designed to answer urgent needs, may be agreed upon by means of a process of cooperation beween the Member States and the Commission in order to enable the Community to meet its responsibilities. In the absence of such cooperation proposals unilaterally made by the Commission in relation to the fishing quotas to be allocated to a Member State cannot be regarded as Community rules within the meaning of Article 3 of Regulation No 729/70 on the financing of the common agricultural policy, disregard of which could justify the Commission's refusal to charge to the European Agricultural Guidance and Guarantee Fund expenses incurred by the Member State for intervention measures connected with catches in excess of the said quotas.

3. Community legislation must be certain and its application foreseeable by those subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them.

REPORT FOR THE HEARING
delivered in Case 346/85 *

I — Facts

1. According to Article 1 (2) (b) and Article 3 of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) intervention intended to stabilize the agricultural markets, undertaken according to Community rules within the framework of the common organization of agricultural markets, is financed out of the Guarantee Section of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as 'the Fund').

Article 5 (2) (b) provides that the Commission must clear the accounts of the authorities and bodies responsible for the payment of the expenses referred to in Article 3 of the regulation before the end of the following year and on the basis of the annual accounts.

Article 8 (a) of Regulation No 1723/72 of the Commission of 26 July 1972 on the clearance of the accounts of the Fund (Official Journal, English Special Edition (Second Series) III, p. 109) provides that the decisions on the clearance of accounts referred to in Article 5 (2) (b) of Regulation No 729/70 should include determination of the amount of expenditure incurred in each

* Language of the Case: English.

Member State during the relevant year and recognized as chargeable to the Fund.

2. The main elements of a common fisheries policy were established in 1970 by Regulation No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry and Regulation No 2142/70 of the Council of 20 October 1970 on the common organization of the market in fishery products (Official Journal, English Special Edition 1970 (III), pp. 703 and 707). Articles 100 to 102 of the Act of Accession of 1972 confirmed and partly amended them in relation to access to fish stocks. In particular Article 102 provided that from the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, was to determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

3. Regulations Nos 2141/70 and 2142/70 were replaced by Council Regulation No 100/76 of 19 January 1976 on the common organization of the market in fishery products and Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (Official Journal, L 20, pp. 1 and 19).

The last recital in the preamble to Regulation No 100/76 stated that the expenditure incurred by the Member States as a result of the obligations arising out of the application of the regulation was to fall on the Community in accordance with the provisions of Articles 2 and 3 of Regulation No 729/70.

Regulation No 100/76 contained no provision similar to Article 26 (2) of Council Regulation No 3796/81 of 29 December 1981 on the common organization of the market in fishery products (Official Journal, L 379, p. 1), which was applicable from 1982. Article 26 (2) provides that intervention measures are to be financed in respect of products from a stock or group of stocks only up to the limit of any quantities allocated to the Member State in question.

Article 1 of Regulation No 101/76 provided that common rules should be laid down for fishing in maritime waters and specific measures should be adopted for appropriate action and the coordination of the structural policies of Member States to promote harmonious and balanced development of the fishing industry and to encourage rational use of the biological resources of the sea and of inland waters.

Article 4 provided that where there was a risk of over-fishing of certain stocks in maritime waters of the Member States, the Council, acting in accordance with the procedure provided for in Article 43 (2) of the Treaty on a proposal from the Commission, could adopt the necessary conservation measures. In particular, those measures could include restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear.

4. On 6 April 1976 the Council adopted Regulation No 811/76 temporarily authorizing certain systems of catch quotas in the fisheries sector (Official Journal, L 94, p. 1), in which it authorized Member States to limit catches of their fishing fleets in accordance with international undertakings contracted or to be contracted. The first recital to the regulation stated that 'the fishery resources of the sea would be considerably endangered if catches were not controlled; ... the rational development of the production of fishery products might be disturbed if no limit were placed on the size of landings'.

5. On 6 October 1976 the Commission submitted to the Council a proposal for a regulation establishing a Community system of conservation and management of fishery resources, on which the Council was not able to reach agreement, however, until 1983.

6. On 3 November 1976 the Council adopted what is known as the 'Hague Resolution'. In Annex VI thereto it was stated that, pending the implementation of the Community measures then in preparation relating to the conservation of resources, the Member States would not take any unilateral measures in respect of the conservation of resources. It provided, however, that if no agreement was reached for 1977 within the international fisheries commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoided discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts. Before adopting such measures, the Member State concerned would seek the approval of the Commission, which had to be consulted at all stages of the procedures.

7. On 18 February 1977 the Council adopted Regulation No 350/77 laying down certain interim measures for the conservation and management of fishery resources (Official Journal, L 48, p. 28), applicable until 31 December 1977 at the latest.

8. At a meeting on 31 January 1978 the Council approved a Commission communication according to which, in the absence of a common system, national measures could only be taken in so far as they were strictly necessary for the conservation and management of fishery resources and were non-discriminatory and in conformity with the Treaty, and if the approval of the Commission had been sought beforehand (Official Journal, C 154, p. 5).

