OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 21 March 2002 [1]

I — Introduction

1. Like Case C-454/99, which relates to the years 1985 to 1988 and 1990, [2] this action for failure to fulfil Treaty obligations concerns the conduct of the United Kingdom authorities in connection with the management of fishing quotas in the years 1991 to 1996. The Commission is essentially alleging that the United Kingdom authorities failed effectively and in good time to ban fishing activities when particular quotas were near exhaustion, with the result that the catch quotas set by the Commission were exceeded in those years.

2. The United Kingdom is essentially contending that the Commission has failed to discharge its duty to adduce evidence of the Treaty infringements which it alleges, but does not contest as a whole the cases of overfishing raised by the Commission in the relevant management years. Like Case C-454/99, the present case therefore chiefly concerns the question of the allocation of the burden of proof.

3. The Court has already given a ruling on that issue in its judgment in Case C-333/99. [3] The main question to be considered here, therefore, is whether, in the light of the particular circumstances of this case, the Commission has met the requirements laid down in that case as to the burden of proof.

II — Legislation

4. The Community rules on the conservation and management of fishery resources are contained in a number of different regulations. They are intended to ensure the protection of fishing grounds,

1 — Original language: German.

2 — See my Opinion of 5 March 2002.

3 — *Commission* v *France* [2001] ECR I-1025. See also my Opinion of 11 October 2001 in Joined Cases C-418/00 and C-419/00 *Commission* v *France* [2002] ECR 3969, pending, and of 5 March 2002 in Case C-454/99 (cited in footnote 2).

the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions. [4]

5. Both Regulation No 170/83 and Regulation No 3760/92 provide for the formulation of the conservation measures necessary to achieve the above aims. Those measures may in particular include limits on catches. [5]

6. Article 3 of Regulation No 170/83 provides that where, in the case of a given species, it becomes necessary to limit the catch, the total allowable catch for each stock or group of stocks, the shares available to the Community and, where applicable, the total catch allocated to third countries, as well as the specific conditions for taking these catches, are to be fixed each year. Regulation No 3760/92 contains analogous conditions.

7. Article 5(2) of Regulation No 170/83 provides, *inter alia*:

'Member States shall determine, in accordance with the applicable Community provisions, the detailed rules for the utilisation of the quotas allocated to them....'

8. Article 9(2) of Regulation No 3760/92 formulates that obligation as follows:

'Member States shall inform the Commission each year of the criteria they have adopted for distribution and of the detailed rules for the use of the fishing availabilities allocated to them, in accordance with Community law and the common fisheries policy.'

9. Title I of Council Regulation (EEC) No 2241/87 [6] is headed 'Inspection and control of fishing vessels and their activities'. Article 1(1) therein sets out the

4 — See Article 1 of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1). See also Article 2 of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1), which replaced Regulation No 170/83 as from 1 January 1993.

5 — Articles 2(2), 3 and 11 of Regulation No 170/83; Article 4(2) and Article 8 of Regulation No 3760/92.

6 — ... of 23 July 1987 establishing certain control measures for fishing activities (OJ 1987 L 207, p. 1).

obligations under Article 5(2) of Regulation No 170/83 as follows:

'... each Member State shall, within its territory and within maritime waters subject to its sovereignty or jurisdiction, monitor fishing activity and related activities. It shall inspect fishing vessels and all activities whose inspection would entail verification of the implementation of this regulation, including the activities of landing, selling and storing fish and recording landings and sales.'

10. Article 2(1) of Regulation No 2241/87 provides, *inter alia*, as follows:

'The inspection and monitoring referred to in Article 1 shall be carried out by each Member State on its own account and by an inspectorate appointed by it.

In carrying out the task thus conferred on them, Member States shall ensure that the provisions and measures referred to in Article 1 are complied with. Moreover, their activities shall be carried out in such a way as to avoid undue interference with normal fishing activities....'

11. On 1 January 1994 Regulation No 2241/87 was replaced by Regulation No 2847/93.[7] Title I thereof is headed 'Inspection and monitoring of fishing vessels and their activities'. Article 2(1) essentially reproduces the rule in Article 1(1) of Regulation No 2241/87. Article 2(4) further provides as follows:

'In order to ensure that inspection is as effective and economical as possible, Member States shall coordinate their control activities. To that end, they may set up joint inspection programmes to allow the inspection of Community fishing vessels in the waters referred to in paragraphs 1 and 3. They shall take measures to permit their competition authorities and the Commission to be regularly informed on a reciprocal basis of the experience gained.'

