and to seek its approval in good faith but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which may be formulated by the Commission.

2. A proposal submitted by the Commission to the Council with a view to taking concerted Community action cannot be considered as constituting in itself approval of a unilateral national measure, even of one having the same content, which is adopted in a sphere coming within the powers of the Community. The lawfulness of national measures adopted in a sphere within which the powers of the Community apply may not be recognized solely by reason of the existence of a Community proposal which is identical in principle. That would not only be contrary to legal certainty but would lead to a distortion of the division of powers between the Community and the Member States and would thus adversely affect the essential balances established by the Treaty.

3. Where, with regard to fishery conservation measures adopted during the period in which the Council had not yet exercised the powers which it possesses, the Commission has put forward express objections to the national measure contemplated, such objections may be considered to have been withdrawn only when the Commission has clearly and expressly indicated that it no longer intends to insist on them.

4. Where criminal proceedings are brought by virtue of a national measure which is held to be contrary to Community law a conviction in those proceedings is also incompatible with that law.

In Case 269/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Court of Appeal, Criminal Division, for a preliminary ruling in the proceedings pending before that court between

REGINA

and

ROBERT TYMEN

on the interpretation of Article 102 of the Act of 22 January 1972 concerning the Conditions of Accession and the Adjustments to the Treaties together with certain other provisions of Community law in relation to national fishery conservation measures,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. In the United Kingdom the Fishing Nets (North-East Atlantic) Order 1977 (Statutory Instrument 1977 No 440), which entered into force on 1 April 1977, prohibits in a specified zone of the Atlantic and Arctic Oceans and the seas adjacent to those oceans the presence on board British and other fishing boats sailing in the United Kingdom fishery zones certain nets having a small mesh size, the minimum size of mesh varying in accordance with the waters in question. The order authorizes nets having a small mesh size to be carried for catching certain non-protected species.

More particularly, Article 5 of the above-mentioned order, taken in conjunction with Schedule 1 thereto, prohibits any foreign fishing boat from carrying, for the purpose of fishing for sea fish in the waters in which the appellant fished, a net any part of which consists of double twine containing neither manila nor sisal, and having a size of mesh smaller than 75 millimetres. In the case of fishing for nephrops, however, a mesh size of 40 to 50 millimetres is authorized.

That order formed the subject-matter of the judgment of the Court of 4 October 1979 (Case 141/78, *France* v *United Kingdom*, [1979] ECR 2923) in which the Court ruled that by bringing the said order into force on 1 April 1977 the

United Kingdom had failed to fulfil its obligations under the EEC Treaty. The decision of the Court was based on the fact that the United Kingdom failed to provide the other Member States and the Commission with prior notification of the measure adopted and to seek the approval of the Commission.

The 1977 Order was amended by the Fishing Nets (North-East Atlantic) (Variation) Order 1979 (SI 1979 No 744) which entered into force on 1 July 1979. The latter order, according to the information provided by the court making the reference, amended Schedule I to the 1977 Order by increasing the minimum size of mesh authorized for double-twine nets from 75 to 80 millimetres. In the case of fishing for nephrops, however, the minimum size of mesh authorized for double-twine nets was fixed at 75 millimetres.

The 1979 Order, together with other British legislation, has in the meantime formed the subject-matter of the judgment of the Court of 5 May 1981 (Case 804/79, *Commission* v *United Kingdom*, [1981] ECR 1045). In that judgment, which was delivered in proceedings under Article 169 of the EEC Treaty, the Court declared that the United Kingdom had failed to fulfil its obligations under the EEC Treaty, *inter alia*, by having brought the said order into force on 1 July 1979 without appropriate prior consultation and in spite of the Commission's objections.

2. On 16 October 1979 Mr Robert Tymen, a French national and master of a French trawler, was arrested whilst fishing for nephrops some 50 miles south-west of the Pembrokeshire coast, within the United Kingdom fishing zone. On board his boat were found two nets of double twine which proved to have an average mesh size of some 62 to 63 millimetres, which was thus less than the minimum size of mesh authorized by the fisheries provisions in force in the United Kingdom.

As a result, Mr Tymen was convicted at Cardiff Crown Court for offences contrary to the above-mentioned orders. The judge imposed on him a total fine of £ 250 and made an order for the forfeiture of the nets.