9. On 19 December 1978 the Council adopted interim measures applicable until the end of March 1979.

10. On 1 January 1979 the transitional period provided for in Article 102 of the 1972 Act of Accession expired. On that date power to take measures intended to conserve maritime resources was to be vested fully and definitively in the Community. Because it was not able to reach agreement on the Commission's proposals, the Council adopted fresh interim measures in 1979 and in March 1980.

11. On 30 May 1980 the Council adopted a declaration concerning the common fisheries policy (Official Journal, C 158, p. 2) in which it undertook to adopt a common overall fisheries policy by 1 January 1981 at the latest. In compliance with the Treaties and in conformity with the Resolution of 3 November 1976 (the Hague Agreement) the policy was to be based *inter alia* on rational and non-discriminatory Community measures for the management of resources, the conservation and reconstitution of stocks and fair distribution of catches.

Council Decision 80/601 of 16 June 1980 (Official Journal, L 160, p. 48) referred to that declaration and adopted fresh interim measures applicable until 31 July 1980.

Council Decision 80/993 of 28 October 1980, based on the Treaties, concerned fishery activities in waters under the sovereignty or jurisdiction of Member States and was adopted on a temporary basis pending the adoption of permanent Community measures (Official Journal, L 298, p. 38); it

provided for the following interim measures, applicable until 20 December 1980:

'(1) Member States shall conduct their fishing activities in such a way as to take into account the total allowable catches (TACs) and the part of the TACs made available to third countries under agreements or arrangements made with them, as given in Regulation (EEC) No 754/80, and in the Commission's amended proposals of 12 September and 24 October 1980, and shall inform the Commission in accordance with Regulation (EEC) No 753/80. The catches taken in the interim period will be offset against the allocations eventually decided upon by the Council for 1980.

(2) As regards the technical measures for the conservation and surveillance of fishery resources in geographical areas not covered by Council Regulation (EEC) No 2527/80, Member States shall apply the same measures as they applied on 3 November 1976, and other measures taken in accordance with the procedures and criteria of Annex VI to the Council Resolution of 3 November 1976.'

At its meeting on 15 to 17 December 1980 the Council adopted a declaration in the minutes to the effect that the Member States would conduct their fishing activities in such a way that the catches made by their ships during the interim period would take into account the total allowable catches (TACs) submitted for 1981 by the Commission to the Council in its proposals of 18 November and 16 December 1980.

12. In the conservation of resources the Community had also to take into account its international obligations.

13. In 1981 the Commission repeatedly amended its TAC proposals and ultimately submitted to the Council on 24 July 1981:

(i) a proposal for a regulation concerning, for certain fish stocks occurring in the Community fishing zone, the fixing of the total allowable catches for 1981 and the shares available to the Community (Official Journal, C 224, p. 2);

(ii) an amendment to the proposal for a Council regulation fixing the conditions governing fishing operations when taking the total allowable catches for 1981 (Official Journal, C 224, p. 10), the proposal submitted to the Council on 6 March 1981 (Official Journal, C 224, p. 7); and

(iii) a proposal for a regulation concerning the distribution among the Member States of the total catch possibilities available to the Community in 1981 of stocks or groups of stocks occurring in the Community fishing zone (Official Journal, C 224, p. 11).

In a declaration submitted to the Council on 27 July 1981 (Official Journal, C 224, p. 1) the Commission set out the position resulting from the absence of agreement on its proposals to fix the TACs and quotas for 1981. The Commission recalled that it had certain rights and duties under Article 155 of the Treaty, as had been confirmed by the Court *inter alia* in its judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045. In view of the overriding public interest and as a precautionary measure, pending a final decision by

the Council, the Commission therefore called upon all Member States in pursuance of their rights and duties to conduct their fishing activities in such a way as to ensure compliance with the Commission's proposals. The Commission also declared that it was determined to use all the means in its power to ensure the respect by Member States of those proposals, which it considered in the circumstances to be legally binding upon the Member States.

It is apparent from the minutes of the Council meeting on 27 July 1981 (PV/Cons. 37th Fishing 197, 8682/81, pp. 8 and 9) that the Commission's declaration was challenged by the Council's legal department and various Member States, including the United Kingdom, and that finally the Council agreed to discuss the TACs and quotas proposed for 1981 at its next meeting.

In a letter to the Member States dated 28 July 1981 the Commission drew attention to its declaration and added that it believed it was obliged not merely to approve or disapprove in the light of its proposals national measures as and when they might be submitted, but also to require all Member States to take steps to comply with those proposals. The Commission stated that its position was dictated by the necessity of controlling fishing activity in the interim period; pending the next meeting of the Council the Commission intended to give its approval to catches which amounted to not more than three-quarters of the amount of the quotas proposed by the Commission. The Commission called upon all Member States to indicate not later than 24 August 1981 the measures which they proposed to take in order to ensure that the general rule was observed in the interim period.