12. The suspension of fishing is governed by Article 11 of Regulation No 2241/87 and Article 21 of Regulation No 2847/93. Article 11(1) and (2) of Regulation No 2241/87, which is in Title III, headed 'Prohibition of fishing activities', provides as follows:

'(1) All catches of a stock or group of stocks subject to quota made by fishing

7 — Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261, p. 1).

vessels under the flag of a Member State or registered in a Member State shall be charged against the quota applicable to that State for the stock or group of stocks in question, irrespective of the place of landing.

(2) Each Member State shall determine the date from which the catches of a stock or group of stocks subject to quota made by the fishing vessels flying its flag or registered in that Member State shall be deemed to have exhausted the quota applicable to it for that stock or group of stocks. As from that date, it shall provisionally prohibit [fishing] for that stock or group of stocks by such vessels as well as the retention on board, the transhipment and the landing of fish taken after that date and shall decide on a date up to which transhipments and landings or final notifications of catches are permitted. The Commission shall forthwith be notified of this measure and shall then inform the other Member States.'

13. Article 21(1) and (2) of Regulation No 2847/93, which is in Title IV ('Regulation and suspension of fishing activities'), is broadly similar to Article 11(1) and (2) of Regulation No 2241/87.

14. Finally, the obligations of the competent authorities in the Member States in regard to penal and administrative penalties are contained in Article 1(2) of Regulation No 2241/87 and its successor, Article 31 of Regulation No 2847/93.

15. Article 1(2) of Regulation No 2241/87 provides:

'If the competent authorities of a Member State observe, as a result of monitoring or inspection carried out by them under paragraph 1, that the relevant rules concerning conservation and control measures are not being complied with, they shall take penal or administrative action against the master of such a vessel or any other person responsible.'

16. Article 31(1) and (2) of Regulation No 2847/93 provides as follows:

'(1) Member States shall ensure that the appropriate measures [are] taken, including administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where [the] common fisheries policy [has] not been respected, in particular following a monitoring or inspection carried out pursuant to this regulation.

(2) The proceedings initiated pursuant to paragraph 1 shall be capable, in accordance with the relevant provisions of national law, of effectively depriving those responsible of the economic benefit of the infringements or of producing results proportionate to the seriousness of such infringements, effectively discouraging further offences of the same kind.'

17. Article 31(3) of Regulation No 2847/93 contains a non-exhaustive list of sanctions.

III — Facts, procedure and forms of order sought

A — *Facts and procedure*

18. The Commission is essentially alleging that on various occasions the United Kingdom exceeded the catch quotas allocated to it for various fish stocks in the years 1991 to 1994 and 1995 and 1996. In its submission, these incidents show that national conservation and control measures do not meet the requirements of the Community rules on the conservation and management of fishery resources.

19. That allegation was made in letters of formal notice of 19 March 1998 in respect of the years 1991 to 1994, and 19 February 1999 in respect of the years 1995 and 1996. The United Kingdom replied to those letters on 20 May 1998 and 4 May 1999 respectively.

20. On 26 August 1999 the Commission sent the United Kingdom two reasoned opinions under Article 226 EC because it continued to be of the view that the United Kingdom authorities had failed to adopt appropriate measures to resolve the problems to which its allegations related. The United Kingdom replied to those reasoned opinions by two letters of 2 December 1999.

21. The Commission based its allegations on data contained in tables which were annexed to the letters of formal notice, the reasoned opinions and the application and in each year were drawn up on the basis of information provided by the United Kingdom authorities. Those tables show, for each of the years concerned, the areas in which and stocks for which overfishing took place.

22. The Commission claims that those tables show that the United Kingdom has failed to fulfil its obligations. First of all, the United Kingdom has not adopted the measures necessary to prevent quotas being exceeded, or adopted them too late. Secondly, it claims that the United Kingdom failed to prevent fishing activities even after orders for closure had been made. Finally, the United Kingdom failed to bring proceedings against those responsible.

23. In its replies to the letters of formal notice, the United Kingdom disputed some of the figures relied on by the Commission. The United Kingdom claimed that catches of mackerel in Area IV in 1991, 1993 and 1994 were much lower than indicated by the figures in the Commission's tables. Catches of cod in Areas I and IIb in 1996 were also lower than indicated. Accordingly there was no overfishing of those stocks in those four years.