When an appeal was lodged with the Court of Appeal Criminal Division that court, in order to be enabled to judge whether the British provisions were compatible with Community law, stayed the proceedings and referred to the Court of Justice under Article 177 of the EEC Treaty the following questions:

"1. Does a Member State have power to adopt and bring into force a fishery conservation measure prescribing a minimum mesh size for nephrops of a kind contained in the United Kingdom's Fishing Nets (North-East Atlantic) (Variation) Order 1979 (SI 1979 No 744) after the expiry of the period referred to in Article 102 of the Act of Accession on 31 December 1978?

2. If not, have individuals prosecuted under such a measure any and if so what rights which national courts must protect?

3. If the answer to 1 above is yes, would
   (a) the procedural requirements or
   (b) the other requirements of the following provisions:
      (i) Article 3 of Council Regulation No 101/76 of 19 January 1976;
      (ii) Annex VI to the Hague Resolution of 3 November 1976;

(iii) Decision 79/590/EEC of 25 June 1979;

(iv) Article 5 of the EEC Treaty,

have been satisfied by a Member State which, before adopting such a fishery conservation measure, acted in the way the United Kingdom acted as shown in the file marked 'Statement of Facts' annexed hereto?

4. Does the fact that the Court of Justice in Case 141/78 *French Republic* v *United Kingdom* [1979] ECR 2923 found that the United Kingdom, in bringing into force the Fishing Nets (North-East Atlantic) Order 1977 (SI 1977 No 440), failed to fulfil its obligations under the EEC Treaty, make any difference to the answer to 3 above?

5. If all or any of the aforesaid requirements were not satisfied, have individuals prosecuted under such a measure any and if so what rights which national courts must protect?"

3. The order making the reference was registered at the Court of Justice on 5 December 1980.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Robert Tymen, represented by Patrick O'Connor, of the English Bar and by Xavier Ghelber, of the Paris Bar; by the United Kingdom, represented by Lord Mackay of Clashfern QC, David Vaughan QC, and R. D. Munrow of the Treasury Solicitor's Department; by the French Government, represented by Thierry Le Roy, acting on behalf of the General Secretary of the Interdepartmental Committee for Questions of European Economic Cooperation; and by the Commission of the European Communities, respresented by R. Wainwright, a member of its Legal Department, acting as Agent.

The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. However it requested the parties to the appeal, the Member States participating in the proceedings before it and the Commission, to bring their written observations up to date in the light of the judgment of 5 May 1981 (Case 804/79, *Commission* v *United Kingdom).* Supplementary observations were lodged by Mr Tymen, the United Kingdom and the Commission.

II — Written observations

1. The appellant in the main action, Mr *Robert Tymen,* makes the following observations:

(a) The reply to the *first question* has already been settled by the judgment in Case 804/79 in which it was stated "... since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession, power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community". The transfer of powers to the Community being total and definitive the failure of the Council to adopt the conservation measures within the required period could in no case restore to the Member States the power and

freedom to act unilaterally. Although in that judgment the Court permitted the Member States "to amend the existing conservation measures in case of need" it stated that such amendments must be "of a limited scope only" and that a Member State might not bring into force any interim conservation measures, "except as part of a process of collaboration with the Commission".

In conclusion Mr Tymen suggests that the reply to the first question should be that "a Member State had no power unilaterally to adopt and bring into force a measure of a kind contained in the United Kingdom's Statutory Instrument 1979 No 744 after the expiry, on 31 December 1978, of the period referred to in Article 102 of the Act of Accession".

(b) With regard to the *second question* Mr Tymen states that the total and definitive transfer of powers to the Community goes beyond the effects of individual "stand-still" provisions. It is a fundamental implication of that transfer that no Member State may invoke measures which are outside its own jurisdiction or power. Authority for that is provided both by the English doctrine of *ultra vires* and the concept of "incompétence" in French administrative law and has been confirmed by the Court in its judgment of 9 March 1978, (Case 106/77, *Simmenthal, [1978] ECR 629).*

Since the Member States have no powers whatever in this field Mr Tymen considers that the question of "direct effect" does not arise. He nevertheless adds in the alternative that the prohibition of conservation measures results not only from Article 102 of the Act of Accession, but also from the cumulative effect of Articles 3 (d), 5, 8 (7), and 38 to 47 of the Treaty together with the preamble to and Articles 1 and 4 of Council Regulation No 101/76, Annex VI to the Hague Resolution and the Council Decision of 25 June 1979. That prohibition corresponds to the criteria for the direct effect of Community measures laid down by the case-law of the Court.

