexes to the request for exemption. However, it is clear from the correspondence between the applicants and the defendant which was produced to the Court by the latter that the list was not among the documents annexed to the request for exemption. Consequently the applicants cannot rely on the list in order to prove that the *Josanne* could not be used for the purpose of carrying goods.

- 35 That being so, it is necessary to consider whether the defendant erred in its assessment in finding, on the basis of the information submitted by the applicants in connection with their request for exemption, that they had not proved that the *Josanne* was not used for the ‘carriage of goods within the meaning of Article 1 [of Regulation No 718/1999]’.
- 36 In that connection, it must be observed that, in their request for exemption, the applicants themselves informed the Commission that they operated ‘in the market for inland waterway transport and dredging’ and that the *Josanne* was designed for ‘dredging, the extraction of sand on the vessel itself and in tanks moored alongside, the transport of the material and the maintenance of navigable waters and waterways’. They also pointed out in the request that the vessel was a ‘multi-functional craft’ equipped *inter alia* with ‘devices for treating sand and gravel in different ways’, and concluded that ‘the vessel is not suitable, from the technical and economic viewpoint, for the transport of goods other than those mentioned above, unless the design and equipment are radically modified’. Moreover, in the drawing of the vessel which the applicants submitted to the Commission with the request for exemption, the term ‘Beunship’ (self-propelled barge) is used to describe the *Josanne*. However, at the hearing of 30 January 2003, the defendant observed that the use of that term did not rule out the possibility that the vessel could be used for commercial transport work, which was not denied.

- 37 In addition, it appears from the draft contract with Hevoo, annexed to the request for exemption, that Hevoo BV is a 'transport company carrying materials for the construction of waterways, roads and concrete infrastructures' ['Handel in vervoer van materialen t.b.v. water-, wegen- en betonbouw']. According to the draft contract, 'during the period 2000 to 2005 inclusive [the applicants will] carry out, with the aid of the motor vessel *Josanne*, the transport of filling sand, filling earth, fouled earth and fouled dredged mud, together with all suction and dredging work on behalf of the trading and transport company HEVOO BV, from various extraction sites to various destinations in Europe, at the tariffs in force'. Finally, the draft contract stated that Hevoo BV was to organise 'the loading and unloading of the vessel'.
- 38 It follows from the foregoing that, although the applicants' request for exemption stated that the *Josanne* was to be used mainly for dredging work, several details of the request, the drawing of the vessel and the draft contract with Hevoo indicated that the vessel could and would be used for the transport of goods in addition to dredging work.
- 39 At the hearing of 18 September 2002 the applicants admitted that the said details could lead to confusion in that it was possible to infer from them long-distance transport services.
- 40 Only at the stage of the proceedings before the Court did the applicants contend, in substance, that the transport work referred to in the request for exemption and the draft contract with Hevoo was limited to the transport of dredged material, which had to be deemed inherent in dredging work. The defendant does not deny that the transport of dredged material may be deemed inherent in dredging work if it is clearly and strictly confined to what is necessary for carrying out that work. However, as the defendant rightly observes, the applicants' request for exemption gave no details at all of the nature and extent of the transport work envisaged for the *Josanne*. On the contrary, on the basis of the information provided by the

applicants in their request for exemption, the defendant could reasonably conclude that, in addition to dredging work, the *Josanne* could and would carry goods within the meaning of Article 1 of Regulation No 718/1999, that is to say, carry goods between two or more points by inland waterway in the Member States.

41 Therefore, as Article 2(2)(g) of Regulation No 718/1999 must be strictly interpreted, taking account of the purpose of the regulation as set out in its first recital, namely to reduce the carrying overcapacity in inland waterway transport, the applicants have not shown that the Commission erred in its assessment in finding that, in addition to dredging work, the *Josanne* was also used for carrying goods within the meaning of Article 1 and that therefore the derogating provision of which the applicants claimed the benefit was not applicable to them.

42 Consequently this plea in law must be rejected.

Plea alleging infringement of Article 4(6) of Regulation No 718/1999 in that the Commission found that the Josanne was not a specialised vessel

Arguments of the parties

43 The applicants submit that the Commission infringed Article 4(6) of Regulation No 718/1999 in finding, in the contested decision, that the *Josanne* could carry various types of goods and was not therefore a specialised vessel within the meaning of that provision.