24. The United Kingdom explains that those discrepancies arose as a result of new information which led its authorities to correct the data. The Commission, however, takes the view that amendments to data cannot be taken into account once infringement proceedings have begun. The United Kingdom, on the other hand, says that it referred to the new figures in letters of 25 April 1996 and 23 December 1997, that is, before the infringement procedure commenced. In the reply the Commission argues that any assessment of whether the applicable provisions have been complied with can only be based on the original data. Irrespective of whether or not it is correct, that data is the basis for deciding if measures to ensure that quotas are met should be adopted.

25. The Commission further observes that the United Kingdom stated during the pre-litigation stage that there were practical difficulties in managing quotas, such as bad weather and the delay between fish being caught and landing declarations being produced.

26. The United Kingdom also submitted in regard to the failure to take penal or administrative measures against those responsible for infringements that under national law prohibitions only apply as regards the future. It was therefore impossible to prosecute for fishing that occurred prior to the prohibition's entry into effect.

Landings recorded after the order for closure was made actually related to fish caught prior to the date of entry into force of the order.

27. Finally, the Commission refers to the action pending in Case C-454/99 in relation to the years 1985 to 1988 and 1990 and to its intention to bring infringement proceedings in relation to the 1997 fishing management year. The United Kingdom emphasises that proceedings in other cases cannot have any effect on the outcome of this case. The Commission, whilst acknowledging in the reply that this case must be decided in the light of the circumstances specific to it, points out that it must none the less be considered in the general context.

B — *Forms of order sought*

28. The Commission considers, on the basis of the replies given by the United Kingdom authorities to its reasoned opinions, that in the years 1991 to 1996 the United Kingdom failed to observe the Community rules on the conservation and management of fishery resources. It therefore brought the present action.

29. In its application, which was lodged at the Court Registry on 30 November 1999, the Commission claims that the Court should:

1. Declare that in respect of each of the years 1991 to 1996 the United Kingdom has failed to carry out the obligations imposed on it by (i) Article 5(2) of Regulation (EEC) No 170/83 or Article 9(2) of Regulation (EEC) No 3760/92 (from 1 January 1993) and Article 1(1) of Regulation (EEC) No 2241/87 or Article 2 of Regulation (EEC) No 2847/93 (from 1 January 1994); (ii) Article 11(2) of Regulation (EEC) No 2241/87 or Article 21 of Regulation (EEC) No 2847/93; and (iii) Article 1(2) of Regulation (EEC) No 2241/87 or Article 31 of Regulation (EEC) No 2847/93 by

   — failing to put in place appropriate detailed rules for the utilisation of the quota allocated to it,

   — not carrying out inspections and other controls as required by the relevant Community regulations,

— failing provisionally to close fisheries when the quota was exhausted, and

— failing to take administrative or penal action against the masters of ships infringing the regulations or against such other persons as were responsible for such infringement;

2. Order the United Kingdom to pay the costs.

30. The United Kingdom contends that the Court should dismiss the application as unfounded and order the Commission to pay the costs.

IV — Legal assessment

31. On all the heads of claim the parties are divided as to whether the Commission has adduced adequate proof of the infringements of obligations alleged by it. Accordingly, prior to examining the individual heads of claim, it is appropriate to consider the question of the allocation of the burden of proof in Treaty infringement proceedings concerning compliance with Community rules on the conservation and management of fishery resources.

A — *General: allocation of the burden of proof*

1. Parties' submissions

32. The United Kingdom claims that the declaration sought by the Commission in the application is too general in view of the individual cases upon which it relies.

33. Furthermore the Commission has not demonstrated in respect of each year that the alleged infringements of Community law did in fact occur even though the Commission has the burden of proof. It is even more important to observe the principles of the allocation of the burden of proof now that judgment against a Member State in proceedings under Article 226 EC may lead to the imposition of financial penalties under Article 228 EC.

34. Nor has the Commission proved that overfishing took place in the instances

alleged by it, since it has failed to take account of the fact that the United Kingdom disputes the figures relied on by it.

35. The Commission observes in the reply that the United Kingdom did not deny in the defence that significant overfishing took place during the period in question. It did not dispute that there was overfishing in 27 out of the 31 instances alleged by the Commission.

36. The Commission also submits that, in order to establish that a Member State has failed to comply with its obligations with regard to establishing an effective system for the control of quotas, it must show that the measures actually taken by the Member State could not achieve the Community objectives and that that failure is not the result of unforeseeable factors. Furthermore it is not for the Commission to describe in detail what measures should in its view have been taken.