14. From 1 January 1982 until 31 March 1982 fishing activities in Community waters were once again governed by an interim Council decision, Decision 81/1052 of 29 December 1981 (Official Journal, L 379, p. 52) requiring the Member States to take into account the TACs proposed by the Commission on 24 July 1981. Subsequently, the Council adopted other provisional measures for 1982.

15. On 25 January 1983 the Council adopted Regulation No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (Official Journal, L 24, p. 1). Article 3 provides for the fixing of the TACs and Article 4 for the distribution of the available share of the TACs between Member States. In application of that regulation the Council subsequently fixed the necessary TACs and quotas. However, it did not fix them for 1981.

16. In a telex message of 25 May 1984, in relation to the clearing of the Fund's accounts for 1980-81, the Commission informed the United Kingdom that some of the expenditure declared in the fisheries sector could not be borne by the Fund since it had not been incurred in accordance with Community rules. The catches not covered by the quotas provided for by the Commission were not eligible for Community financing unless it was shown that the quantities at issue had not caused expense to the Community. The message set out the method of calculating the expenditure declared ineligible and the financial consequences. The sum at issue was UKL 22 169.79, relating to 74 627 tonnes of cod and hake.

17. In a telex message of 12 June 1984 the United Kingdom requested further time to examine the issues raised by the Commission and contested the amount of hake. In a letter of 25 July 1984 the United Kingdom stated that it did not accept the validity of the Commission's declaration of 27 July 1981 and that Regulation No 3796/81, which introduced the rule restricting the financing of intervention measures to catches within the quotas, could not apply to 1981.

18. In a telex message of 24 August 1984 the Commission asked the United Kingdom for its views on the figures communicated to it.

Following a meeting held on 27 September 1984 as part of the preparatory work on the clearance of the accounts for 1980 and 1981, the Commission sent the United Kingdom a telex message on 16 October 1984 containing a summary of the various points established during the exchange of views. At point 6.4 the Fund's officials asked the United Kingdom to let them have its views on those calculations as soon as possible.

In its reply of 9 November 1984 the United Kingdom stated that it was clear from the amended figures shown in the Commission's telex message that the proposed reduction was based on the total compensation paid on the two species of fish and in that respect the revised figures were correct.

19. In Decision 85/466/EEC of 28 August 1985 on the clearance of the accounts presented by the United Kingdom in respect of the Fund, expenditure for 1981 (Official Journal, L 267, p. 52), the Commission refused financing of UKL 12 976.92 and UKL 3 236.25 incurred by the United Kingdom in 1981 by way of financial compensation to producers' organizations in respect of compensation paid by them for the withdrawal of cod and hake respectively from the market.

II — Written procedure and conclusions of the parties

1. The application by the United Kingdom was lodged at the Court Registry on 15 November 1985.

2. Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

3. The *United Kingdom*, the applicant, claims that the Court should:

(i) Declare Commission Decision 85/466/EEC void in so far as it excludes from the charges made to the Fund the expenditure of UKL 12 976.92 and UKL 3 236.25 incurred by the United Kingdom in 1981 by way of financial compensation to producers' organizations in respect of compensation paid by them for the withdrawal of cod and hake respectively from the market;

(ii) Order the Commission to pay the costs.

4. The *Commission*, the defendant, contends that the Court should:

(i) Dismiss the application as unfounded;

(ii) In any event order the applicant to pay the costs.

III — Submissions and arguments of the parties

In support of its action, which is based on Article 173 of the EEC Treaty, the *United Kingdom* relies on four submissions:

A — Infringement of Article 43 of the EEC Treaty and Article 102 of the Act of Accession in conjunction with Regulations Nos 729/70, 1723/72 and 100/76.

B — Infringement of Regulations Nos 729/70, 1723/72 and 100/76.

C — Misuse of powers.

D — Infringement of essential procedural requirements.

A — *Infringement of Article 43 of the EEC Treaty and Article 102 of the Act of Accession in conjunction with Regulations Nos 729/70, 1723/72 and 100/76*

1. The *United Kingdom* submits that the Commission had no power to require Member States to observe the quotas which it had proposed in 1981 and that in seeking to make those quotas legally binding on Member States it infringed Article 43 of the Treaty and Article 102 of the Act of Accession. Since the quotas were not legally binding, the Commission was not entitled to give infringement of quotas as a ground for disallowing the expenditure against the Fund. The United Kingdom considers that in so doing the Commission infringed Articles 1, 3 and 5 of Regulation No 729/70, Article 8 of Regulation No 1723/72 and Regulation No 100/76.

The applicant considers that the quotas on which the Commission relies are not legally binding because competence to adopt Community measures in the relevant field is vested solely in the Council, as is clear from Article 43 of the Treaty and Article 102 of the Act of Accession.