- 44 First, according to the applicants, the file submitted to the defendant shows that the *Josanne* is a vessel specially and technically designed for carrying a single type of goods, namely dredged material (or dredged mud). The fact that various documents in the file indicate that the *Josanne* will, in particular, carry sand or filling earth in no way alter that conclusion. The use of different terms in the documents merely reflects the later use of the dredged material. However, according to the applicants, in every case only 'a single type of goods' within the meaning of Article 4(6) of Regulation No 718/1999, namely material removed in the course of dredging work, is involved. They repeat that the *Josanne* was, both technically and economically, unsuitable for carrying other types of goods.
- 45 Second, the applicants contend that the *Josanne* does not compete with vessels which are designed for carrying goods and which have no special technical installations within the meaning of Article 4(6) of Regulation No 718/1999 because only dredged material can be loaded on to a dredger. Thus, first, a dredger carries no type of goods other than dredged mud and, second, a non-specialised vessel without the special technical installations of a dredger cannot carry dredged mud and would not receive the licences necessary for carrying such material.
- 46 The defendant refers to the request for exemption and the draft contract with Hevoo and submits that the applicants have not shown that the *Josanne* was a specialised vessel within the meaning of Article 4(6) of Regulation No 718/1999.

Findings of the Court

- 47 Under Article 4(6) of Regulation No 718/1999 the Commission may exclude certain vessels from the scope of the regulation and consequently exempt their

owners from payment of the special contribution prescribed by the regulation if the vessels in questions are ‘specialised vessels’. The same article also provides that they must be ‘specially and technically designed to carry a single type of goods’ and ‘technically unsuitable for carrying other goods, [and that] it must be impossible to carry this single type of goods in vessels without special technical installations and the owners of the vessels must give a written undertaking that no other goods will be carried in their vessels as long as the “old-for-new” rule applies’.

48 Therefore it is necessary to determine whether, in the present case, the Commission erred in its assessment in finding, on the basis of the request for exemption and its annexes, that the applicants had not shown that the *Josanne* was a specialised vessel within the meaning of Article 4(6) of Regulation No 718/1999.

49 As that article is a derogating provision, the principles of interpretation and the distribution of the burden of proof mentioned in paragraph 33 above must be applied in this context. Similarly, only the information available at the date of adoption of the contested decision can be taken into account.

50 First, it must be observed that it is clear from the request for exemption that the *Josanne* was suitable for carrying sand and gravel (see paragraph 36 above). Similarly, the draft contract with Hevoo stated that the *Josanne* would carry out ‘the transport of filling sand, filling earth, fouled earth and fouled dredged mud... from various extraction sites to various destinations in Europe’ and that Hevoo BV would organise ‘the loading and unloading of the vessel’.

51 On the basis of that information the Commission could reasonably conclude that the *Josanne* was not specially and technically designed to carry a single type of

goods, but that, on the contrary, the transport of several types of goods was envisaged with that vessel. Even if, as the applicants point out, all the dredged material carried to the nearest site for unloading was to be understood as ‘a single type of goods’ within the meaning of Article 4(6) of Regulation No 718/1999, the fact remains that it is clear from the wording of the draft contract with Hevoo that the *Josanne* was to carry not only material recovered from the water during dredging operations, but also goods loaded otherwise than by such operations. In those circumstances, the Commission could validly find that those different materials could not, on any view, be regarded as ‘a single type of goods’ within the meaning of Article 4(6) of Regulation No 718/1999.

52 Similarly, on the basis of the information provided by the applicants in the course of the administrative procedure, the Commission could reasonably conclude that the *Josanne* was not ‘technically unsuitable for carrying other goods’. On the contrary, the information could rather be understood to mean that the *Josanne* was suitable for carrying different goods such as sand, earth or gravel, in addition to dredging work. The applicants assert that the *Josanne* was economically unsuitable for carrying other goods, but this is not sufficient to invalidate the foregoing conclusion as it is clear from the express terms of Article 4(6) of Regulation No 718/1999 that only vessels ‘technically unsuitable’ for carrying other goods can be exempted.