2. Appraisal

37. The question of the allocation of the burden of proof was clarified by the Court in Case C-333/99. According to the judgment in that case, 'it follows from the scale of those figures and the repetition of the situation which they describe that the instances of overfishing could not but have been the consequence of a failure by the French authorities to comply with their monitoring obligations. The French Government's argument that the Commission is basing itself on no more that a presumption is for that reason unjustified.' [8]

38. In my Opinion in Case C-454/99 I pointed out how judiciously that decision takes account of both the general principle of the allocation of the burden of proof in Treaty infringement proceedings and the peculiarities of the Community rules on the conservation and management of fishery resources. To avoid repetition I would therefore refer to my comments there. [9]

39. The significance of that decision for this case is that, in order to show that there has been an infringement of obligations under the Community rules on the conservation and management of fishery resources, the Commission must set out in detail the repeated instances of significant overfishing.

40. The Court of Justice did not say that evidence was also required that the

8 — Judgment cited in footnote 2, paragraph 35.

9 — Cited in footnote 2, points 45 et seq.

instances of overfishing were not attributable to unforeseeable events. The Commission's argument to that effect can only be understood to mean that, whilst Member States are in principle required to procure success or a result — namely compliance with the quotas allocated to them —, if those quotas are not complied with they may be released from that obligation if they can prove unforeseeable events, presumably in the sense of *force majeure*.

41. Therefore, the United Kingdom's allegation that the individual cases relied on by the Commission cannot give rise to an inference as to an overall failure to fulfil obligations under the Community rules cannot be upheld.

42. Nor can the success of the Commission's application for a declaration depend on the number of individual instances of overfishing. It is not for the Court of Justice to determine how many instances of overfishing occurred but rather the extent to which repeated instances of overfishing support the inference that the Member State in question failed to fulfil its obligations. Contrary to the view of the United Kingdom, it is therefore in principle immaterial that individual figures are the subject of dispute, if the Commission has provided evidence of repeated instances of overfishing during the entire period in question by listing those instances.

43. The possibility that financial penalties may be imposed under Article 228 EC cannot call into question the premiss on which the judgment in Case C-333/99 is based. Assuming that the Member States have to secure a particular result — in this case compliance with the fishing quotas allocated to them — there is no inconsistency between the basic principle that the Commission bears the burden of proof in regard to failures by the Member States to fulfil their obligations and allowing the Commission to prove shortcomings in national control systems by adducing evidence of repeated instances of overfishing. That premiss is therefore compatible with the scope of the Member States' obligations under the Community rules on the conservation and management of fishery resources.

44. I therefore now turn to the individual pleas in law.

B — *Failure to lay down appropriate detailed rules for the utilisation of fishing quotas*

1. Parties' submissions

45. The Commission claims that the United Kingdom failed to fulfil its obligations

under Article 5(2) of Regulation No 170/83 and — as from 1 January 1993 — under Article 9(2) of Regulation No 3760/92 by not laying down detailed rules for the appropriate utilisation of fishing quotas. It submits that it is for the Member States to put in place sufficiently flexible detailed rules to take into account the difficulties arising in relation to fisheries in non-Community waters, too. The Member States are also under a duty to check that the rules are complied with.

46. Since it has been shown that the United Kingdom fishermen frequently exceeded the quotas which were set for them, either the detailed rules adopted by the United Kingdom authorities were not appropriate or those authorities did not check compliance with the rules. In particular the applicable provisions of national law in the period in question failed to ensure that declarations of landings or logbook entries were processed swiftly. Nor did they enable decisions to close fisheries to be taken sufficiently early to allow for quantities of fish which had already been caught but not yet landed, or to take account of the lapse of time between the decision to close being taken and its coming into effect. The Commission also notes that the United Kingdom succeeded in 1998 and 1999 in resolving that problem by adopting stringent measures.

47. The United Kingdom claims, in line with its general argument in defence, [10] that the individual cases of overfishing alleged by the Commission cannot justify a general finding of failure to comply with the applicable provisions.

48. The United Kingdom submits first of all in this regard that such an approach would be tantamount to basing a finding of infringement on a presumption, which is unlawful. [11] In its judgment in Case C-62/89 [12] the Court dismissed the Commission's allegation, likewise relating to an alleged failure to fulfil obligations under Article 5(2) of Regulation No 170/83, on the ground that the Commission simply stated that the mere fact that quotas were exceeded showed that the provisions in question were not complied with.

49. The United Kingdom argues that even if it were possible to conclude from the fact that quotas had been exceeded that there was a failure to comply with the applicable provisions, several of the instances of overfishing alleged by the Commission would exceed the relevant quota by less than 5%.

10 — See above, points 32 et seq.

