REPORT FOR THE HEARING
in Case C-279/89 *

United Kingdom legislation and practice in the matter of fisheries

1. Under the terms of the Sea Fish (Conservation) Act 1967, as amended by the Fishery Limits Act 1976 and the Fisheries Act 1981, and of the Sea Fish Licensing Order 1983, fishing vessels registered in the United Kingdom must have a fishing licence.

2. That legislation was supplemented by the British Fishing Boats Act 1983 and by the British Fishing Boats Order 1983, under which a British fishing boat might not carry out certain operations unless at least 75% of the members of the crew were British citizens or nationals of another Member State. The excluded operations were fishing and trans-shipping fish within British fishery limits and landing fish in the United Kingdom. British vessels not complying with the abovementioned condition could continue to fish, even for species subject to British quotas, outside British fishery limits and land their catches outside the United Kingdom.

3. Since 1 January 1986 licences granted by the United Kingdom in regard to species covered by the United Kingdom quotas, have contained the following conditions with the aim of ensuring that fishing vessels have a 'real economic link' with the United Kingdom.

'(i) The vessel must operate from the United Kingdom, Isle of Man or Channel Islands; without prejudice to the generality of this requirement a vessel will be deemed to have been so operating if for each six month period in each calendar year (i. e. January to June or July to December) either

(a) 50% by weight of the vessel's landings or trans-shipments of stocks to which this or any other licence issued relates, have been landed and sold in the United Kingdom, Isle of Man or Channel Islands or trans-shipped by way of sale within British fishery limits; or

(b) other evidence is provided of the vessel's presence in a United Kingdom, Isle of Man or Channel

* Language of the case: English.

Islands' port on at least four occasions at intervals of at least 15 days.

(ii) At least 75% of the crew must be British citizens or EEC nationals (excluding ... until 1 January 1993 any Spanish or Portuguese nationals who are not the spouse or child under 21 of ... Spanish or Portuguese workers already installed in the United Kingdom in accordance with the transitional arrangements on the free movement of workers following the accession of ... Spain and Portugal to the European Communities as provided for in the relevant accession treaties) ordinarily resident in the United Kingdom, Isle of Man or Channel Islands: residence means residence on shore and for this purpose service aboard a British ship does not count as residence in the United Kingdom, Isle of Man or Channel Islands.

(iii) The skipper and all the crew must be making contributions to United Kingdom national insurance, or equivalent Isle of Man or Channel Islands schemes: this would include Class 1, Special Mariners' Class 2 or Class 4 self-employed contributions.'

4. The compatibility of those conditions with Community law was contested before the Queen's Bench Division of the High Court, which referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty certain questions on the interpretation of Community law. The Court replied to those questions in its judgments in Case C-3/87 (*The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Agegate Ltd* [1989] ECR 4459), and in Case C-216/87 (*The Queen* v *Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd* [1989] ECR 4509).

The pre-litigation procedure

5. Prior to judgment being given in those cases, the Commission, considering that the abovementioned conditions were contrary to Community law, by letter of 18 April 1988 requested the United Kingdom to submit to it its observations under the first paragraph of Article 169 of the EEC Treaty within a period of one month of receipt of that letter.

6. By a letter dated 1 July 1988, the United Kingdom requested the Commission to refer to its written observations submitted in Cases C-3/87 and C-216/87, and expressed the view that any Article 169 application would merely duplicate the observations already submitted to the Court in those cases and that therefore there would seem to be no necessity for the Commission to take further steps pursuant to Article 169 in the matter.

7. On 24 May 1989 the Commission issued a reasoned opinion in which it requested the United Kingdom to take the necessary measures to put an end to the infringements complained of within one month of notification of the opinion.

8. In its reply, by letter of 23 June 1989, the United Kingdom once more referred to its observations in Cases C-3/87 and C-216/87 and stated that it was unable to accede to the Commission's request, while reiterating its intention of considering its position in the light of the judgments of the Court in those cases.

9. Since the Commission was not satisfied by that reply, it brought these infringement proceedings.

Written procedure and form of order sought by the parties

10. The Commission's application was registered at the Court Registry on 11 September 1989.

11. By an order of 6 December 1989 the Kingdom of Spain was granted leave to intervene in support of the form of order sought by the Commission.

12. The written procedure followed a normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court opened the oral procedure without any preparatory inquiry. The Commission was requested to reply in writing to certain questions.

13. The *Commission*, the applicant, claims that the Court should:

— declare that, by imposing the fishing licence conditions referred to, the United Kingdom has infringed Articles 34, 48, 52 and 59 of the Treaty as well as Council Regulations Nos. 1612/68 and 1408/71 and Commission Regulation No 1251/70;

— order the United Kingdom to pay the costs.