53 Finally, again on the basis of the information in the request for exemption and its annexes, the defendant could properly consider that the *Josanne* did not fulfil the condition that the ‘it must be impossible to carry this single type of goods in vessels without special technical installations’. The applicants have not denied that material such as that mentioned in the preceding paragraphs can also be carried by non-specialised vessels.

54 Accordingly, the applicants have not discharged the burden of proving that the Commission exceeded the limits of its discretion in finding, on the basis of the information supplied by the applicants, that the *Josanne* did not fulfil the conditions laid down in Article 4(6) of Regulation No 718/1999 for the exemption of specialised vessels.

55 Consequently this plea must also be rejected.

Plea alleging infringement of Article 4(6) of Regulation No 718/1999 in that the Commission did not duly consult the Member States and organisations representing inland waterway transport at Community level

Arguments of the parties

56 In their application the applicants observe that, according to the contested decision, the defendant consulted the Group of Experts and the latter decided against granting an exemption. However, they point out that the contested decision does not indicate the reasons for which and the basis on which the Group of Experts did so.

57 In response to the documents annexed to the defence, namely, first, an extract from the defendant's request of 16 October 2000 to the Group of Experts for an opinion and, second, an extract from the minutes of the Group's meeting of 20 November 2000 (see paragraph 13 above), the applicants contend in their

reply that the defendant did not duly consult the Group of Experts. The applicants claim, first, that the defendant did not send the Group the complete request for exemption with the information which it contained and, second, that the opinion of the Group of Experts does not state the reasons on which it is based.

- 58 In response to this the defendant states that, in its consultation of the Group of Experts of 16 October 2000, it gave an exact description of the contents of the request for exemption and provided a construction drawing of the *Josanne* for each member of the Group who requested one.

Findings of the Court

- 59 First, with regard to the complaint that the Group of Experts was not given the complete request for exemption, it must be observed that, although the Group's opinion does not bind the Commission, the consultation of the Group is nevertheless an essential procedural requirement the non-observance of which affects the lawfulness of the final decision if it is shown that the failure to produce certain essential documents did not enable that advisory committee to deliver its opinion in full knowledge of the facts, that is, without being misled on an essential point by errors or omissions (see, in the context of competition law, the judgments in Case T-69/89 *RTE v Commission* [1991] ECR II-485, paragraph 23, and Case T-83/91 *Tetra Pak v Commission* [1994] ECR II-755, paragraph 37).
- 60 Although, when the matter was referred to the Group of Experts in the present case, the defendant sent them only a summary of the request for exemption and

not the complete request with annexes, the defendant confirmed at the hearing on 18 September 2002 that the complete files relating to requests for exemption under Regulation No 718/1999 are always kept available for members at meetings of the Group and that was the case here.

- 61 In addition, the Court asked the applicants, on whom the burden of proof lies, what was the essential information which they claimed had not been sent to the Group of Experts by the Commission. On that point the applicants merely referred, first, to the document which was the subject of the Court's finding, in paragraph 34 above, that they had not proved that it was submitted to the Commission with their request for exemption and, second, to a list annexed to the request with the names of the undertakings with which the applicants proposed to work. They added that the members of the Group of Experts needed to know that those undertakings were companies 'generally' active in the field of dredging. On this point, it is sufficient for the Court to observe that the names of all those companies also appeared in the body of the actual request for exemption and could therefore be examined by the members of the Group of Experts.
- 62 Second, as regards the complaint that the Group's opinion did not state the reasons on which it was based, it must be observed that such a defect, relating to an opinion, which is not an act adversely affecting a person's interests but only a non-binding act, cannot render the contested decision unlawful. It is only if the contested decision referred to an expert opinion which did not state reasons and if it did not itself include an independent and sufficient statement of reasons that it would be vitiated by a lack of reasoning
- 63 In so far as the applicants are in reality seeking to show that the contested decision is vitiated by a lack of reasoning in that it does not give the reasons for which the Group of Experts decided against an exemption, it must be observed

that, since the Group's opinion does not bind the Commission and since, in the present case, there is no difference of opinion between the Group and the Commission, the applicants cannot complain that the defendant did not give them detailed particulars of the Group's viewpoint.