11 — In this connection it refers to the judgment in Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 61, in which the Court stated that '...in proceedings under Article 169 of the Treaty, the Commission is required to establish the existence of the alleged infringement and may not rely on any presumption'.

12 — *Commission* v *France* [1990] ECR I-925, paragraphs 35 to 38.

Under Article 3(2) of Regulation (EC) No 847/96,[13] 'Member States may take catches up to 5% in excess of permitted landings'. Taking that rule into account, the Commission only provided evidence of two to six instances of significant overfishing per year during the relevant period. It may be inferred from that that the instances of overfishing must be regarded as isolated incidents from which it cannot be concluded that the United Kingdom's system of control was generally deficient.

50. The Commission argues in the rejoinder that the period at issue preceded the entry into force of Regulation No 847/96. In addition the United Kingdom has not denied 23 instances of significant overfishing[14] over the whole period in question, which is sufficient to show a failure to comply with the applicable provisions.

51. As regards the question whether the data on the four instances of overfishing that are contested may be corrected retrospectively, the Commission argues that the United Kingdom did not explain, or prove by documentary evidence, why it was necessary for corrections to be made during the pre-litigation procedure. The Commission also cites the principle of legal certainty which, it submits, would be infringed if the United Kingdom were allowed, by retrospectively correcting its original figures, to increase the quotas allocated to it in subsequent years in the context of the year-to-year quota management system now in force by reducing the figures for overfishing to be carried over.

2. Appraisal

52. It follows from the judgment in Case C-333/99[15] that the Commission may demonstrate a failure to comply with the obligation arising under Article 5(2) of Regulation No 170/83, which is to lay down the detailed rules for appropriate utilisation of fishing quotas, by adducing evidence of repeated incidents of significant overfishing. In that connection the Court expressly referred to its decision in Case C-62/89[16] and stated that the particulars which, so it held in that case, must be set out in detail consist in substantiated evidence from the Commission of repeated instances of overfishing.

53. It is common ground between the parties in this case that several instances

13 — Council Regulation (EC) No 847/96 of 6 May 1996 introducing additional conditions for year-to-year management of TACs and quotas (OJ 1996 L 115, p. 3).

14 — Of the 31 instances alleged by the Commission the United Kingdom disputes the underlying figures in four instances (see point 35 above). The United Kingdom's argument in relation to Regulation No 847/96 relates to four further instances.

15 — Cited in footnote 3.

16 — Cited in footnote 12.

of overfishing occurred each year. That is not affected by the United Kingdom's reliance on Article 3(2) of Regulation No 847/96 because that regulation does not apply to the fishery management years in question here. [17] It should also be observed that the possibility offered by that regulation to 'offset' catch statistics by allowing management of total allowable catches (TACs) and quotas over several years does not affect the finding of overfishing. [18]

54. In that context, the fact that the figures on individual instances of overfishing are a matter of dispute would appear to be immaterial.

55. It must also be observed that it was certainly open to the United Kingdom to bring evidence that the Commission's figures do not correspond to the actual facts. The Commission is right to note that a retrospective correction of data cannot affect the assessment of whether individual obligations under the Community rules for the conservation and management of fishery resources have been complied with, since both the national authorities and the Commission's staff must reach their decision on the basis of contemporaneous data. Thus it is conceivable that judgment may be given against a Member State for failing to take action when exhaustion of individual fishing quotas appears to be imminent because the data available at the time suggested that exhaustion was imminent. In this regard it must be assumed, however, in the light of the nature of the obligation [19] (that is, to achieve a given result, namely compliance with the allocated quotas), that there is a principle that preventive action is required to enable that result-orientated goal to be achieved. Whether there actually was overfishing must be regarded as a separate issue.

56. I accordingly consider that the Commission's application should be upheld and the United Kingdom found to have failed to fulfil its obligations under Article 5(2) of Regulation No 170/83 and Article 9(2) of Regulation No 3760/92 by failing to put in place appropriate detailed rules for the utilisation of the quotas allocated to it in the years 1991 to 1996.

17 — The regulation entered into force on 1 January 1997 pursuant to Article 6.

18 — The second sentence of Article 3(2) of Regulation No 847/96 expressly states: 'However these catches shall be considered as exceeding permitted landings as regards the deductions envisaged in Article 5'.

19 — See point 40 above.

