OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 13 March 1991 *

Mr President,
Members of the Court,

1. This Opinion is concerned with the action which the Commission has brought against Ireland in connection with the conditions to which the grant of a licence for sea fishing is subject in that Member State.

2. Section 2 of the Fisheries (Amendment) Act 1983 inserted Section 222B into the Fisheries (Consolidation) Act 1959, subsection (4)(a) of which provides as follows:

'The Minister shall not grant a licence for the purposes of this section unless the sea-fishing boat in relation to which the licence is granted is wholly owned by an Irish citizen or a body corporate established under and subject to the law of the State and having its principal place of business in the State.'

3. Under Section 222B(2) a sea-fishing boat registered (or subject to registration) in Ireland may not be used for sea fishing, whether within the exclusive fishery limits of Ireland or otherwise, save under and in accordance with such a licence.

4. The Commission considers that by requiring nationals of other Member States to set up an Irish company in order to obtain a licence to engage in sea fishing from an Irish boat, whereas an Irish citizen may obtain such a licence without setting up a company, Ireland has failed to fulfil its obligations under Article 52 of the EEC Treaty.

5. Initially, Ireland opposed what it considered to be an attempt by the Commission to broaden the basis of its claim before the Court in order to include criticism of the Irish legislation concerning registration of sea-fishing boats. However, the Commission gave its views in that connection in the application only in response to arguments set out by Ireland in its answer to the reasoned opinion. The Commission states in its reply that its application is concerned in fact only with the licence conditions.

6. Nevertheless, I consider that it is appropriate briefly to dwell on the question of the relationship between the conditions governing registration and the licence conditions at issue. The licence conditions are in fact identical to the conditions governing the registration of a fishing boat in the Irish fishing register. However, on the one hand, although the two parties have reached agreement on the exact scope of the

* Original language: French.

proceedings, Ireland seems to be seeking to take advantage of the fact that the two types of conditions are identical in this way when it states that the sole object of Section 222B(4)(a) of the 1959 Act is to ensure that a vessel must be Irish in terms of the laws on registration of vessels in Ireland in order to be licensed and concludes that

'it cannot be contrary to the Treaty for the Irish statutory licensing regime to be made applicable only to Irish sea-fishing boats' (see paragraphs 2.2. and 2.3. of the rejoinder).

On the other hand, the United Kingdom, which has intervened in support of Ireland's conclusions, argues that since the two sets of conditions are identical, the licence conditions are not, in the present case, a bar to the freedom of establishment.

7. I do not consider, however, that those arguments should debar the Court from considering the compatibility of the licence conditions with Article 52 of the Treaty and, if necessary, from declaring that they are incompatible with that provision. Ireland and the United Kingdom — in common with the Commission — agree that the conditions at issue apply only to boats registered in Ireland. According to Ireland, that is the effect of subsection (1) of Section 222B (see paragraph 2.1. of the rejoinder). According to that provision, Section 222B applies to 'a fishing boat which *is entered in the fishing boat register*' and to a ship 'which is required (...) to be so registered'. In addition, as the defendant itself pointed out in its reply to the reasoned opinion, Section 222B is to be read in conjunction with Section 8 of the 1983 Act, under which no *new registration* upon the Irish register of a sea-fishing boat can take place unless a licence has previously been issued by the Minister for Fisheries under Section 222B. Consequently, even if the registration and licence conditions are identical, it is nevertheless the latter on which the utilization of a fishing boat for sea fishing depends.

8. If I may now turn to the licence condition at issue, Ireland argues that it does not infringe Article 52 of the Treaty, first because it is applicable only to boats which are registered in Ireland (or subject to such registration) and, secondly, because there is nothing to prevent owners of boats registered in other Member States from establishing themselves in Ireland and operating their boats from Irish ports and in Irish waters.