14. The *Kingdom of Spain*, the intervener, claims that the Court should:

— uphold the application lodged by the Commission and declare the United Kingdom to be in breach of its obligations;

— order the United Kingdom to pay the costs, including those of the intervener.

15. The *United Kingdom*, the defendant, contends that the Court should:

— dismiss the action;

— order the Commission to pay the costs.

The judgments of the Court in Cases C-3/87 and C-216/87

16. On 14 December 1989, when the written procedure in the present case was following its course, the Court gave judgment in cases C-3/87 and C-216/87.

17. In its judgment in the *Jaderow* case (C-216/87), the Court held:

'Community law as it now stands:

1. Does not preclude a Member State, in authorizing one of its vessels to fish against national quotas, from laying down conditions designed to ensure that the vessel has a real economic link with that State if that link concerns only the relations between that vessel's fishing operations and the populations dependent on fisheries and related industries;

2. Does not preclude a Member State, in authorizing one of its vessels to fish against national quotas, from laying down the condition, in order to ensure that there is a real economic link as defined above, that the vessel is to operate from national ports, if that condition does not involve an obligation for the vessel to depart from a national port on all its fishing trips;

3. Does not preclude a Member State, in authorizing one of its vessels to fish against national quotas, from taking the position that the fact of the vessel's operation from national ports may be proved by the landing of a proportion of its catches or its periodic presence, in national ports;

4. Does not preclude a Member State from accepting, as evidence of compliance with the condition that the vessel must operate from national ports, only the landing of a specified proportion of the vessel's catches or a specified periodic presence of the vessel in national ports, provided that the frequency with which the vessel is required to be present in those ports does not impose, directly or indirectly, an obligation to land the vessel's catches in national ports or hinder normal fishing operations;

5. Does not preclude legislation or a practice of a Member State whereby a new condition not previously stipulated is laid down for the grant of licences to fish against national quotas.'

18. In its judgment in the *Agegate* case (C-3/87), the Court ruled:

'1. Community law does not preclude a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must be nationals of the Member States of the Community.

2. Community law precludes a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that 75% of the crew of the vessel in question must reside ashore in that Member State.

3. Save in those cases where Regulation (EEC) No 1408/71 of the Council otherwise provides, Community law does not preclude a Member State from requiring, as a condition for authorizing one of its vessels to fish against its quotas, that the skipper and all the crew of the vessel must be making contributions to the social security scheme of that Member State.

4. Articles 55 and 56 of the 1985 Act of Accession must be interpreted as meaning that their application to Spanish fishermen working on board British vessels is not excluded by the sole fact that the fishermen in question are paid on a "share" basis and as not precluding national legislation or a national practice whereby Spanish workers are excluded up to 1 January 1993 from 75% of the crew of those vessels, provided that such a restriction, introduced after the 1985 Act of Accession, does not in any circumstances make the position of Spanish workers more unfavourable and that the restriction does not concern Spanish nationals already employed at the time of accession as workers on British territory or on board a British vessel where the employment relationship displays a sufficiently close link with that territory.

5. ...'

Pleas in law and arguments of the parties

19. The *Commission* explains, as a preliminary matter, that it will submit in support of its application only a summary of its principal arguments, whilst referring for the rest, as it did during the pre-litigation procedure, to its written and oral observations in Cases C-3/87 and C-216/87. It points out that the United Kingdom adopted the same approach in its letters of 1 July 1988 and 23 June 1989.

20. The *condition relating to the operation* of the fishing vessel (paragraph 3(i) above) is incompatible with Article 34 of the EEC Treaty. The Commission maintains that by complying either with criterion (a) or with criterion (b) a ship-owner may incur substantial financial loss, not least because he may be prevented from benefiting from the higher prices which may be available in other Member States.

21. Criteria (a) and (b) pursue a purely economic aim, namely the promotion of industry and employment in the United Kingdom; according to the Court's case-law, that objective cannot justify measures falling under Articles 30 or 34 of the Treaty.

22. Finally, the operating condition is contrary to the principle of the free movement of goods on which the common organization of the market in fishery products, laid down by Council Regulation (EEC) No 3796/81 (OJ 1981 L 379, p. 1), is founded.

23. The *crewing condition* in respect of the fishing vessel (conditions as to nationality, residence and social security, paragraph

(3)(ii) and (iii) above) infringes a number of provisions of Community law.