The direct effect of the prohibition of the adoption of unilateral measures implies, as the Court has found in a number of judgments, including that of 16 February 1978 (Case 88/77, *Schonenberg,* [1978] ECR 473), that a prosecution under such measures must itself be in breach of Community law.

Consequently the Court should reply to the second question to the effect that no Member State may prosecute an individual under a national measure which it had no power to introduce and which falls within the exclusive competence and jurisdiction of the Community. Any such prosecution would be incompatible with Community law.

(c) With regard to the *third question* Mr Tymen maintains that the Fishing Nets (North-East Atlantic) (Variation) Order 1979 was adopted in breach of the prohibitions set out clearly in Annex VI to the Hague Resolution of 3 November 1976 and in paragraph 2 of Council Decision 79/590/EEC of 25 June 1979 as the United Kingdom has failed to fulfil the duty incumbent on Member States to seek the approval of the Commission and to consult it at all stages of the procedure, having regard to the requirements laid down in this

connection by the case-law of the Court. It has likewise failed to fulfil the duty which is incumbent on Member States under Article 3 of Council Regulation No 101/76 of 19 January 1976 and which consists in notifying the other Member States and the Commission of the amendments which they intend to make to their fisheries legislation.

(d) With regard to the *fourth question* Mr Tymen submits that the infringement which forms the subject-matter of the main proceedings is based precisely upon the British Order of 1977 which was merely modified by the Fishing Nets (North-East Atlantic) (Variation) Order 1979. Since, as the Court held in its judgment of 4 October 1979 (Case 141/78, *France* v *United Kingdom*, [1979] ECR 2923) the United Kingdom failed to fulfil its obligations under the Treaty by adopting the 1977 Order it has likewise failed to fulfil its obligations by adopting the 1979 Order.

The fact that the arrest, conviction and punishment took place after the Court gave its judgment in Case 141/78 also constitutes a breach of Community law on the part of the United Kingdom. The consequence of that judgment is that not only the 1977 Order but all amendments which, as in the present case, are wholly dependent upon the original measure are retroactively rendered unlawful.

(e) With regard to the *fifth question* Mr Tymen submits that the prohibition of unilateral conservation measures laid down in Annex VI and Decision 79/590/EEC corresponds to the basic criteria which must be satisfied, according to a consistent line of decisions of the Court, for Community measures to have direct effect.

Direct effect implies that a prosecution instituted pursuant to unilateral measures adopted in breach of a Member State's obligations under the Treaty itself constitutes a breach of Community law. That is made clear in the settled case-law of the Court, *inter alia* in its judgment of 16 February 1978 (Case 88/77, *Schonenberg*, [1978], ECR 473).

Consequently Mr Tymen suggests that the Court should reply to the fifth question to the effect that for a Member State to invoke a unilateral measure such as the Fishing Nets (North-East Atlantic) (Variation) Order 1979 or to prosecute an individual pursuant to such a measure is contrary to Community law if the measure was adopted in breach of substantive or formal provisions of Community law.

2. The *United Kingdom* makes the following observations:

(a) The reply to the *first question*, in the light of the judgment in Case 804/79, is that a Member State, after the expiry of the period provided for in Article 102 of the Act of Accession, does have the power to adopt and enforce a fishery conservation measure prescribing a minimum mesh size for nephrops of a kind contained in the Fishing Nets (North-East Atlantic) (Variation) Order 1979 provided that:

(i) the conservation measure can be properly considered as an amendment of existing conservation measures in the case of need owing to the development of the relevant biological and technical effects in this sphere, and does not involve a new conservation policy on the part of the Member State; and

(ii) it is introduced as a part of a process of collaboration with the Com-

mission and with due regard to the general task of supervision given to the Commission.

These requirements are fulfilled in this case. As from 1 September 1979 the Commission by implication approved the measure in question by putting forward identical proposals which would have entered into force on that date.