C — *Defective control measures under Article 1(1) of Regulation No 2241/87 and Article 2 of Regulation No 2847/93*

1. Parties' submissions

57. The Commission argues that Article 1 of Regulation No 2241/87 and, as from 1 January 1994, Article 2 of Regulation No 2847/93 imposed on the Member States more specific obligations for complying with the Community rules on the conservation and management of fishery resources than those in Regulations Nos 170/83 and 3760/92. In the Commission's submission, the measures taken pursuant to those articles should have ensured that fishermen reported all catches to the competent authorities.[20] Furthermore those measures should have permitted that information to be analysed rapidly so that a ban on fishing of a given stock could be taken in time to prevent the quota from being exceeded.

58. The Commission infers from the United Kingdom's attempt to have the Commission retrospectively correct its data that the system used by the United Kingdom in the years 1991 to 1996 was incapable of providing accurate data on the status of catches.

59. The United Kingdom disputes that inference and denies that it failed to fulfil its obligations under the provisions in question, citing the measures it adopted.

2. Appraisal

60. It must first be noted that in Case C-333/99 the Court considered the question of failure to fulfil obligations under Article 1(1) of Regulation No 2241/87 in conjunction with Article 5(2) of Regulation No 170/83.[21] The Court applied the principles concerning the allocation of the burden of proof alluded to earlier.[22] Contrary to the United Kingdom's assertion, therefore, inferences relating to com-

20 — In accordance with Commission Regulation (EEC) No 2807/83 of 22 September 1983 laying down detailed rules for recording information on Member States' catches of fish (OJ 1983 L 276, p. 1).

21 — Case cited in footnote 3; a finding of failure to fulfil obligations under Article 2 of Regulation No 2847/93 was not necessary because the infringement proceedings related only to the years 1988 and 1990.

22 — See points 37 et seq., above.

pliance with obligations under those provisions may certainly be drawn from repeated instances of overfishing. The documents show that the Commission has proven repeated instances of overfishing during the period in question. [23]

61. Likewise, the Commission is also correct in concluding that the fact that the United Kingdom asked the Commission to correct retrospectively the information it had suggests that it did not comply with its obligations under the provisions in question. In my Opinion in Case C-454/99 [24] I emphasised the importance of reliable data on catches for the attainment of the objectives of the Community rules on the conservation and management of fishery resources. [25] If the Member State by its own admission produces unreliable data then it seems reasonable to assume that it did not properly supervise compliance by fishermen with the duty to provide information. Whilst the fact that the Member State in question is concerned that incorrect data should be corrected is in principle to be welcomed, it should be done when the corrected data can still be used for the purposes of the management of fishery resources.

62. Accordingly, the Commission has demonstrated sufficiently that the repeated instances of overfishing in the years 1991 to 1996 were attributable to inadequate controls. It further observed that in several cases there was no national order for closure of fisheries and in those cases where such an order was made, landings continued to be made even after the order for closure. That too militates against a finding that the United Kingdom complied with its supervisory duties, particularly since, as the Commission pointed out, [26] problems were apparently able to be resolved later. Finally, the United Kingdom itself acknowledged that some of its data needed to be corrected. It may be concluded that in such cases the United Kingdom authorities did not have access to reliable data that would have enabled them to make a timely order for closure of fisheries. The Commission has therefore adduced sufficient evidence to prove a failure to fulfil obligations under Article 1(1) of Regulation No 2241/87 and Article 2 of Regulation No 2847/93.

63. I therefore conclude that, by not ensuring compliance with Community rules on the conservation and management of fishery resources by means of adequate supervision of fishing and appropriate controls of the landing and recording of

23 — See also point 53 above.
24 — Cited in footnote 2.
25 — See in particular point 69.
26 — See point 46 above.

catches, the United Kingdom has failed to fulfil its obligations under Article 1(1) of Regulation No 2241/87 and Article 2 of Regulation No 2847/93.

D — *Delayed closure of fisheries*

1. Parties' submissions

64. The Commission submits that the United Kingdom failed to fulfil its obligations under Article 11 of Regulation No 2241/87 and, as regards the period beginning on 1 January 1994, under Article 21 of Regulation No 2847/93 in not provisionally closing fisheries when quotas were exhausted. It follows from the judgments in Case C-62/89 [27] and Case C-244/89 [28] that the Member States are under a duty to adopt in good time all the measures necessary to prevent quotas from being exceeded in order to ensure adherence to the quotas allocated to the Member States for the purposes of conserving fishery resources. It also follows from those judgments that the Member State in question may not rely on practical difficulties in order to justify the failure to fulfil its obligations.