24. Where members of the crew of a vessel are employed persons, the *nationality requirement* is contrary to Article 48 of the Treaty, since it discriminates against workers from Spain and Portugal. Such discrimination is not justified by Articles 56(1) and Article 216(1) of the 1985 Act of Accession, since those provisions in no way entitle the Member States to apply fresh restrictions to Spanish or Portuguese workers. That finding is supported by both the principle established by the Court in its judgment in Case 77/82 *Peskeloglou* v *Bundesanstalt für Arbeit* [1983] ECR 1083 and Articles 55 and 215 of the 1985 Act of Accession and the Joint Declaration annexed thereto 'relating to workers from the present Member States established in Spain or Portugal and to Spanish or Portuguese workers established in the Community and members of their families' (OJ 1985 L 302, p. 480).

25. The nationality requirement constitutes a new restriction because it was introduced with effect from 1 January 1986, that is to say after the Act of Accession of 1985. Furthermore, it is different both in purpose and geographical scope from the similar condition imposed in 1983. Whereas the latter related to all fishing activities by British vessels in certain waters, namely within British fishery limits, the present condition concerns access to British quotas in all waters. The observation to the contrary made by Advocate General Mischo in the *Agegate* case (paragraphs 26 to 28) is merely an *obiter dictum* because the questions submitted for a preliminary ruling in that case did not concern that specific question.

26. Moreover, since no exemption from the 75% rule is provided for in the case of Spanish or Portuguese relatives of nationals of other Member States who work in the United Kingdom in an employed or self-employed capacity, the nationality requirement fails, the Commission says, to take full account of the requirements of Article 11 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community.

27. The same applies to relatives of other Member States' nationals who fall under Commission Regulation (EEC) No 1251/70 of 29 June 1970 on the rights of workers to remain in the territory of a Member State after having been employed in that State.

28. Where fishermen are self-employed, the nationality requirement is contrary to Articles 52 or 59 of the Treaty, as the case may be.

29. Referring to its observations in the *Agegate* case, the Commission considers that the *residence requirement* contravenes Article 48 (as regards employed fishermen) or Articles 52 and 59 of the Treaty (with regard to self-employed fishermen).

30. Finally, the *social security condition* disregards Articles 14b(1) and (2) and Article

14c of Council Regulation No 1408/71, as amended by Council Regulation No 2001/83.

31. The conditions in issue cannot find justification in the common fisheries policy and more particularly in the quota system, as the United Kingdom maintains.

32. In that connection the Commission points out that no basis can be found in the Treaty for any suggestion that the common fisheries policy, which like the common agricultural policy is based on Article 43 of the Treaty, is a special case.

33. The quota system established by secondary Community law (Council Regulation (EEC) No 170/83 of 25 January 1983 OJ 1983 L 24 p. 1) cannot by itself authorize derogations from the Treaty. That much is clear from the judgments in Joined Cases 80 and 81/77 *Ramel* v *Receveur des Douanes* [1978] ECR 927, and in Case 218/82 *Commission* v *Council* [1983] ECR 4063.

34. Moreover, Article 5(2) of Regulation No 170/83, which requires the Member States to determine the detailed rules for the utilization of the quotas allocated to them, provides that they must do so 'in accordance with the applicable Community provisions'. In the exercise of that competence, the Member States must in particular abide by the provisions of Articles 34, 48, 52 and 59 of the Treaty, the principles of equality and non-discrimination among producers (Articles 40(3) of the Treaty) as well as the principles of proportionality and legitimate expectations. The Court confirmed this requirement in its judgments in Joined Cases 201 and 202/85 *Klensch* [1986] ECR 3477, and in Case 207/86 *Apesco* v *Commission* [1988] ECR 2151.

35. The system of quota allocation was upheld as being compatible with Article 7 of the Treaty in the judgment in Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2671. However, that judgment provides no support whatsoever for the view that Member States may take restrictive measures which are incompatible with the Treaty, in order to reserve the economic benefit of their quotas for their fishing industry and related economic sectors.

36. On the other hand, Member States are free to limit or even reduce the fishing capacity of their fleet, provided that the measures adopted in that connection are not discriminatory.

37. Aware of serious problems frequently referred to by the term 'quota hopping', the Commission submitted to the Council certain proposals which resulted in the adoption on 7 November 1988 of Regulation (EEC) No 3483/88 (OJ 1988 L 306 p. 2). That regulation reinforces the control of landings outside the flag state. Moreover, concerned by the economic and social problems which

may occur in certain cases in the operation of the quota system, the Commission in its communication of 19 July 1989 on a Community framework for access to fishing quotas (OJ 1989 C 224, p. 3) indicated a number of measures which Member States could take in order to tackle those problems without infringing Community law.