The United Kingdom's action, which was also in conformity with the judgment in Case 804/79, was taken as "trustee of the common interest" since the "common interest" requires that there should be a law in force to protect the Community fishery resources.

Thus, even if it were supposed that the failure of the United Kingdom to consult and to heed the objections of the Commission gave rights to individuals, the common interest requires that such rights should be limited to the period in the measure to which the Commission objects, that is the period between 1 July 1979 and 1 September 1979. Thus, as from 1 September 1979 the United Kingdom was entitled to and had a duty to maintain and enforce in the common interest legislation such as the Fishing Nets (North-East Atlantic) (Variation) Order 1979 in order to prevent fishermen from using nets such as Mr Tymen was using for nephrops fishing.

(b) The *second question* is only submitted in the alternative in case, despite the views of the United Kingdom, the reply to the first question is in the negative.

It is apparent that Article 102 of the Act of Accession and the other Community provisions which establish Community competence in the field of fisheries, namely Articles 3 (d), and 38 to 47 of the EEC Treaty are (with the exception of the second paragraph of Article 40 (3) relating to discrimination) in general terms conferring general powers and duties different in character from those specific provisions which the Court has held to be directly effective.

Consequently, the reply must be that the provisions of a general nature in Articles 3 (d), and 38 to 47 of the EEC Treaty and the unfulfilled duty laid upon the Council by Article 102 of the Act of Accession are not of such a nature as to prevent a prosecution under such national rules.

(c) With regard to the *third question* the United Kingdom emphasizes that, even if it were supposed that the adoption of the 1979 Order on 1 July 1979 was in breach of Community law, that does not mean that after 1 September 1979 the maintenance of that measure in force and the prosecution of Mr Tymen were also in breach of Community law. By withholding approval of the 1979 Order solely on the ground that it should not have come into force before 1 September 1979, the Commission implicitly approved the measure as from that date.

(d) With regard to the *fourth question* the United Kingdom takes the view that the form and method of United Kingdom legislation is a matter for the United Kingdom alone and that it is irrelevant to Community law whether the requirements as to minimum mesh sizes in force in United Kingdom waters in

October 1979 were established as a matter of United Kingdom law by an amendment of the 1977 Order or by the process of repeal and separate enactment. Such an amendment is thus not retroactively and automatically invalidated by a subsequent judgment.

(e) With regard to the *fifth question* the United Kingdom takes the view that it is only if the specific provisions referred to in the third question had to be considered as having direct effect, which is not the case, that individuals could have rights which the national court must protect.

The United Kingdom accordingly proposes that the reply to the fifth question should be that, even if the requirements referred to in the third question were not satisfied, whether at the time of the introduction of the 1979 Order or the date of arrest of Mr Tymen, any failure to comply with such requirements does not give rights to individuals which national courts must protect.

3. The *French Government* submits that the state of the law underwent a considerable change after the expiry of the transitional period provided for in Article 102 of the Act of Accession.

(a) With regard to the *first question* the French Government considers that the expiry of the transitional period entailed the loss of all national powers in relation to fisheries and the conservation of the biological resources of the sea. Consequently the Member States might no longer adopt any national measures in that field, the more so since the so-called "roll-over" decisions adopted on a temporary basis "pending the adoption of permanent Community measures" have frozen the situation in this respect.

Consequently the first question should be answered in the negative.

(b) With regard to the *third question* which was submitted in case the answer to the first question should be in the affirmative, the French Government adds in the alternative that the United Kingdom failed to seek the approval of the Commission in accordance with Annex VI to the Hague Resolution since the Commission's requests for the actual text of the proposed measures were in vain.

The United Kingdom also disregarded Articles 2 and 3 of Regulation No 101/76 by not notifying the other Member States in good time of the proposed measures.

(c) With regard to the *fourth question* the reply must be that the irregularity affecting the Fishing Nets (North-East Atlantic) Order 1977, which was found in the above-mentioned judgment of 4 October 1979, affects the lawfulness of the Fishing Nets (North-East Atlantic) (Variation) Order 1979. No criminal proceedings may lawfully be brought under the 1977 Order for failure to comply with the provisions on sizes of mesh laid down by the 1979 Order.