9. That argument cannot be accepted. On the one hand, the matter at issue in this case is a difference in treatment between nationals of Member States and not between boats registered in the various Member States: it is not a question of the right of establishment of boats but of persons. As Ireland correctly observes:

'The Commission could hardly complain and indeed has not complained at the fact that the licence regime only applies to Irish vessels' (see paragraph 2.1. of the rejoinder).

Consequently no argument based on that consideration is relevant. On the other hand, the Commission accuses Ireland of infringing the right which the second paragraph of Article 52 expressly confers on nationals of other Member States to take up and pursue activities as self-employed persons

'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'.

Unlike Irish nationals, nationals of other Member States have to set up an Irish company having its principal place of business in Ireland before they can obtain a licence authorizing them to operate their fishing boats under the Irish flag. Therefore, even though the Irish legislation does not apply to boats registered in other Member States, it does apply to nationals of other Member States in so far as it prevents them from pursuing their activities in Ireland under the same conditions as those applying to Irish nationals. (It is, moreover, doubtful whether pursuit, by a national of a Member State other than Ireland, of the activity of sea fishing from Irish ports and in Irish waters using a vessel not registered in Ireland can be regarded as being covered by the right of establishment.)

10. Ireland further argues that the provision at issue is justified in the light of the Community system of fishing quotas in order to protect Irish quotas from 'quota hopping', which conflicts with the aims of the quota system.

11. It is sufficient to observe in that regard that considerations relating to the aims of the quota system cannot serve as justification for a general measure applicable to sea-fishing activities as a whole irrespective as to whether or not the fishing is for species of fish subject to quotas.

12. In the rejoinder, Ireland refers, *inter alia*, to the judgment of 14 December 1989 in Case C-216/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food*, ex parte *Jaderow Ltd* [1989] ECR 4509, in which the Court accepted that the objective pursued by the system of national quotas may in fact justify the stipulation of licence conditions designed to ensure that there is a real economic link between the vessel and the flag State. The Court made it clear, however, that the purpose of those conditions must be that the local populations dependent on fisheries and related industries should benefit from the quotas and that the link which the conditions are intended to ensure must concern only the relations between the vessel's fishing operations and those populations and industries (see paragraphs 25, 26 and 27 of the judgment in *Jaderow*). A condition requiring nationals of other Member States to set up an Irish company in order to obtain a fishing licence is not apt to guarantee that the Irish quotas accrue to the local populations dependent on fisheries and related industries and does not concern only the relations between the vessels' fishing operations and those populations and industries.

13. As for the argument put forward by Ireland to the effect that the condition at issue is justified under Article 56(1) of the Treaty, it is pointed out that the Court has held that

'As an exception to a fundamental principle of the Treaty, Article 56 of the Treaty must be interpreted in such a way that its effects are limited to that which is necessary in order to protect the interests which it seeks to safeguard'. [1]

14. Even if the proper application of the Community system of fishing quotas, which is what Ireland is seeking to secure, were capable of falling within the concept of public policy for the purposes of Article 56(1), it must be held that it follows from what has been stated above that the condition at issue is disproportionate to that objective.

15. Lastly, Ireland argues that it would adversely affect the Community's structural policy for the fishing industry if fishing boats from one Member State could freely transfer to the fishing fleet of another Member State. In this connection, I agree with the Commission's view that whilst the Member States may indeed limit or even reduce the capacity of their fishing fleets, they must, in doing so, apply criteria involving no discrimination on the grounds of the nationality of the owners of the boats concerned,

16. For all those reasons, I propose that the Court should uphold the Commission's application and declare that, by requiring nationals of other Member States to set up an Irish company in order to obtain a licence to engage in sea fishing from an Irish boat, Ireland has failed to fulfil its obligations under Article 52 of the Treaty. As a result, Ireland should be ordered to pay the costs, with the exception of those incurred by the United Kingdom, which intervened in support of Ireland's conclusions and should be ordered to bear its own costs.

1 — Judgment of 26 April 1988 in Case 352/85 *Bond van Adverteerders* v *The Netherlands State* [1988] ECR 2085, paragraph 36.