(a) None of the judgments of the Court cited by the Commission supports its claim. The supervisory role of the Commission, to which the Court referred in Case 804/79 of 5 May 1981 *Commission* v *United Kingdom* [1981] ECR 1045, falls far short of a power on the part of the Commission to make legally binding Community rules, either by declaring its proposals to be legally binding on Member States or by requiring Member States to adopt national measures that comply with those proposals. The Court described the Commission's proposals in 1979 as 'the point of departure for concerted Community action' (paragraph 28), not as an independent source of legal obligation. Had they been regarded as an independent source of legal obligation, the whole basis of the Court's reasoning would have been different. The United Kingdom submits that if such proposals did not constitute a source of legal obligation, they could not be given legal force in 1981 simply by a declaration to that effect by the Commission. Moreover, in relation to the question of equal access to fish stocks by Community fishermen, the Court stated at paragraph 29 of its judgment that the Council alone had the power to determine the detailed conditions of such access in accordance with the procedures laid down by Articles 43 of the Treaty and 102 of the Act of Accession. The United Kingdom submits that the position is the same in relation to TACs and quotas generally and that the Council's sole enjoyment of the relevant power cannot be modified by a unilateral declaration by the Commission, any more than it can be modified by measures adopted unilaterally by the Member States.

There is no suggestion in the judgment of the Court of 10 July 1980 in Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403 that the various proposals put forward by the Commission had the force of law or that the Commission could require Member States to comply with them. The essential issue in that case concerned the duty of Member States to consult with the Commission before exercising the wider powers enjoyed by the Member States during the transitional period.

The judgment of the Court of 14 February 1984 in Case 24/83 *Gewiese* v *Mackenzie* [1984] ECR 817 supports the contentions of the United Kingdom rather than those of the Commission. The Court stated in paragraph 5 of its judgment that the power to adopt measures for the protection of resources had since 1 January 1979 been vested exclusively in the Council acting on a proposal from the Commission, and in paragraph 7 that 'although Member States may, in the case of inaction by the Council, bring into force interim conservation measures, they must, within the framework of the general task of supervision which Article 155 of the Treaty entrusts to the Commission, comply with the procedural and substantive conditions laid down . . . '. The United Kingdom considers that there is no suggestion in the judgment that in the case of inaction by the Council the supervisory role of the Commission entitles it to take measures in its own right, or that Member States must take national measures if so required by the Commission. The United Kingdom also points out that the Court referred, in paragraph 17 of the judgment in Case 24/83, to the Commission's proposals of 24 July 1981 and the declaration of 27 July 1981. The reference provides no basis for any inference that those proposals and the declaration had legal force on their own. As appears from the Advocate General's Opinion (at p. 839), their validity was a result of the nature of the Member States' obligation to consult the Commission before adopting national measures and to obtain its approval.

In the view of the United Kingdom the judgment of the Court of 10 July 1984 in Case 63/83 *Regina* v *Kent Kirk* [1984] ECR 2689 is also relevant. In that case the Court held that a national measure adopted with the approval of the Commission did not fall within the limited powers ascribed to the Member States by the Court in the judgment of 5 May 1981 in Case 804/79 and that the measure was void notwithstanding the Commission's declaration of 21 December 1982 (which was to the same effect as the declaration of 27 July 1981) and its approval of the measure. That is again inconsistent with the Commission's claim that it has the power to create legally binding rules pending the Council's introduction of such rules.

(b) The United Kingdom argues that the Commission cannot justify its position indirectly by referring to the powers and duties of the Member States to adopt the necessary conservation measures in the absence of appropriate action by the Council.

In the first place, the Court's judgments repeatedly stress that the exercise of powers in this area in the absence of action by the Council requires close cooperation between the Member States and the Commission. In the present case the Commission approached the matter 'with a closed mind'

and simply declared in advance that it considered its proposals to be legally binding.

The United Kingdom argues that the Commission's attempt to impose its proposals on the Member States was neither good administrative management nor lawful. Following the Council's failure to reach agreement, it was open to the Commission to request Member States to notify the measures that they intended to adopt, together with supporting reasons where such measures differed from the Commission's proposals. That would have enabled the process of cooperation and good administrative management to take place in the proper way, through detailed consultations.

The second point stressed by the Court is that it is necessary to take conservation measures in the Community interest. It is, of course, closely related to the first point: the purpose of the process of cooperation between the Member States and the Commission is to determine what measures are truly necessary in the Community interest. The United Kingdom fully recognizes the importance of conserving the Community's resources and points out that in practice it agreed with much of the substance of the Commission's proposals; however, it does not accept that the quotas in question were the maximum that could reasonably be allocated. It disputes the Commission's assertion that such quotas were necessary in the Community interest.

In the United Kingdom's view the determination of the quota comprises two elements, namely the total allowable catch (TAC) and the proportion of that TAC which may be taken by an individual Member State. The assessment of TACs is itself a complex issue and although scientific opinions, to which the Commission refers, are important, they are not the only consideration. The Community must consider a wide range of factors, as illustrated by the concern expressed by the European Parliament in its Resolution of 26 March 1981 on the Commission's initial proposals for TACs for 1981 in which it urged the Commission to review its proposals and increase the catch quotas for 1981. Moreover, scientific assessment is a continuing process. Thus in the case of North Sea cod the TAC for 1981 recommended by the Advisory Committee for Fishery Management was increased in July 1981 from 190 000 tonnes to 220 000 tonnes and the Commission revised its own proposals to increase the 190 000 tonnes proposed in December 1980 to 220 000 tonnes in July 1981.