(d) With regard to the *second and fifth questions* the French Government submits that a national measure adopted in breach of Community law may not lawfully be applied by the national court. That means that in this case the conviction of the accused of the charges brought against him must be quashed.

4. The *Commission of the European Communities* outlines the views which it

set out in Case 804/79 *(Commission* v *United Kingdom)* and indicates the consequences which they have for this case.

(a) The *first question* must be analysed in the light of both the judgment in Case 804/79 and the judgment of 2 June 1981 (Case 124/80, *Van Dam,* [1981] ECR 1447). These two judgments confirm that the Member States no longer have power to adopt fishery conservation measures unless they have been specifically authorized by the Community to adopt such measures. They also recognize that, where the Council has failed to adopt conservation measures, it is for the Commission to supervise the national measures by giving or withholding its approval of their adoption.

Consequently the reply to the first question should be as follows:

"Since the end of the transitional period under Article 102 of the Act of Accession Member States no longer have power of their own to adopt sea-fishery conservation measures. Where the Council has failed to act, Member States may adopt conservation measures in case of need. However such measures may only be adopted after appropriate consultation with the Commission and where the Commission has not formulated objections, reservations or conditions."

(b) The *second question* concerns the extent to which the national courts may protect the rights of individuals.

The foundation of this question shows that the court making the reference is concerned with the direct effect of a provision of Community law. However the Commission considers that the question of direct effect does not arise, having regard to the arguments set out above in connection with the first question. A measure adopted by a Member State in excess of its powers must be without legal effect and, in particular, cannot found a criminal prosecution. That principle has been confirmed by the case-law of the Court, in particular by its judgment of 16 February 1978 (Case 88/77, *Schonenberg,* [1978] ECR 473). In that judgment, which in fact goes beyond the question of competence, the Court held that "... where criminal proceedings are brought by virtue of a national legislative measure which is held to be contrary to Community law, a conviction in those proceedings is also incompatible with that law" (paragraph 16 of the decision).

Accordingly, the Commission suggests the following reply to the second question:

"Where criminal proceedings are brought by virtue of a national legislative measure which is held to be contrary to Community law a conviction in those proceedings is also incompatible with that law."

(c) The *third, fourth and fifth questions* are, in the Commission's view, redundant, as they assume a positive reply to the first question to the effect that the Member States still have power to adopt conservation measures.

III — Oral procedure

At the sitting on 29 September 1981 Robert Tymen, represented by Patrick O'Connor of the Bar of England and Wales and by Xavier Ghelber of the Paris Bar; the United Kingdom, represented by The Lord Advocate, Lord Mackay of Clashfern QC, and by David

Vaughan QC; the French Republic, represented by A. Carnelutti, Advocate, and the Commission of the European Communities, represented by R. Wainwright, a member of its Legal Department, submitted oral argument and gave their replies to the questions submitted by the Court.

The Advocate General delivered his opinion at the sitting on 11 November 1981.

Decision

1 By order of 14 November 1980, which was received at the Court on 5 December 1980, the Court of Appeal, Criminal Devision, London, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions as to the interpretation of Article 102 of the Act of 22 January 1972 concerning Conditions of Accession and the Adjustments to the Treaties and certain other provisions of Community law in relation to a United Kingdom measure concerning fisheries.

2 These questions were raised in the context of criminal proceedings against the master of a French trawler, Mr Tymen, for the infringement of the Fishing Nets (North-East Atlantic) (Variation) Order 1979 (SI 1979 No 744). That order, which entered into force on 1 July 1979 and which amended the Fishing Nets (North-East Atlantic) Order 1977 (SI 1977 No 440), prohibits in a specified zone of the Atlantic and Arctic Oceans and the seas adjacent to those oceans the presence on board fishing boats of nets having a mesh-size less than certain prescribed minimum sizes.

3 In the case in point Mr Tymen was found guilty by Cardiff Crown Court of offences contrary to the above-mentioned orders, having been found in possession on 16 October 1979 on board his ship within the United Kingdom fishing zone of nets having an average mesh-size less than the minimum permitted mesh-size. He appealed against that judgment to the Court of Appeal, Criminal Division.

