OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 6 June 1990 *

Mr President,
Members of the Court,

1. These proceedings are concerned with a reference for a preliminary ruling made under Article 177 of the Treaty by the High Court of Justiciary (Scotland) in proceedings pending before that court between the Procurator Fiscal, Stranraer, and Mr Andrew Marshall.

2. The legislative background to the proceedings is relatively straightforward.

Article 19 of Council Regulation (EEC) No 171/83 of 25 January 1983 laying down certain technical measures for the conservation of fishery resources [1] authorizes the Member States to take, within the context of the common fisheries policy, additional national measures designed to secure a more balanced exploitation of those resources.

Article 19 reads as follows:

'1. In the case of strictly local stocks of interest to the fishermen of one Member State only, that Member State may take measures for the conservation and management of those stocks, provided that such measures are compatible with Community law and are in conformity with the common fisheries policy.

2. Member States shall be authorized to lay down any strictly local conditions or detailed arrangements, applying to their national fishermen only, designed to limit the catches by technical measures in addition to those defined in the Community regulations, provided that such measures are compatible with Community law and are in conformity with the common fisheries policy.

3. Before adopting any measures referred to in paragraphs 1 and 2, the Member State concerned shall obtain the agreement of the Commission on the finding that the measures are in conformity with one or other of these paragraphs.

The Commission shall take a reasoned decision within three months of a request being submitted under the terms of the first subparagraph.

...'

3. On 14 January 1986 the Secretary of State for Scotland, having obtained the requisite agreement of the Commission, made an order prohibiting the carriage of monofilament gill nets in British fishing boats in the sea area adjacent to the coast of Scotland and within a limit of six miles from the baseline.

* Original language: Italian.
1 — OJ 1983 L 24, p. 14.

The order was designed to ensure compliance with the prohibition on salmon fishing in Scottish inshore waters laid down by an earlier order.

According to the written observations submitted by the United Kingdom, the fisheries authorities became aware that, despite the existing ban, a large amount of illegal salmon fishing was being carried out by British fishing vessels, especially by means of monofilament gill nets, in Scottish waters and that this was threatening the traditional salmon fisheries and causing serious damage to the local economy.

4. The facts which gave rise to these proceedings can readily be summarized.

On 20 September 1986, following an inspection carried out in waters adjacent to the coast of Scotland on board a vessel belonging to Mr Marshall, a British subject resident in Scotland, the latter was charged with unlawfully carrying a monofilament gill net in his boat.

In criminal proceedings against him in the Sheriff Court at Stranraer, Mr Marshall maintained, *inter alia*, that the order was unlawful on the ground that it discriminated against Scottish fishermen in comparison with other Community fishermen, and between Scottish fishermen and other British fishermen operating from ports outside the waters to which the ban applied.

Only British fishermen operating from Scottish ports cannot use the type of net at issue even where its use is permitted, because that would necessarily entail the carriage of the nets across the relevant inshore waters.

The Sheriff accepted Mr Marshall's argument and dismissed the complaint.

5. The Procurator Fiscal appealed to the High Court of Justiciary, which stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Do the provisions of Article 7 or Article 40(3) of the EEC Treaty, or any other provision of Community law, prevent a Member State from adopting, with the prior valid approval of the Commission, a measure prohibiting the carriage on a fishing vessel registered in that Member State, while that vessel is within an area of the inshore waters of that Member State adjacent to a part of the coast thereof, of a fishing net of a specified type and construction, the use of which is otherwise not prohibited under Community legislation; and if so, in what circumstances?

(2) (a) Is Article 19 of Council Regulation (EEC) No 171/83 valid under Community law?

(b) If so, does a measure such as that described in Question 1 properly come within the scope of Article 19?'

6. I shall first consider the question concerning the validity of Article 19 of the regulation in question.

I would start by saying that it is not absolutely clear to me what the basis is for the uncertainty which is said to exist as to the validity of Article 19 under Community law.

Mr Marshall maintained before the national court that Article 19 was invalid in that, in fact, it authorized Member States to take measures under the common fisheries policy which conflicted with the fundamental principles of the Treaty.

However, Mr Marshall, who has not submitted written observations in the course of these proceedings, stated at the hearing that he did not seek to contest the validity of Article 19 but only the validity under Community law of the order of the Secretary of State for Scotland.