Subsequently, the Council also set the TACs at a level appreciably above that recommended by the relevant committee. Thus the TAC which was recommended for 1982 in July 1981, 190 000 tonnes, was set at 255 000 tonnes and that figure reflected the quantities fished in 1981. The Council thus accepted that scientific opinion was not the only relevant criterion.

Differences of view may reasonably exist and there should not be attributed to the Commission's figures an absolute validity which they manifestly lacked. A similar point arises with regard to the allocation of the TACs. To take again the example of North Sea cod, the proportion allocated to the United Kingdom under the Commission's proposals for 1981 was 41%. However, the proportion allocated under

the regulations adopted by the Council for 1982 was 47%. That is a further reason why the quotas proposed by the Commission in July 1981 cannot be regarded as having absolute validity.

Accordingly, although the Commission's proposed quotas for 1981 represented 'the point of departure for concerted Community action', there was considerable room for debate about the appropriateness of the specific figures put forward by the Commission. The Commission was not entitled to prejudge the process of consultation. Failure by a Member State to observe the Commission's specific figures did not entail a breach of Community obligations.

(c) In the view of the United Kingdom, the Commission's reference to the Council's declaration of 17 December 1980 does not advance the Commission's case. A declaration is not the same as a decision: a declaration is not a binding act and the Council's declaration was not intended to make the Commission's proposals binding. Moreover, the specific declaration did not relate to the amended proposals that the Commission sought to make legally binding on the Member States.

(d) The United Kingdom considers that the Commission's declaration of 27 July 1981 was intended to be only a provisional measure pending the introduction of common rules by the Council. Even if the Commission had power to require its proposals to be observed on a provisional basis during 1981, the fact that the Council ultimately did not introduce common rules for 1981 brought any provisional measure to an end: the provisional measure cannot in those circumstances be treated as a set of definitive Community rules for 1981.

2. The Commission states that when in 1981 it requested the Member States to apply its proposals for TACs and quotas it expressly referred to the case-law of the Court.

(a) In paragraph 25 of its judgment of 10 July 1980 in Case 32/79 (cited above) the Court defined the obligations of the Member States as follows: 'Both Article 102 of the Act of Accession and Council Regulation (EEC) No 101/76, in particular Article 4 thereof, in the same way as Annex VI to the Hague Resolution and the Council declaration of 31 January 1978, are based on the twofold assumption that measures must be adopted so as to meet established conservation needs and that if those measures cannot be introduced in good time on a Community basis the Member States not only have the right but are also under a duty to act in the interests of the Community.'

In its judgment of 5 May 1981 in Case 804/79 the Court stated that failure of the Council to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field (paragraph 20) and that conservation measures must be defined by means of all the available elements of law, even though fragmentary, and by having regard to the structural principles on which the Community is founded. Those principles require the Community to retain in all circumstances its capacity to comply with its responsibilities, subject to the observance of

the essential balances intended by the Treaty (paragraph 23). In paragraph 25 of its judgment the Court referred to the Commission's proposals with regard to the interim measures adopted by the Council, and several times mentioned the Commission's role when the Member States adopted conservation measures (paragraphs 27, 28 and 30 to 32); in paragraph 31 it referred to the obligation of all Member States in the circumstances to undertake detailed consultations with the Commission and to seek its approval in good faith, and their duty not to adopt national conservation measures which are incompatible with the objections, reservations or conditions which might be formulated by the Commission.

(b) In view of those judgments the Commission considers itself justified in having asked the Member States in the special circumstances of 1981 to abide by its proposals.

It is clear both from Article 102 of the Act of Accession and from the different measures adopted by the Council on the conservation of maritime resources that such conservation constitutes one of the fundamental objectives of the Community fisheries policy. As the Council itself has on several occasions admitted, the biological resources of the sea would be greatly threatened by uncontrolled catches.

Whilst the competence in this area belongs to the Community, therefore, it is for the Member States to implement Community conservation measures. This obligation continues to exist even when the Council fails to act, as the Court stated in Case 804/79. The Council's failure to act cannot in any case restore to the Member States the power and freedom to act unilaterally in this field. It is clear that such measures cannot have any useful effect unless they are applied throughout the maritime area concerned.

It follows, therefore, not only that the Member States cannot adopt conservation measures at will but also that they must adopt the provisions necessary to ensure that their fishing activities do not cause irremediable harm to the resources of fishing waters, whether they are Community fishing waters or not.

The Commission states that conservation measures must be implemented in accordance with the rules adopted by the Council on the basis of Article 43 of the EEC Treaty. When it was unable to adopt the necessary rules, it was logical for the Council to adopt interim decisions in order to safeguard the situation.