65. The United Kingdom, on the other hand, argues that the fact that there are discrepancies between the figures relied on by the Commission and the figures available to it at the relevant time cannot be ignored. This is attributable first of all to the system for logging the data and also in particular to landings made in third countries of which the United Kingdom was informed by the captains of the vessels, whereas the Commission has available to it figures from the competent authorities in all the Member States. The United Kingdom also regards the declaration sought by the Commission as too general, particularly as it ensured that the overwhelming majority of the quotas were complied with in the period in question.

66. In the reply the Commission confirms its allegations and observes that in certain cases orders for the closure of fisheries took effect only several weeks after quotas were exhausted, which shows that in such cases measures were not adopted in time.

2. Appraisal

67. It is settled case-law of the Court [29] that the Member States are obliged under

27 — Cited in footnote 12.

28 — *Commission* v *France* [1991] ECR I-163.

29 — See, *inter alia*, the judgment in Case C-333/99 cited in footnote 3 above.

Article 11 of Regulation No 2241/87 even before exhaustion of the quotas to take binding measures to prohibit fishing activity until further notice. Article 21 of Regulation No 2847/93 subjects the Member States to the same obligation as from 1 January 1994.

68. Both during the pre-litigation procedure and during the written procedure, the United Kingdom explained its failure to order the closure of fisheries, or its order to close them at the time that it did so — apart from the discrepancies in data already referred to — by the fact that the weather conditions made it difficult to attribute catches to particular quotas and fluctuations in volumes of catches made it difficult to record the quantities of fish landed, and thus, where appropriate, to order closures in time.

69. It is the consistent case-law of the Court that a Member State cannot rely on practical difficulties in order to justify its failure to adopt effective control measures. On the contrary, it is for the Member States responsible for implementing Community regulations in the fishery product sector to overcome those difficulties by adopting appropriate measures. [30]

70. For that reason the United Kingdom cannot rely on practical difficulties, such as the landings in third countries and fluctuations in the volumes of fish landed in other Member States or third countries. That applies *a fortiori* because those difficulties were by no means insurmountable and the Community rules do not leave the exchange of information between Member States and with third countries unregulated. [31]

71. In those instances where an order for closure was made, the Commission has satisfactorily proved, by means of the volumes of fish that had been caught at the time when the order for closure took effect, that the United Kingdom did not succeed in provisionally suspending fishery activities in sufficient time before the relevant quotas allocated to it were exhausted.

72. It follows from all of the foregoing that the United Kingdom failed to fulfil its obligations under Article 11(2) of Regulation No 2241/87 and, as from 1 January 1994, under Article 21 of Regulation No 2847/93, in not prohibiting fishing of particular stocks or not doing so in good time when the corresponding quotas were deemed to have been exhausted by fishing activities.

30 — Judgments in Case C-333/99 (cited in footnote 3, paragraph 44), Case C-52/95 (*Commission* v *France* [1995] ECR I-4443) and Case C-62/89 (cited in footnote 12).

31 — See, for example, Articles 7 and 9 of Regulation No 2241/87.

E — *Failure to impose penal or administrative penalties*

1. Parties' submissions

73. The Commission takes the view that the measures provided for by Article 1 of Regulation No 2241/87 and Article 31 of Regulation No 2847/93 relating to those responsible for infringements of the provisions on the conservation and control measures include bringing penal or administrative proceedings against those responsible. [32] In that connection the Commission underlines the significance of that obligation for the conservation of fishery resources. Article 31 of Regulation No 2847/93 expressed that obligation even more clearly in requiring that the sanctions deprive those responsible of the economic benefit of the infringement.

74. The Commission, referring to the instances of overfishing alleged by it, points out that there were many cases where catches continued to be reported after the order banning fishing was issued. That is an indication that closure orders were breached without having resulted in any consequences for those responsible. Practical difficulties, such as evidential issues before the national courts, cannot justify the United Kingdom authorities' failure to take action.

75. The United Kingdom submits that throughout the period in question its policy was to bring forward for prosecution any cases which disclosed evidence that would satisfy a criminal court that an offence had been committed. The United Kingdom refers to the list annexed to the defence showing the number of prosecutions taken and official warnings given in respect of vessels which ignored a ban on fishing or fished in an area for which the United Kingdom did not have any quota.

76. The United Kingdom then gives individual examples. It emphasises that prosecutions did not succeed, *inter alia,* because it was not possible to identify those responsible with sufficient certainty to secure a criminal conviction. In some cases administrative procedures were brought with the aim of reducing the allocations to those responsible in the following year for overfishing once the relevant quotas had been exceeded. Finally, in other cases proceedings were deliberately not instituted

32 — In so far as this does not follow directly from the wording of the relevant provision, it can in any event be inferred from Article 10 EC.

partly because the United Kingdom authorities tolerated overfishing in view of an expected quota exchange with the Federal Republic of Germany — which did not in the event take place. Proceedings were not brought in cases where the evidence was inadequate under national law.