38. In its *defence*, lodged on 25 May 1990, that is to say after judgment was given in the abovementioned *Agegate* and *Jaderow* cases, the *United Kingdom* submits that unlike the judgment in the *Jaderow* case which does not require any modification to the operating condition, the *Agegate* judgment made it clear that certain modifications needed to be made to the crewing condition. Pending judgment in the main proceedings, the British authorities have issued a press release in which they announced: (i) that they were no longer enforcing the residence requirement; (ii) that they were no longer enforcing the social security condition against crew members falling within one of the exceptions to Article 13(2)(c) of Regulation No 1408/71, notably Article 14b of that regulation; (iii) that they would no longer exclude from 75% of the crew spouses or children under 21 of nationals of other Member States who work in the United Kingdom in an employed or self-employed capacity (in accordance with Article 11 of Regulation No 1612/68).

39. In particular the United Kingdom considers that the judgment of the Court in the *Jaderow* case (at paragraphs 26, 28, 31, 32, 40 and 41) upheld the compatibility of the operating condition with Community law and that in these proceedings the Commission has presented no evidence of incompatibility.

40. As regards the compatibility with Community law of the *nationality requirement for Spanish and Portuguese crew members* of a fishing vessel, the United Kingdom considers, with reference to paragraph 41 of the *Agegate* judgment (paragraph 4 of the operative part), that it is necessary to resolve the following two problems: (a) what are the criteria for determining whether an employment relationship disclosed a sufficiently close link with the United Kingdom prior to 1 January 1986 and (b) whether the United Kingdom can continue to enforce that condition until 1 January 1993 with regard to Spanish and Portuguese nationals whose employment relationship did not disclose such a sufficiently close link prior to 1 January 1986. The resolution of the latter problem necessitates in its turn a reply to the following questions concerning: (i) the date on which the condition in issue was introduced; (ii) the meaning of the words 'after the 1985 Act of Accession'; and (iii) whether the condition in issue made the position of Spanish and Portuguese nationals more unfavourable.

41. With regard to the first problem, the United Kingdom is of the opinion that the relevant criteria are those referred to by the Court in Case 9/88 *Lopes da Veiga* [1989] ECR 2989, namely: (a) the place of registration of the vessel; (b) whether the employer is a company established in the United Kingdom under local law; (c) whether the employee was taken on in the United Kingdom and whether the employment relationship was subject to the law of a part of the

United Kingdom and (d) whether the employee is subject to the tax and social security regime of the United Kingdom.

42. Irrespective of the date of issue of the new licences, it is indisputable that the condition in issue was introduced on 1 January 1986, the date on which the 1985 Act of Accession entered into force.

43. The phrase 'after the 1985 Act of Accession' in paragraph 41 of the *Agegate* judgment (paragraph 4 of the operative part) refers to the period subsequent to the entry into force of that Act and not to the period following its signature (on 12 June 1985). That interpretation is corroborated by the judgment in *Peskeloglou*, cited above; the restrictions in issue in that case were introduced after the date of the entry into force of the Act of Accession of the Hellenic Republic (1 January 1981).

44. A measure such as the condition in issue which takes effect simultaneously with the entry into force of the Act of Accession cannot be considered to have been introduced after the entry into force of that Act. That submission accords with the purpose behind standstill provisions such as those found in Article 56 of the 1985 Act of Accession. Their purpose is to ensure that a Member State does not take a step backwards so as to deprive persons of rights that they enjoyed during the period of operation of the standstill provision.

45. Consequently, the nationality requirement was not introduced after the entry into force of the 1985 Act of Accession.

46. In the alternative the United Kingdom submits that that requirement did not place Spanish and Portuguese workers in a more unfavourable position.

47. In that connection it acknowledges that the geographical ambit of the condition in issue is wider than that of the analogous condition adopted in the British Fishing Boats Act 1983 and the British Fishing Boats Order 1983. It points out that the crew members of vessels operated by the applicants in the main proceedings in the *Agegate* and *Jaderow* cases which as a result of the British measures adopted in 1983 were operating outside British fishery limits within Irish waters were subject to a similar condition contained in Irish legislation of 1983 (Fisheries (Amendment) Act 1983 and Seafishing Boats Regulations 1983). Accordingly Spanish and Portuguese nationals have since 1983 been excluded from 75% of those crews in both British and Irish waters.

48. The United Kingdom goes on to argue that only Spanish and Portuguese workers who were already residing on the territory of the Community of Ten prior to accession are entitled to benefit from the standstill provisions in Articles 56 and 216 of the 1985 Act of Accession. That proposition is supported by the judgment in *Peskeloglou*, cited above, (paragraph 12), in which the Court stated that the equivalent transitional provision in the Act of Accession of the Hellenic Republic was 'intended to prevent disturbances of the labour market both in Greece and in the other Member States as a result of immediate and substantial movements of workers following accession'. Yet there is no evidence that any of the Spanish crew employed aboard the vessels operated by the applicants

in the main proceedings in the *Agegate* and *Jaderow* cases resided in the United Kingdom prior to 1 January 1986.

49. It follows from the foregoing that the nationality requirement for Spanish and Portuguese workers is compatible with Community law.