In any event, I shall make the following observations of a general tenor in order to answer the question put by the national court.

7. As we have seen, Article 19 of Regulation No 171/83 authorizes Member States to take measures for the conservation and management of strictly local stocks or to lay down conditions or detailed arrangements — of a local nature and applying to national fishermen only — designed to limit catches. Naturally, this authorization is subject to the proviso that the measures must be compatible with Community law and in conformity with the common fisheries policy, and to the prior agreement of the Commission.

8. As the Council has rightly pointed out in its written observations, the situation is one in which the Community has in principle legislative competence but has decided, within certain limits and subject to certain conditions, to give Member States the possibility of adopting more stringent measures of a local nature in the light of specific situations.

The measure appears to be completely consistent with the line of reasoning followed by the Court in the judgment in Case 804/79 *Commission* v *United Kingdom*,[2] to the effect that even though power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has passed fully and definitively to the Community, it is not entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere, provided that such amendments are of limited scope and do not involve a new conservation policy on the part of a Member State.

It is also worthwhile observing that in the same judgment the Court stated that the process of cooperation between Member States and the Commission in the sector in question has been confirmed by a practice

2 — Judgment in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, paragraphs 17 and 22.

which has been widely followed inasmuch as the Commission has given its views on a large number of national conservation measures notified to it by the various Member States concerned and has put forward, where appropriate, reservations or conditions (paragraph 32).

9. Moreover, a delegation of legislative powers, of the type in this case, is all the more easy to understand bearing in mind that the reproduction of the various species may have characteristics which differ considerably from one biological area to another and, in addition, that fish stocks are not an inexhaustible resource.

Indeed, as the Court has stated, whilst measures for the conservation of the resources of the sea restrict 'production' in the short term, they are aimed precisely at preventing such 'production' from being marked by a fall in the future and, in the absence of measures designed to ensure optimum utilization of the factors of production, certain resources of the sea would rapidly become exhausted. [3]

10. As for the argument that the national measures taken may have the effect of subjecting fisherman operating on vessels subject to the jurisdiction of the State in question to more stringent measures than those applying to fishermen operating on vessels subject to the jurisdiction of other Member States, it is sufficient to observe that, as the Court has repeatedly stated, the fact that the rules applied by one Member State are stricter than those applied in the same sphere by other Member States does not constitute a breach of the principle of non-discrimination laid down in Article 7 of the Treaty, as long as the provisions in question, which are moreover compatible with Community law, are applied equally to every person under the jurisdiction of that State. [4]

11. In view of the foregoing I take the view that consideration of the question submitted to the Court has disclosed no factor of such a kind as to cast doubt on the validity of Article 19 of Regulation No 171/83.

12. In Question 1 the High Court of Justiciary asks the Court whether the provisions of Article 7 or Article 40(3) of the EEC Treaty, or any other provision of Community law, prevent a Member State from adopting, with the prior valid approval of the Commission, a measure of the kind described above and, if so, in what circumstances.

13. Before considering the substance of the question, it is necessary in my view to clarify a number of matters relating to the actual nature of the measure in question.

In that connection, it should be pointed out that what is involved in this case is in reality a complex process consisting, on the one hand, of the national measures and, on the other, of the necessary decision giving the Commission's 'approval'.

3 — Judgments in Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279, paragraph 58 and in Case 46/86 *Romkes* v *Officier van Justitie* [1987] ECR 2681, paragraph 22.

4 — Judgments in Case 223/86 *Pesca Valentia* v *Minister for Fisheries and Forestry* [1988] ECR 83, paragraph 18 and in Joined Cases 185 to 204/78 *van Dam and Others* [1979] ECR 2345, paragraph 10.

Consequently, it is a question of national measures which have in some way been 'communitized', if I may be permitted to use such a term.

This is borne out by the fact that in the absence of the Commission's agreement the Member States may not adopt in their own right the measures provided for in Article 19(1) and (2), but have to make use of the management committee procedure laid down in Article 14 of Regulation (EEC) No 170/83 (see Article 19(4) of Regulation No 171/83).

It follows, moreover, that any finding that the national measures are invalid under Community law implicitly but necessarily entails assessing the legality of the decision by which the Commission gave its approval to the adoption of the measures.