4 It should be recalled that the above-mentioned United Kingdom orders have led to two actions against the United Kingdom for failure to fulfil its obligations under the Treaty, brought by France and the Commission under

Articles 170 and 169 of the EEC Treaty respectively. In the first of these cases the Court declared, in its judgment of 4 October 1979 (Case 141/78, *France* v *United Kingdom*, [1979] ECR 2923) that, by bringing into force on 1 April 1977 the Fishing Nets (North-East Atlantic) Order 1977, the United Kingdom had failed to fulfil its obligations under the EEC Treaty. In the second case the Court declared, by judgment of 5 May 1981 *(Case 804/79, Commission* v *United Kingdom,* [1981] ECR 1045) that the United Kingdom had failed to fulfil its obligations under the EEC Treaty *inter alia* by having brought into force on 1 July 1979, without appropriate prior consultation and in spite of the Commission's objections, the Fishing Nets (North-East Atlantic) (Variation) Order 1979 (SI No 744).

5 Since the Court of Appeal, Criminal Division, considered that a ruling of the Court of Justice was necessary to enable it to decide whether the United Kingdom order of 1979 was compatible with Community law it submitted the following questions:

"1. Does a Member State have power to adopt and bring into force a fishery conservation measure prescribing a minimum mesh size for nephrops of a kind contained in the United Kingdom's Fishing Nets (North-East Atlantic) (Variation) Order 1979 (SI 1979 No 744) after the expiry of the period referred to in Article 102 of the Act of Accession on 31 December 1978?

2. If not, have individuals prosecuted under such a measure any and if so what rights which national courts must protect?

3. If the answer to 1 above is yes, would

(a) the procedural requirements or

(b) the other requirements of the following provisions:

(i) Article 3 of Council Regulation No 101/76 of 19 January 1976;

(ii) Annex VI to the Hague Resolution of 3 November 1976;

(iii) Decision 79/590/EEC of 25 June 1979;

(iv) Article 5 of the EEC Treaty,

have been satisfied by a Member State which, before adopting such a fishery conservation measure, acted in the way the United Kingdom acted as shown in the file marked 'Statement of Facts' annexed hereto?

4. Does the fact that the Court of Justice in Case 141/78 *French Republic* v *United Kingdom* [1979] ECR 2923 found that the United Kingdom, in bringing into force the Fishing Nets (North-East Atlantic) Order 1977 (SI 1977 No 440), failed to fulfil its obligations under the EEC Treaty, make any difference to the answer to 3 above?

5. If all or any of the aforesaid requirements were not satisfied, have individuals prosecuted under such a measure any and if so what rights which national courts must protect?"

First question

6 The first question inquires whether the Member States still retained power after 31 December 1978 to adopt conservation measures of the kind contained in the United Kingdom order in question.

7 As the Court has already held in its above-mentioned judgment of 5 May 1981, the power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Communities since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession so that after that date the Member States are no longer entitled to exercise any power of their own in this matter and may henceforth only act as trustees of the common interest, in the absence of appropriate action on the part of the Council.

8 The Court consequently held in that judgment that, in a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force the Member States not only have an

obligation to undertake detailed consultations with the Commission and to seek its approval in good faith but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which may be formulated by the Commission.

9 The United Kingdom claimed that the Commission had in essence opposed the date of the entry into force of the order referred to by the national court, that is 1 July 1979, without putting forward objections as to its content. Since the Commission had submitted to the Council at the same time, that is in June 1979, proposals which in substance were identical and which were to enter into force on 1 September 1979, it by implication approved the order with effect from that date.

10 In this connection it is not contested by the Commission that the United Kingdom order of 1979 corresponded, in principle at least, to the measures proposed at the same time by the Commission to the Council for the whole of the relevant areas of sea. The criticisms advanced by the Commission were based on the consideration that measures of that nature could not be introduced without affording fishermen a reasonable time within which to adapt themselves to them. Moreover, according to the Commission, such measures might properly be taken only for the Community as a whole. By unilaterally adopting the measures in question the United Kingdom has encroached on powers which, from 1 January 1979, belonged entirely to the Community.