50. As regards the *social security condition*, the United Kingdom recalls that on the introduction of the licence conditions the interested organizations were informed that that condition was not intended to change the existing law. Moreover, the press release published after delivery of judgment in the *Agegate* and *Jaderow* cases removed any doubt on that point. Consequently, the condition in issue is compatible with Community law.

51. In its *reply*, the *Commission* abandons its allegation as to the compatibility of the social security condition with Regulation No 1408/71. It also points out that, following the *Agegate* judgment, the compatibility with Community law of the crewing condition 'can be decided on the sole basis of Article 48 of the EEC Treaty' and 'need not be appreciated with respect to Articles 52 and 59 of that Treaty, which the Commission has advanced as an alternative basis for its application.' In the conclusion to its reply the Commissions states that it maintains 'in full its arguments and requests set out in the application, save in respect of Regulation No 1408/71.'

52. The Commission goes on to state that the *Jaderow* judgment did not invalidate its argument that the operating condition is contrary to Article 34 of the Treaty. In that judgment the Court merely defined the limits within which a Member State may apply an operating condition of the type used by the United Kingdom. However, the Court did not examine the question whether the principles laid down in that judgment were observed by the specific criteria imposed by the United Kingdom.

53. In that respect the Commission contends that the operating condition is incompatible with Article 34 of the Treaty since it contains no exemption or derogation for fishing vessels whose normal operations are likely to be hindered.

54. That is true of vessels whose fishing trips normally last for less than 15 days and which must therefore alter their fishing programmes in order to comply with the requisite frequency of calls to a British port. In that connection the Commission relies on the affidavit sworn by Mr Trigas, which was submitted in the *Jaderow* case. That is also true of vessels which in the course of their normal fishing activities make less than four calls during each six-month period in British ports (in particular because their activities are carried out in distant areas). Finally, even operators who traditionally sell, through direct landing or trans-shipment, most of their catches in the United Kingdom are affected by the criterion relating to periodic presence, for they are prevented from abandoning their traditional patterns in order to

avail themselves of better opportunities for sales which might exist in markets outside the United Kingdom.

55. It might prove difficult, or even practically impossible, to modify the *contested* operating condition *complained of* in such a way as to eliminate any interference with the normal fishing operations of each vessel.

56. Thus the Commission recalls that in its communication of 19 July 1989 on a Community framework for access to fishing quotas, mentioned above, it indicated that Member States could legitimately require a shore-based representation of undertakings which operate vessels fishing against national quotas (paragraph 3.1 of the communication). Such representation would tend to ensure that the fishing vessels concerned operate from a national port and thereby maintain with the Member State whose flag they are flying the real economic link which the Court envisaged in its *Jaderow* judgment.

57. The Commission considers that the United Kingdom has not dealt in the proper order with the questions relating to the *nationality requirement for Spanish and Portuguese workers*, which leads to erroneous conclusions. Logically, the first question to be answered is whether the restriction in question is a new one, that is to say a restriction not covered by the derogation provided for in the second subparagraphs of Articles 56(1) and 216(1) of the Act of Accession.

58. In that connection, the Commission welcomes the fact that the United Kingdom has expressly accepted that the geographical ambit of that condition is wider than that of the 1983 legislation. It adds that the present condition is also of a different nature because the 1983 measures did not prevent the employment of Spanish and Portuguese workers, provided the vessels carried on their operations outside British fishing limits.

59. The Irish legislation of 1983 cannot avail the United Kingdom because the 1985 Act of Accession permits it to maintain in force only pre-existing national provisions.

60. The United Kingdom's argument that the restriction in question is not prohibited by the standstill provision contained in Articles 56 and 216 of the 1985 Act of Accession, because it entered into force at the same time as the Act of Accession, is erroneous.

61. First, were that view to be accepted, all the standstill provisions in the various treaties could have been set at nought by the Member States adopting further restrictions at the very moment when each Treaty entered into force. Yet that contradicts the very nature of a standstill provision, which is to maintain the *status quo ante*.

62. The Commission states that in the present case only the national provisions which were in force immediately prior to accession, that is to say on 31 December

1985, could be continued in force. It also points out that the joint declaration annexed to the 1985 Act of Accession seems to imply that the standstill obligation took effect from the date of signature of the Act of Accession, on 12 June 1985.

63. Secondly, the United Kingdom's view runs counter to the case-law of the Court. In that connection the Commission relies on the judgment in the *Peskeloglou* case mentioned above.

64. As regards the phrase 'restriction, introduced after the 1985 Act of Accession' in paragraph 41 of the *Agegate* judgment, the Commission points out that the United Kingdom did not then advance the argument which it is now putting forward; consequently the abovementioned phrase cannot constitute authority for that contention.