64 Consequently, this plea must also be rejected.

Pleas alleging breach of the principle of non-discrimination and of the audi alteram partem rule

Arguments of the parties

65 In their observations on the documents produced by the defendant further to the hearing of 18 September 2002, relating to its practice in previous years concerning decisions on requests for exemption relating to carrier dredgers, the applicants submit that the contested decision infringes the principle of non-discrimination and the *audi alteram partem* rule.

66 According to the applicants, those documents show that suitability for carrying goods had also been mentioned in the course of the administrative procedure relating to other carrier dredgers similar to the *Josanne* because they had comparable equipment. Unlike what it did in the present case, the Commission had examined the requests for exemption relating to the other carrier dredgers

with great care. In particular, the Commission had permitted the parties concerned to provide additional information on the vessels and had asked for additional information from the appropriate national authorities so as to satisfy itself that the vessels had not been used for carrying goods and, therefore, that the exemptions sought could be granted. Therefore, according to the applicants, the defendant was under an obligation to deal with the *Josanne* case in the same way. As regards the letter of 1 September 2000, the applicants claimed at the hearing on 30 January 2003 that it was not sufficiently specific and did not include an express request for additional information.

67 The defendant points out that, in their application, the applicants did not plead breach of the principle of non-discrimination and of the *audi alteram partem* rule. Consequently, these new pleas in law must be rejected as inadmissible.

68 In any case, the defendant contends that these pleas are unfounded. First, it submits that the *Josanne* case is not comparable with that of other carrier dredgers. It observes that, unlike the requests for exemption relating to other vessels, it was clear from the information supplied by the applicants in the case of the *Josanne* that that vessel did not meet the requirements for exclusion from the scope of Regulation No 718/1999 and for its owners to be exempted from payment of the special contribution laid down by the regulation. Second, the Commission contends that its letter of 1 September 2000 reminded the applicants of the conditions for exemption from payment of the contribution and informed them that, on the basis of the available information, exemption could not be granted. The Commission therefore enabled the applicants to state their case before taking a decision on the request for exemption. Furthermore, the Commission contends that the present case may be compared with that which gave rise to the judgment in Case T-109/94 *Windpark Groothusen v Commission* [1995] ECR II-3007, paragraph 48, in which it was held that applicants for financial support need not be given a hearing by the Commission before it gives a decision on the grant of finance.

Findings of the Court

- 69 With regard to the admissibility of the pleas, it must be observed that, under Article 48(2) of the Rules of Procedure, no new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.
- 70 In the present case the applicants put forward the present pleas on the basis of factual matters which were raised by the defendant in connection with a measure of organisation of procedure decided upon by the Court at the hearing on 18 September 2002 and of which the applicants could not have known in any other way.
- 71 Consequently, the introduction of those pleas must be allowed (see, to that effect, the judgments in Case C-259/96 P *Council v De Nil and Impens* [1998] ECR I-2915, paragraph 31; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* [2002] ECR I-8375, paragraphs 369 to 378, and Case T-141/97 *Yasse v EIB* [1999] ECR-SC I-A-177 and II-929, paragraph 127).
- 72 With regard to the merits of the plea of breach of the principle of non-discrimination, it must be observed that that principle prohibits comparable situations from being treated differently and different situations from being treated in the same way unless such difference in treatment is objectively justified (see Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305, paragraph 478).

- 73 In the present case, the applicants correctly note that the documents produced by the defendant show that in the case of other carrier dredgers the exclusion of which from the scope of Regulation No 718/1999 was requested in years prior to the adoption of the contested decision, the Commission examined the files in greater detail than in the case of the *Josanne*, before granting the exemptions in question. Depending on the particular case, the Commission asked the parties concerned for additional information on the equipment of the vessels in question or as to how they were used and/or requested additional information from the appropriate national authorities. In certain cases, the Commission also asked the authorities to inspect the vessel so as to satisfy itself of the veracity of the information provided.
- 74 It is also true that, as the applicants note, the requests for exemption for the other vessels include to some degree information from which it could be inferred that they could likewise be used for carrying goods. In reply to the Court's questions, the defendant itself admitted that at first it doubted the truth of the assertions of the parties concerned and that those doubts were removed only thanks to the information received. The documents also show that the Commission granted exemptions for some of the vessels in question even though the Group of Experts or the competent national authorities had questioned whether the vessels fulfilled all the prescribed conditions.
- 75 However, a careful comparison of the different requests for exemption relating to the other carrier dredgers with the applicants' request relating to the *Josanne* shows that although, as the Commission admits, the other requests might to some degree have raised doubts as to the eligibility of those vessels for exemption under Regulation No 718/1999, none of those requests included, as was the case as regards the *Josanne* (see paragraphs 36 to 38 and 50 to 53 above), a number of clear and express indications that, in addition to dredging, the vessels in question could and would also be used for carrying different goods.