11 It is to be remarked in this connection that a proposal submitted by the Commission to the Council with a view to taking concerted Community action cannot be considered as constituting in itself approval of a unilateral national measure, even of one having the same content, which is adopted in a sphere coming within the powers of the Community. To accept the reasoning of the British Government would amount to recognizing the lawfulness of national measures adopted in a sphere within which the powers of the Community apply solely by reason of the existence of a Community proposal which is identical in principle. That would not only be contrary to legal certainty but would lead to a distortion of the division of powers between the Community and the Member States and would thus adversely affect the essential balances established by the Treaty.

12 Furthermore, where, with regard to fishery conservation measures adopted during the period in which the Council had not yet exercised the powers which it possesses, the Commission has put forward express objections to the national measure contemplated, such objections may be considered to have been withdrawn only when the Commission has clearly and expressly indicated that it no longer intends to insist on them. Consideration, in the light of the state of the law thus defined, of the measure referred to by the national court does not disclose any factor of such a kind as to allow the conclusion that that is the position. On the contrary, as is made clear by the communication from the Commission relating to the publication of national fishery conservation measures of 4 June 1980 (Official Journal C 133, p. 2), the Commission, on 3 August 1979, expressly persisted in its disapproval of the disputed order as such although it approved of the designation in the order of a certain fish as a protected species.

13 Similarly, the United Kingdom's alternative argument to the effect that the Commission acted unreasonably by refusing its approval must be rejected. Where, as was found with regard to the contested measures in the above-mentioned judgment of 5 May 1981, the Member State concerned has omitted to apply the procedure of consultation in such a way as to enable the Commission to undertake an appropriate examination of the measures contemplated it is impossible to charge the Commission with having acted in breach of the law by failing to approve the measure retroactively.

14 The reply to the first question must accordingly be that after the expiry of the period referred to in Article 102 of the Act of Accession a Member State does not have power to adopt and bring into force, without appropriate prior consultation with the Commission and in spite of objections, reservations or conditions formulated by the Commission, a fishery conservation measure of the kind which forms the subject-matter of the Fishing Nets (North-East Atlantic) (Variation) Order 1979 (SI 1979 No 744).

Second question

15 The second question inquires in substance whether individuals may be prosecuted under a measure which is found to be contrary to Community law.

16 The same question has already formed the subject-matter of the judgment of 16 February 1978 (Case 88/77, *Schonenberg*, [1978] ECR 473). In that judgment, which, like the present case, concerned a breach of national fishery provisions, the Court found that where criminal proceedings are brought by virtue of a national measure which is held to be contrary to Community law a conviction in those proceedings is also incompatible with that law.

17 The reply to the second question must accordingly be that where criminal proceedings are brought by virtue of a national measure which is held to be contrary to Community law a conviction in those proceedings is also incompatible with that law.

Third, fourth and fifth questions

18 Since the third, fourth and fifth questions were submitted only in the event of an affirmative reply to the first question it is unnecessary to reply to them.

Costs

19 The costs incurred by the United Kingdom, the French Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the main action is concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Court of Appeal, Criminal Division, by order of 14 November 1980, hereby rules:

1. **After the expiry of the period referred to in Article 102 of the Act of Accession a Member State does not have power to adopt and**

bring into force, without appropriate prior consultation with the Commission and notwithstanding objections, reservations or conditions formulated by the Commission, a fishery conservation measure of the kind which forms the subject-matter of the Fishing Nets (North-East Atlantic) (Variation) Order 1979 (SI 1979 No 744).

2. Where criminal proceedings are brought by virtue of a national measure which is held to be contrary to Community law a conviction in those proceedings is also incompatible with that law.

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 16 December 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 NOVEMBER 1981 [1]

Mr President,
Members of the Court,

The main action, which gave rise to the reference for a preliminary ruling which is to be considered today, concerns the point whether the United Kingdom Fishing Nets (North-East Atlantic) Order 1977, as amended by the Fishing Nets (North-East Atlantic) (Variation) Order 1979, is compatible with the provisions of Community law. Both the United Kingdom measures, which concern the conservation of fishing stocks, have already formed the subject-matter of proceedings for breach of Treaty obligations in which the Court of Justice was able to consider in detail the orders in question together with the relevant provisions of Community law. In its judgment of 4 October 1979 in Case 141/78, *French Republic* v *United*

1 — Translated from the German