In the absence of any such decisions in 1981 the Commission, just as logically, requested the Member States to observe the TACs and quotas recommended in its own proposals. The Court has emphasized, in particular in paragraphs 27 to 31 of its judgment of 5 May 1981 in Case 804/79, the need for the Member States, in the absence of appropriate action by the Council, to take their conservation measures in collaboration with the Commission. They must not only consult the Commission and seek its agreement, but also take account of the objections, reservations or conditions which the Commission might formulate.

The Commission contends that it would have been guilty of poor management if it had waited for the Member States to inform it of their intentions before making known to each of them its objections or reservations. To wait would have been pointless if a Member State had decided to take no action. Only a general assessment was possible, and that general assessment was contained in the proposals. Any national measure which was inconsistent with it was considered automatically as calling for objections and reservations.

The Commission states that that was the effect of its declaration to the Council on 27 July 1981 in which it stated that it considered its proposals to be 'legally binding'. Taken literally and out of context that expression might obviously be open to objection. However, the declaration simply expresses the logical conclusion of the reasoning set out above.

In answer to the complaint of lack of cooperation or collaboration, the Commission states that in 1981 the situation was completely different from that referred to in the judgment of 5 May 1981 in Case 804/79.

The Council had indeed failed to act, but the United Kingdom had also failed to act or to notify the Commission of the measures taken by it although fishing quotas were nearly exhausted. If in such circumstances the Commission had not stepped in to remedy the failure to act both by the Council and by the Member States it would have been failing in its duty.

The Commission stresses once again the fact that the Court emphasized the importance of the Commission's proposals and pointed out in paragraph 25 of its judgment of 5 May 1981 in Case 804/79 the reference to the proposals which appears in the interim decisions of the Council.

The Commission points out that the decision and declaration adopted by the Council at the end of 1980 required Member States to comply with the proposals which the Commission had submitted to the Council for 1981.

In the absence of an interim decision by the Council, the Commission considers that it was justified in referring to its proposals, which it had in the meantime amended in view of scientific opinions obtained from international organizations of which either the Community or the Member States were members and from its own Scientific and Technical Committee for Fisheries. The Commission's proposals concerning conservation measures also took account of the Community's obligations to non-member countries and international fishing organizations.

The Commission considers that it based its action on the best scientific evidence available. The United Kingdom also ultimately admits it, and it would be pointless to speculate on what the Council might have done with the Commission's proposals for 1981, since the Council adopted the percentages proposed by the Commission for 1982.

B — *Infringement of Articles 1, 3 and 5 of Regulation No 729/70, Article 8 of Regulation No 1723/72 and Regulation No 100/76*

1. The *United Kingdom* claims that even if the quotas proposed were legally binding

there was no justification for disallowing the expenditure. The fact that a Member State has infringed a provision of the common agricultural policy does not of itself entitle the Commission to refuse to recognize sums as chargeable to the Fund.

Regulation No 100/76, which laid down the compensation scheme relevant to these proceedings, contained no corresponding provision and therefore provides no basis for disallowing expenditure on the ground that catches have exceeded quotas.

(a) The United Kingdom submits that the Commission must prove that the alleged infringement has caused an increase in the expenditure being claimed against the Fund: there must be a causal nexus between the infringement and the expenditure disallowed. That is implicit in the judgments of the Court of 7 February 1979 in Joined Cases 15 and 16/76 *France* v *Commission* [1979] ECR 321 and the judgment of 27 February 1985 in Cases 55/83 and 56/83 *Italy* v *Commission* [1985] ECR 691 and 705.

The Commission has not even begun to establish that failure by the United Kingdom to observe its quotas resulted in the specific expenditure which the Commission disallowed. Even in its summary report, it provided no indication whatsoever of the causal relationship upon which it relies; *a fortiori*, no attempt is made to prove the existence of such a relationship.

The Commission's summary report, especially paragraphs 2.3 and 3.13.1.1 thereof, acknowledges the need for the Commission to establish that the expenditure disallowed is attributable to the alleged breach of Community rules. A recent document issued by the Commission in 1986 to the Fund Committee is to the same effect, requiring proof of an unavoidable and direct impact on the expenditure of the Fund. The position would be different if the regulations governing the intervention scheme in 1981 had contained an express provision that intervention measures would be financed only if quotas were observed, or only up to the limit of such quotas, as is provided by Article 26 (2) of Regulation No 3796/81, which however, entered into effect only in 1982.

The United Kingdom submits that the Commission has not alleged that fishing in excess of the quota caused such a distortion of the market as to affect withdrawals, let alone that it affected them throughout 1981 and thereby justified the refusal to finance the relevant compensation for the whole of 1981. So many factors are involved that a relatively small amount of over-fishing could not have a significant effect on the market. Withdrawal prices are fixed by reference to prices in previous years throughout the Community. As for the market prices, in 1981 the United Kingdom was a net importer of the two species concerned and imports had an important influence on market prices. It could not, therefore, be assumed that a small increase in domestic supply would give rise to a reduction in market prices or, in consequence, to the possibility of an increased number or value of withdrawals from the market.