14. Having said that, I shall consider the substance of the question submitted to the Court.

As regards the consistency of the measures in question with Article 7 of the Treaty I consider that I have already dealt with that aspect (see point 10).

15. In contrast, the assessment of the order in the light of Article 40(3) of the Treaty, which provides that the common organization of the agricultural markets must exclude any discrimination between producers or consumers within the Community, is a more delicate matter.

As far as the field of application of that provision is concerned, I would point out that, according to the case-law of the Court, Article 40(3) of the Treaty constitutes a specific constraint, not only as regards measures relating to the common organization of the agricultural markets adopted by Community institutions, but also for the Member States when they are adopting measures relating to the common organization of the agricultural markets pursuant to a Community regulation; it follows that Article 40(3) is also relevant with respect to a national measure such as the British order at issue. [5]

As for the substance of Article 40(3), it appears from a consistent line of cases that the prohibition of discrimination set out therein is simply a specific expression of the general principle of equality, which is one of the fundamental principles of Community law. That principle requires that similar situations shall not be treated differently unless the differentiation is objectively justified. [6]

16. The Court has also made it clear that different treatment may not be regarded as discrimination prohibited by Article 40(3) of the Treaty unless it appears to be arbitrary, or in other words devoid of adequate justification and not based on objective criteria. [7]

I shall say forthwith that in the light of that case-law it does not seem to me that the contested prohibition, albeit in fact

5 — Judgments in Case 207/86 *Apesco* v *Commission* [1988] ECR 2151, paragraph 23, and in Joined Cases 201 and 202/85 *Klensch* v *Secrétaire d'Etat* [1986] ECR 3477, paragraph 8.

6 — Judgments in Case 84/87 *Erpelding* v *Secrétaire d'Etat* [1988] ECR 2647, paragraph 29, in *Klensch*, cited above, paragraph 9, in Case 117/76 *Ruckdeschel* [1977] ECR 1753, paragraph 7 and in Joined Cases 124/76 and 20/77 *Moulins Pont-à-Mousson* [1977] ECR 1795, paragraph 16.

7 — Judgments in Case 106/81 *Kind* v *EEC* [1982] ECR 2885, paragraph 22 and in Case 139/77 *Denkavit* [1978] ECR 1317, paragraph 15.

particularly affecting fishermen operating on British vessels sailing from Scottish ports, can truly be described as discriminatory.

It must be borne in mind in fact that the order in question constitutes a typical ancillary measure adopted in order to ensure that the prohibition on fishing for salmon along the Scottish coasts is complied with.

It does not appear that doubt has been cast in these proceedings on the legality of the prohibition on salmon fishing, either as regards its substance or the area to which it applies.

It follows that an ancillary measure, such as the one described, by reason of its very nature — given that it is concerned with inshore waters — affects fishermen sailing from the ports affected by the prohibition more and indeed, in certain respects, exclusively.

Furthermore, any ban restricted to a particular geographical area affects the various economic agents to a different extent depending on their location but, in so far as the territorial scope of the measure is objectively justified, the measure cannot be regarded as discriminatory on that ground.

17. The problem arising for a measure of this type is therefore not so much one of discrimination as one of proportionality.

The principle of proportionality, which, in my view is binding on the Member States, in the same way as the principle of non-discrimination, when they act as 'managers' of the common interest in the context of a common organization of the markets, requires that the restrictive measures adopted should be appropriate for the attainment of the objective sought and should not exceed what is necessary in order to attain that objective.

Applying that principle it seems clear that a prohibition of the type laid down in the British order would be completely lawful if particular fish stocks were under serious threat, if there was no reasonable possibility of adopting alternative measures which would be equally effective and if the fishermen did not have to make an excessive sacrifice (that is to say, if they did not have a genuine interest in using the particular kind of net at issue).

18. Now, even though the request for a preliminary ruling casts but little light on the question whether those circumstances actually obtain, I consider that I should make the following remarks in the light of the facts which have emerged in the course of the proceedings.

In the first place, it appears to be uncontested that owing to its particular construction the monofilament gill net affords a particularly effective means of catching salmon, as witness, moreover, the fact that Ireland, too, which is faced with similar problems, prohibits the use of that type of net for salmon fishing in its waters.