- 76 In such a situation, the defendant cannot be criticised for having treated the request for exemption relating to the *Josanne* differently, in procedural terms, from the other vessels. Consequently, the plea that the principle of non-discrimination was not observed must be rejected as unfounded.
- 77 With regard to the merits of the plea of non-observance of the *audi alteram partem* rule, it should be borne in mind that, according to settled case-law, observance of the rights of defence in any procedure initiated against a person and liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the procedure in question. That principle requires that any person who may be adversely affected by a decision be placed in a position in which he may effectively make his views known, at least as regards the evidence on which the Commission has based its decision (see the judgment in Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97 to T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others v Commission* [2001] ECR II-1337, paragraphs 151 and 153, and the cases cited therein).
- 78 Contrary to what the defendant maintains, the present case cannot be compared with the one which gave rise to the judgment in *Windpark Groothusen v Commission*, cited in paragraph 68 above. First, that case involved an application for financial support lodged on the sole initiative of the interested party whereas the applicants in the present case are required to pay the special contribution under Regulation No 718/1999 and must request the Commission for exemption. Second, the contested decision in the abovementioned case was adopted in a situation where hundreds of applications had to be examined. That is not the case here, as the Commission confirmed at the hearing on 30 January 2003.
- 79 In the present case, the Commission's letter of 1 September 2000 acknowledged receipt of the request for exemption and drew the applicants' attention to the

exemption conditions laid down by Regulation No 718/1999. In particular, the Commission made it clear that, under Article 2(2)(g) of the regulation, the exemption of dredging equipment from the ambit of the regulation was subject to the condition that such equipment is not 'used for the carriage of goods within the meaning of Article 1 [of the regulation]' (emphasis added in the original). The Commission added that exemption could be contemplated only 'on condition that a carrier dredger is used exclusively for dredging and maintenance work and for the extraction of sand'. The Commission concluded that 'without prejudice to the outcome of the examination in progress, it is clear from the documents... received that [the] *Josanne* does not appear in principle to fulfil the abovementioned conditions'.

80 In this way the Commission indicated to the applicants in a sufficiently clear and precise manner that the information in the request for exemption and its annexes did not justify the conclusion that the *Josanne* was used exclusively for dredging work because it could also be used for carrying goods within the meaning of Article 1 of Regulation No 718/1999.

81 In so far as the applicants contend that the letter of 1 September 2000 did not contain an express request for additional information, it must be borne in mind that, while the principle of respect for rights of the defence imposes a number of procedural obligations on the national and Community authorities, it also implies a certain amount of diligence on the part of the party concerned. Accordingly, if the party concerned considers that its rights of defence have not been respected, or have not been adequately respected, in the administrative procedure, it is for that party to take the measures necessary to ensure that they are respected or, at the very least, to inform the competent administrative authority of that situation in good time (see Case T-205/99 *Hyper v Commission* [2002] ECR II-3141, paragraph 59).

- 82 It must therefore be concluded that the applicants, as well-informed economic operators, were enabled effectively to make known their viewpoint before the contested decision was adopted. Consequently, the plea of non-observance of the *audi alteram partem* rule must also be rejected.
- 83 As none of the pleas raised against the contested decision has succeeded, the application must be dismissed in its entirety.
- 84 Furthermore, with regard to the documents produced by the parties at the hearing on 18 September 2002 (see paragraph 18 above), the Court considers that they have no bearing on the outcome of the present case.

Costs

- 85 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 (Third Chamber)

hereby:

1. Dismisses the application;
2. Orders the applicants to bear their own costs and pay those of the Commission.

Lenaerts

Azizi

Jaeger

Delivered in open court in Luxembourg on 8 May 2003.

H. Jung

Registrar

K. Lenaerts

President