In the United Kingdom's view the Commission's argument is based on the assumption that it is expenditure relating to excess fishing that should be disallowed. It follows that there is no basis for disallowing expenditure relating to fishing up to the limit of the quota. Yet the Commission's conclusion is that the United Kingdom's expenditure should be disallowed whether it relates to excess fishing or to fishing up to the limit of the quota. That is clearly wrong.

The United Kingdom argues that the Commission is not entitled to disallow all the expenditure for 1981 unless and until a Member State proves that some or all of that expenditure related to fishing up to the limit of the quota, rather than to fishing in excess of the quota. Since all the technical rules relating to payment of the withdrawal compensation were complied with and since there is no necessary connection between breach of quotas and payment of withdrawal compensation, the burden rests on the Commission to establish that additional expenditure has been incurred as a result of fishing in excess of quota. The Commission should have considered the monthly catch figures and payments of withdrawal compensation, details of which were available to it. Rather than discharging the burden of proof, it preferred to put a burden of disproof on the Member States. That was the wrong approach.

(b) The United Kingdom considers that, even if the quotas were binding, the Commission has failed to establish that there was a breach of Community rules before the date on which the quotas were exceeded. So long as catches were within the limits allocated to the United Kingdom, there was no breach of the proposed quotas.

The proposed regulations leave Member States with a considerable degree of discretion in the management of their fisheries. There is no obligation to spread the quota across the year. The Community quota operates simply as a cut-off point. Accordingly there could not have been any breach of Community rules in relation to the quotas until the time when the quotas for cod and hake were exceeded. Until that time there could be no basis for disallowing compensation paid in respect of withdrawals of cod and hake. Article 26 (2) of Regulation No 3796/81 provides for withdrawal compensation to be disallowed only in respect of fishing after the quota has been exceeded. The Commission's current practice is to allow withdrawal compensation to be charged to the Fund if it was paid in respect of withdrawals made before the limit of the relevant quotas was reached.

In Annexes 6. A and 6. B to the application, the United Kingdom sets out the cumulative monthly catches of cod and hake by its vessels in 1981. The figures show that the quota was not exceeded until after 15 September 1981 in the case of cod and after 7 October 1981 in the case of hake.

The amounts paid by the United Kingdom by way of monthly withdrawal compensation in the latter part of 1981 are set out in Annexes 7. A, 7. B and 7. C to the application.

The precise figures show that very little compensation was paid after the cut-off dates: it amounted to UKL 101.63 in respect of cod and UKL 141.09 in respect

of hake, a total of UKL 242.72. That is to be contrasted with the sum of UKL 16 213.17 disallowed by the Commission.

The United Kingdom has at no time confirmed the figures which formed the basis of the Commission's calculations. The relevant United Kingdom authorities merely confirmed the figures as such, without in any way accepting the principle upon which they were based.

The judgment of the Court of 12 July 1984 in Case 49/83 *Luxembourg* v *Commission* [1984] ECR 2931 shows that a Member State may put before the Court evidence of the kind contained in the United Kingdom's application to show that the contested expenditure was lawfully incurred.

The United Kingdom therefore requests the Court to take into account the unchallenged evidence contained in the application.

(c) The United Kingdom states that the Commission addresses arguments that have not been advanced by the United Kingdom.

2. The *Commission* considers that it was perfectly entitled to take account of the fact that the fishing quota had been exceeded when it was clearing the accounts, even in the absence of a specific rule establishing for 1981 a link between observance of the quotas and Community financing. Regulation No 729/70 must be interpreted as meaning that the Commission had not only the right but also the obligation to exclude from financing expenditure incurred for quantities of fish caught in breach of a Community rule intended to conserve resources.

(a) The Commission contends that the application of Article 3 of Regulation No 729/70 suffices to justify the contested decision. The phrase 'according to Community rules' has always been interpreted to mean that any expense must, in order to be financed out of the Fund, be in complete conformity with the Community law in force. It is established case-law that Article 3 of Regulation No 729/70 'permits the Commission to charge to the Fund only sums paid in accordance with the rules laid down in the various sectors of agricultural production while leaving the Member State to bear the burden of any other sum paid, and in particular, any amounts which the national authorities wrongly believe themselves authorized to pay in the context of the common organization of the markets'.

(b) The Commission contends that nowhere in Regulation No 729/70 is it stated that only the violation of a technical rule concerning the material and formal conditions for the payment of some expense can lead to that expenditure being disallowed. Both the case-law of the Court and the wording of Article 3 itself (which uses the plural 'Community rules') argue against that point of view. The Court refers to 'the rules laid down in the various sectors of agricultural production'. It is clear from the judgments of 7 February 1979 in Joined Cases 15 and 16/76 and of 27 February 1985 in Case 56/83, cited above, that the Court has never accepted a restrictive interpretation but, on the contrary, has considered infringements of the Treaty which lay outside the technical rules governing financing.