Secondly, salmon have the particular characteristic of returning to swim back up the rivers to spawn; therefore it is necessary in order to guarantee the survival of the

species that at least some of them should succeed and therefore not be intercepted in inshore waters.

19. As regards the possibility of ensuring that the ban on salmon fishing is complied with simply by stepping up checks and thus without prohibiting the carriage of the nets in question, it must be borne in mind that the Scottish coastline — which is moreover thinly populated — is so extensive that it is difficult in practice to check that a vessel carrying such a net does not subsequently use it for unlawful purposes.

Moreover, there has been a ban on salmon fishing in Scottish inshore waters using monofilament gill nets for decades but, according to the United Kingdom, it was sparsely complied with before the adoption in 1986 of the contested ban on the carriage of such nets.

20. As far as the actual interest in using that type of net for permitted purposes is concerned, the United Kingdom stated that, according to a survey carried out by the competent Scottish authorities, in 1985 the value of British fishing boats' annual landings in Scottish ports was UKL 215 million, whilst the value of the fish caught legitimately using monofilament nets and landed in those ports in the same period was only UKL 25 000.

Although Mr Marshall contested those figures at the hearing he was unable to provide alternative figures or clearly to explain why he disagreed with the figures produced.

21. In the light of those considerations I consider that I can reach the conclusion that consideration of the question has disclosed no factor of such a kind as to suggest that the measure at issue conflicts in this case with the principle of proportionality.

22. However, it is clear that should the national court find that different circumstances or new factors exist compared with those set out above, it could refer the question back to the Court of Justice; indeed, given that the measures adopted pursuant to Article 19 of Regulation No 171/83 are supported by a Commission decision holding that they are compatible with Community law, I take the view that in any event the national court could not refrain from applying them without the prior intervention of the Court of Justice.

23. As for the question of a possible infringement of fundamental rights, I shall confine myself to pointing out that, according to the case-law of the Court, it is legitimate to subject the freedom to pursue a trade, occupation or profession to limits justified by the general objectives pursued by the Community, on condition that the substance of those rights is left untouched. [8]

However, in this case the measure adopted appears, when considered in the context of the common organization of the markets in fisheries products, to be fully justified by general objectives and is certainly not such

8 — Judgments in Case 234/85 *Staatsanwalt* v *Keller* [1986] ECR 2897, paragraph 8 and in Case 4/73 *Nold* v *Commission* [1974] ECR 491, paragraph 14.

as to detract from the substance of the rights of the economic agents concerned.

24. In its last question the national court asks the Court whether such a measure falls within the scope of Article 19 of Regulation No 171/83.

In that connection I would observe in the first place that the measure in question, when placed in the wider context of the Community, undoubtedly acquires a local character despite the extent of the waters concerned.

Furthermore, the scope of the measure as regards British vessels does not seem to me to be at odds with the reference made in Article 19 to national fisherman, since that term must be intended to refer to economic agents who are in any event subject to the jurisdiction of the State in question.

Lastly, as regards the claim that the decision by which the Commission authorized the adoption of the measure is insufficiently reasoned, I would merely point out that in view of the nature of that decision — in practice a simple check that the conditions laid down in Article 19 are fulfilled — even a brief statement of reasons, such as that set out in the decision in this case, may be regarded as sufficient.

25. In the light of the considerations set out above, I therefore propose that the Court should answer the questions put by the High Court of Justiciary as follows:

'(1) Consideration of the question submitted to the Court has disclosed no factor of such a kind as to cast doubt on the validity of Article 19 of Council Regulation (EEC) No 171/83.

(2) Community law, in particular Article 7 and Article 40(3) of the EEC Treaty, does not prevent a Member State from adopting, with the prior valid approval of the Commission, a measure prohibiting the carriage on a fishing vessel registered in that Member State, while that vessel is within an area of the inshore waters of that Member State adjacent to a part of the coast thereof, of a fishing net of a specified type and construction, the use of which is otherwise not prohibited under Community legislation, provided that, as it appears in this case in the light of the facts available to the Court, that measure appears appropriate for the attainment of the objective sought and does not exceed what is necessary in order to attain that objective.

(3) a measure such as that described above properly comes within the scope of the measures covered by Article 19 of Council Regulation (EEC) No 171/83.'