65. New restrictions are illegal *per se*, because they are contrary to Article 48 of the Treaty. The transitional provisions of Articles 56(1) and 216(1) only suspend certain provisions of Regulation No 1612/68, but not the rights guaranteed by Article 48 of the Treaty (judgments in Case 305/87 *Commission* v *Hellenic Republic* [1989] ECR 1461 and *Lopes da Veiga*, cited above).

66. Consequently, the United Kingdom's argument that, even if the nationality requirement contains a new restriction, only Spanish or Portuguese workers residing in the United Kingdom prior to 1 January 1986 are entitled to protection, is without foundation. Although Mrs Peskeloglou resided in Germany before the accession of Greece, the Court did not refer to this fact in support of the interpretation arrived at in paragraphs 13 and 15 of its judgment, cited above. Moreover, the judgments in *Lopes da Veiga* and *Agegate* only considered the extent to which pre-existing restrictions, which Member States may maintain in force under Articles 56(1) and 216(1), can affect the freedom of movement of Spanish and Portuguese workers who were already employed in the territory of one of the old Member States (paragraphs 9 to 11 of the *Lopes da Veiga* judgment and 41 of the *Agegate* judgment).

67. It follows that the general and unconditional exclusion of all Spanish and Portuguese workers from the 75% requirement is incompatible with Article 48 of the EEC Treaty and the relevant provisions of Regulations No 1612/68 and 1251/70 and that, as a new measure, it is not covered by the exception provided for in the second subparagraph of Article 56(1) and in the second subparagraph of Article 216(1) of the 1985 Act of Accession.

68. As an alternative submission, the Commission argues that this exclusion could not refer to Spanish and Portuguese workers already employed prior to 1 January 1986 in the territory of the United Kingdom, including those employed on board a British vessel whose employment relationship displays a sufficiently close link with that territory. In support of that view it relies on the judgments cited above in *Peskeloglou* (paragraph 12), *Lopes da Veiga* (paragraphs 10 and 11), and *Agegate* (paragraph 40).

69. Finally, the matters mentioned in paragraph 17 of the *Lopes da Veiga* judgment are factors appearing from the documents before the Court which had to be taken into consideration by the national court in deciding whether the employment relationship displayed a sufficiently close link with Netherlands territory; therefore, they cannot, and in any event they cannot all, be used as criterion for determining whether an employment relationship displayed a sufficiently close link with the United Kingdom prior to 1 January 1986, as the United Kingdom authorities propose. Moreover, the Court did not refer to any of those circumstances in paragraph 1 of its ruling in *Lopez da Veiga* or in the *Agegate* judgment.

70. With regard to the *residence requirement* the Commission puts forward the same arguments as those advanced with regard to the nationality requirement.

71. In its *rejoinder*, the *United Kingdom* observes that new licensing conditions were introduced from 1 January 1991. These depart from the conditions in issue on the following points: (a) the operating condition has been slightly amended to enable it to be more easily observed (the restrictions relating to the trans-shipment of fish have been abolished; the number of visits required has been maintained but those visits must henceforth take place at intervals of at least 10 days and on each occasion for a minimum period of eight hours); (b) the nationality requirement has been amended so that Spanish and Portuguese nationals are no longer excluded from 75% of the crew; (c) the residence requirement has been abolished and (d) the social security condition has likewise been discontinued. As a result of the introduction of the new conditions the applicants in *Agegate* and *Jaderow* are taking steps to discontinue the high court proceedings.

72. The United Kingdom raises an objection of inadmissibility in regard to certain matters in the reply referring to the *operating condition*. It maintains that the Commission has sought to extend the scope of the proceedings by alleging for the first time during the course of these proceedings that the operating condition hinders normal fishing operations. In acting in that way the Commission has infringed Article 169 of the Treaty and Article 42 of the Rules of Procedure.

73. The infringement of Article 169 of the Treaty is said to stem from the fact that the pre-litigation procedure related solely to the question whether the operating condition was *per se* contrary to Article 34 of the Treaty and to the common organization of the market in fisheries. The claim made by the Commission in its reply is different because it raises new legal issues which can be understood and addressed only in the context of the *Jaderow* judgment. The United Kingdom has had no opportunity to comment on these issues in the legal context in which they now arise, namely the principles laid down by the Court in *Jaderow*.

74. Furthermore, since a fresh issue is being raised which alters the subject-matter of the dispute, there is an infringement of Article 42(2) of the Rules of Procedure.

75. The United Kingdom also claims an infringement of Article 42(1) of the Rules of Procedure because the Commission in its reply referred to further evidence, namely the affidavit of Mr Trigas sworn in the context of the *Jaderow* proceedings, without giving any reason for the delay in producing it.