77. In the reply the Commission observes that the number of prosecutions bears no relation to the extent of the overfishing. Furthermore, it is not clear from the list provided by the United Kingdom whether actions were brought in every case of overfishing. In addition it is not possible for the Commission to ascertain why relatively few prosecutions were brought even though fishing was proven to have continued after fishing was banned.

2. Appraisal

78. It is common ground between the parties that there is a duty on the Member States to bring penal or administrative proceedings in the event of failure to comply with the provisions relating to the conservation and control measures under both Article 1(2) of Regulation No 2241/87 and Article 31 of Regulation No 2847/93.

79. The question to be examined is whether the United Kingdom's submissions are capable of meeting the Commission's allegations.

80. In my Opinion of 5 March 2002 in Case C-454/99 [33] I demonstrated how the fact that the Commission in principle bears the burden of proof does not rule out a duty on the part of the Member States to communicate the measures adopted by them. [34]

81. The United Kingdom admits in the defence that it took action against those responsible for infringements only in isolated cases. It has therefore substantiated its claim that at least some prosecutions were brought against those responsible for infringements. The Commission's application for a general declaration that the United Kingdom failed to fulfil its obligation to bring penal or administrative proceedings against those responsible for infringements cannot therefore be granted in that form.

82. None the less it is necessary to consider whether the United Kingdom failed to fulfil

33 — Cited in footnote 2, points 94 et seq.

34 — It is sufficient in this connection to look to Article 4 of Regulation No 2241/87: 'Member States shall at regular intervals provide the Commission with information on... the action taken by them with respect to such infringements.'

its obligations in not bringing prosecutions against those responsible for overfishing in other cases.

83. The United Kingdom's argument that it could not bring penal or administrative penalties on the basis that there was not sufficient evidence under national law cannot be upheld because the lack of evidence is possibly attributable to the national authorities' failure adequately to supervise fishing and related activities, contrary to its Community obligations. In advancing that argument the United Kingdom is essentially seeking to justify a later infringement of Community law by an earlier one. Furthermore the Court has already stated as regards national requirements relating to penal prosecution that 'it is settled case-law that a Member State cannot plead provisions, practices or situations in its internal legal system to justify non-compliance with obligations and time-limits arising from rules of Community law'. [35]

84. That principle may also be applied to the examples cited by the United Kingdom. The expectation of a planned quota exchange cannot justify a failure to bring penal or administrative proceedings against those responsible any more than the reference to by-catches. [36] It must further be observed that the list compiled by the United Kingdom of proceedings brought under the provisions in question does not reveal whether the proceedings were brought against all or at least a significant proportion of those responsible for infringements.

85. It is therefore clear from the foregoing considerations that the United Kingdom has infringed Article 1(2) of Regulation (EC) No 2241/87 and Article 31 of Regulation No 2847/93 by instituting administrative or penal proceedings against those responsible for infringements in too few cases.

V — Costs

86. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the United Kingdom has been unsuccessful and the Commission has applied for an order in that connection, the United Kingdom must be ordered to pay the costs.

35 — Judgment cited in footnote 3, paragraph 54.

36 — That is to say, fish unintentionally caught in the course of regular fishing.

VI — Conclusion

87. On the grounds set out above I therefore propose that the Court:

(1) Declare that, in respect of each of the years 1991 to 1996, the United Kingdom has failed to fulfil its obligations under (i) Article 5(2) of Regulation (EEC) No 170/83 or Article 9(2) of Regulation (EEC) No 3760/92 (as from 1 January 1993) and Article 1(1) of Regulation (EEC) No 2241/87 or Article 2 of Regulation (EEC) No 2847/93 (from 1 January 1994); (ii) Article 11(2) of Regulation (EEC) No 2241/87 or Article 21 of Regulation (EEC) No 2847/93; and (iii) Article 1(2) of Regulation (EEC) No 2241/87 or Article 31 of Regulation (EEC) No 2847/93, by

— failing to put in place appropriate detailed rules for the utilisation of quotas allocated to it,

— not carrying out inspections and other controls as required by the relevant Community regulations,

— failing provisionally to close fisheries when the quota was exhausted,

— taking administrative or penal action against the masters of the ships infringing the regulations or against such other persons as were responsible for such infringement in too few cases;

(2) Order the United Kingdom of Great Britain and Northern Ireland to pay the costs.