76. In the alternative, the United Kingdom maintains that the operating condition does not hinder normal fishing operations. In that connection it states that the question whether the patterns of landings or fishing operations are distorted must be examined from the point of view of a vessel which is operating habitually out of a national port. Such a vessel will necessarily return to port from time to time for crew changes, fresh supplies of ice, water, provisioning, repairs and so on. To require a vessel to return to the port from which it habitually operates on only four occasions during a 26-week period is an absolutely minimal requirement if any sensible meaning is to be given to the concept of a real economic link between the vessel and the local population.

77. By way of example, a vessel making trips of 10 days UK port/UK port with two days in port between each trip would complete 15 visits in that period, a vessel making trips of 12 days with three days in port between each trip would complete 11 visits, and so on.

78. In support of its argument, the United Kingdom quotes several passages from the affidavit evidence produced in the *Agegate* and *Jaderow* proceedings.

79. The alternative put forward by the Commission, namely the requirement of a shore-based representation in the United Kingdom of undertakings which operate vessels fishing against British quotas would in no way ensure that those vessels would habitually operate from a national port or establish a real economic link with the local population.

80. The *Spanish Government* contends, with regard to the requirement for landing catches, that the origin of the fish is determined according to the flag or the registration of the vessel taking the fish from the sea (Article 4(2)(f) of Regulation (EEC) No 802/68 of the Council of 27 January 1968 on the common definition of the concept of the origin of goods). Consequently, the catches of British vessels constitute goods of British origin and their landing and direct sale in another Member State without passing through British territory constitutes an export. The requirement in question is contrary to Article 34 of the Treaty since it makes exportation more difficult, more time-consuming and more costly.

81. That statement is not undermined by the *Jaderow* judgment (paragraph 4 of the operative part) because the landing requirement impedes the normal exercise of fishing.

82. The *nationality requirement for Spanish and Portuguese workers* runs counter to Article 48 of the Treaty.

83. Discrimination against such workers is not justified by Articles 55 to 59 and 215 to 219 of the 1985 Act of Accession. Those provisions in no way authorize the introduction of new restrictions in respect of Spanish and Portuguese workers, since the purpose of such provisions is to ensure that the accession of a new Member State does not have traumatic effects on a particular sector, both for the new Member State and for the other Member States of the Community.

84. Moreover, the requirement in issue conflicts with the joint declaration annexed to the 1985 Act of Accession which prohibits any Member State from applying to Spanish and Portuguese nationals already working within its territory any measure adversely affecting their situation which that Member State might adopt after signature of the Act of Accession with regard to the residence and employment of foreign workers.

85. The incompatibility of the nationality requirement for Spanish workers with the Community legal order is clear from the *Agegate* judgment. It is henceforth clear that that requirement may not be imposed on Spanish workers who were already members of crews of British vessels before its adoption.

86. It is also clear from the *Agegate* judgment that a *residence requirement* such as the one in issue conflicts with Community law (paragraphs 22 to 26 of the judgment and paragraph 2 of the operative part).

87. Finally, the Spanish Government contends, with reference to the provisions of Regulation No 170/83, that the quota system seeks to ensure the conservation of fishery resources and not to confer economic advantages on the nationals of a specific Member State. Consequently, the Member States are not permitted to adopt restrictive measures incompatible with the Treaty, in order to reserve the economic advantages deriving from their quotas for their national economy and in particular for their fishing industry and the related economic sectors.

The Commission's replies to the questions asked by the Court

First Question

'In paragraphs 1.1 to 1.5 of its rejoinder, the United Kingdom sets out the new conditions for the granting of a fishing licence in force from 1 January 1991, states that as a result of the introduction of those new conditions the applicants in *Agegate* and *Jaderow* are taking steps to discontinue the High Court proceedings and considers that in those circumstances, and given the judgments of the Court of Justice of 14 December 1989 in Case C-3/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food Ex Parte Agegate* [1989] ECR 4459 and Case C-216/87 *The Queen* v *Ministry of Agriculture, Fisheries and Food Ex Parte Jaderow* [1989] ECR 4509, the Court may consider that the Commission's application in the present case is without purpose. The Commission is requested to inform the Court by 20 February 1992 of its view concerning those paragraphs in the Rejoinder.'

Reply

88. The Commission is of the opinion that of the new licensing conditions the new condition relating to the nationality of the crew takes full account of the *Agegate* judgment.

89. However, the operating condition is still in effect the same as that which the Court examined in the *Jaderow* case. The Commission states in that connection that although the reduction of the minimum interval from 15 to 10 days makes that condition more flexible, the effect of other modifications is less clear. Moreover, there is no possibility of exemption for owners of fishing vessels unable to comply with the new operating condition, notwithstanding the statement to the contrary in the Ministry's press communiqué.

90. At all events, the amendments made would seem to indicate that the United Kingdom authorities realised the illegality of the 1986 operating condition and the need to amend it in order to persuade the applicants in the *Jaderow* case to discontinue proceedings before the High Court.

91. The Commission maintains its conclusion that the 1986 operating condition is incompatible with Community law, as interpreted in the *Jaderow* judgment. It feels justified in asking the Court to rule on the incompatibility with Community law of the 1986 operating condition and not of the 1991 condition, in particular because since the licensing conditions are not defined in general regulations, but established from time to time by the licensing authorities in the exercise of their discretionary power, they may be modified again, at any time, and without the Commission being informed.

92. The Commission goes on to explain that neither the judgment in *Jaderow* nor the withdrawal by the applicants from the main proceedings in the same case are of such a nature as to deprive the present case of its purpose. In that connection it submits the following arguments.

93. In *Jaderow* the Court did not examine the question whether the principles established by it were respected by the specific criteria set out in the contested United Kingdom licensing conditions and more particularly by the criterion relating to the periodic presence of the vessel in a United Kingdom port.

94. Regard being had to the fact that the criterion in question does not make any distinction between different categories of vessels and fishing activities and provides for no exemption, there are a number of situations in which the imposed frequency of visits unavoidably hinders the normal fishing operation of the vessels concerned.

95. Moreover, it would seem that the United Kingdom authorities regard as 'normal fishing operations' within the meaning of the *Jaderow* judgment, not those envisaged by each individual vessel owner for the duration of the new licensing period, but the operating patterns followed during the previous periods by the majority of 'genuine' United Kingdom vessels (i. e. the 'Anglo-Spanish'

vessels excluded) which are operating from the same port and fishing for the same 'species'. However, such an approach would tend to perpetuate traditional patterns of fishing, landing, selling and related operations and prevent individual vessel owners from adjusting their operating patterns to the ever-changing conditions in the fisheries sector.

96. Finally, the withdrawal by the applicants from the main proceedings in the *Jaderow* case cannot deprive this action of its purpose, since it concerns the application of the 1986 operating condition to all British vessels, and not only to the vessels involved in the *Jaderow* case.

Second Question

'(a) In paragraphs 2.1.1 to 2.1.15 and 2.1.18 to 2.1.22 of the Rejoinder, the United Kingdom raises an objection of inadmissibility based on an alleged infringement of Article 169 of the Treaty and Article 42(2) of the Rules of Procedure of the Court of Justice. That objection concerns the plea in law submitted in paragraphs 4 to 8 inclusive of the Reply, to the effect that the operating conditions for fishing vessels are incompatible with Article 34 of the EEC Treaty because they contain "no exemption or derogation for fishing vessels whose normal operations are likely to be hindered during the period of validity of the licence" (paragraph 7 of the reply).

(b) In paragraph 2.1.17 of the Rejoinder, the United Kingdom raises the further objection of inadmissibility based on an alleged infringement of Article 42(1) of the Rules of Procedure of the Court. That objection concerns the delay by the Commission in producing evidence, namely the affidavit of Mr Trigas, sworn in the *Jaderow* proceedings, without giving any reason for the delay in offering it (see paragraph 4.4 of the reply).

The Commission is requested to inform the Court by 20 February 1992 of its views concerning those two objections of inadmissibility.'

Reply to the question at (a)

97. The Commission states that its reply is not outside the scope of the proceedings as defined by the preliminary administrative procedure under Article 169 of the Treaty. The object of the present proceedings is to obtain a ruling to the effect that the licensing conditions introduced in 1986 by the United Kingdom are contrary to 'Articles 34, 48, 52 and 59 of the EEC Treaty as well as to Council Regulations 1612/68 and 1408/71 and Commission Regulation 1251/70'.

98. After the *Jaderow* judgment, the Commission still maintains its conclusion that the operating condition infringes Article 34 of the Treaty. In its reply it has merely formulated new arguments for this incompatibility.

99. The Commission is entitled to advance this new argument since the *Jaderow* judgment, delivered after the Commission's application, contained an interpretation of the relevant Community law, and thus supplied new matter of law within the meaning of Article 42(2) of the Rules of Procedure.

Reply to the question at (b)

100. The Commission points out that although in its reply it invoked the affidavit of Mr Trigas the reason for that was the interpretation of the relevant provisions of Community law which the Court gave in its *Jaderow* judgment. It also explains that that evidence was hardly 'new', because it was at all times available, not only to the Commission, but also to the United Kingdom which submitted observations in the *Jaderow* case. Therefore, in adducing this item of evidence, the Commission did not infringe Article 42(1) of the Rules of Procedure.

C. N. Kakouris
Judge-Rapporteur