(c) The Commission wishes to emphasize that the position taken by the United Kingdom contradicts the principle of equal

treatment for fishermen (Article 40 (3) of the EEC Treaty). The Court stated in paragraph 9 of its judgment of 7 February 1979 in Case 11/76 *Netherlands* v *Commission* [1979] ECR 245 that

'if such distortion of competition between Member States arises despite the means available to ensure the uniform application of Community law throughout the Community it cannot be financed by the EAGGF but must, in any event, be borne by the Member State concerned.'

(d) The Commission contends that the common organization of a market may include all the measures which the Council considers necessary to attain the objectives set out in Article 39 of the Treaty. Nowhere is it said that these measures must all figure in one single act. The TACs and quotas in the fisheries sector are an integral part of the common market organization. Their purpose is to achieve several aims of the common agricultural policy and to ensure in the long term that fishing can continue. The failure to abide by the quotas proposed by the Commission must be regarded in these circumstances as a violation of a rule which is part of the common organization of the agricultural market within the meaning of Article 3 of Regulation No 729/70.

(e) The Commission contends that a provision linking payment of financial compensation to the respect of quotas was not necessary in view of the general character of Regulation No 729/70 and the sufficiently precise general principle set out in Article 3 of the regulation. In a Community which is based on the force of law it would be superfluous to insist that the institutions add, wherever they laid down conditions for expenditure, a clause stating that the Member States must observe not only the conditions laid down but also all the legally binding rules governing the sector. In the Commission's opinion such a clause can be implied and it underlies every technical rule. Article 26 (2) of Regulation No 3796/81 is not relevant in the present case. The regulation neither increased nor diminished the scope of Regulation No 729/70. Article 26 (2) of Regulation No 3796/81 concerns, in the first instance, relations between the Member States and their subjects. In any event the regulation entered into force only in 1982.

(f) The Commission denies that Member States could not do otherwise than finance fish caught after the quotas had been exhausted. It must first be noted that the arrival on the market of fish caught in excess of quotas was the result of a clear infringement by certain Member States. It is therefore perfectly normal that they should bear the resulting financial burden. In accordance with general principles of law no one can be obliged to accept products when it is clearly established that these products were produced or obtained contrary to the law in force. Article 26 (2) of Regulation No 3796/81 is a clear expression of this principle. The United Kingdom should have adopted in due time measures forbidding fishing when the proposed quotas had been exhausted.

The present case is solely concerned with determining whether the expenditure was incurred in accordance with Community law. The consequences on a national level

for the United Kingdom and its fishermen are of no relevance to this case.

The Commission contends that it cannot be said that it has failed to fulfil its obligations by not introducing into the technical rules governing intervention a provision referring expressly to the need to observe the quotas. The Commission was entitled to expect that the Member States would scrupulously observe their Community obligations. It indicated clearly in its declaration of 27 July 1981 that it was determined to use all the means in its power to ensure the respect by the Member States of its proposals. The Commission did not encourage any Member State to make payments after the quota had been exceeded.

(g) The Commission observes that it repeatedly requested the United Kingdom to comment on the figures it used. As is clear from the judgment of the Court of 12 July 1984 in Case 49/83, Member States must establish the figures precisely and expenditure in respect of which all doubts about its regularity have not been removed cannot be financed by the Community.

The Commission received only global figures and, finally, a confirmation that the figures were correct. At no time was the Commission asked to refer to the monthly catch figures and the details of payments of withdrawal compensation do not provide sufficient information to deduce the month in which the quantities were withdrawn.

The Commission contends that the United Kingdom had the opportunity to provide, as other Member States did, relevant information on the quantities withdrawn before the quotas were exhausted and to obtain a reduction of the amounts refused. It did not do so and cannot now adduce to the Court new evidence not presented to the Commission prior to the decision on the clearance of the accounts. In that respect the United Kingdom cannot rely on the judgment of 12 July 1984 in Case 49/83. In that case the statistics produced were not in the nature of new evidence but had been presented to the Commission prior to its decision.

As regards the relevance of subsequent rectification, the Court observed in Joined Cases 15 and 16/76 that in the context of an application for annulment the legality of the contested measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. In that case the Court rejected the application of the French Republic despite the fact that during the proceedings the French Government lodged documentary evidence showing that the formalities relating to proof had been complied with. It is thus clear that the Commission's decision of 28 August 1985 can be assessed only in the light of the facts put before the Commission.

Finally, the Commission observes that if convincing statistics had been presented to it before it reached its decision the present litigation could no doubt have been avoided and it requests the Court to order the United Kingdom to pay the costs pursuant to Article 69 (3) of the Rules of Procedure whatever the outcome of the case.

C — *Misuse of powers*

1. The *United Kingdom* claims that by seeking to enforce, through the machinery

of the Fund, proposals that were not legally binding on the Member States, the Commission misused its powers of supervision under the Treaty.

It submits that it is clear that it would be a misuse of powers for the Commission to operate the Fund, in substitution for the procedures under Article 169 of the Treaty, as a means of securing compliance with Community rules the infringement of which did not directly affect the Fund itself.

2. The *Commission* has not specifically replied to that submission.

D — *Infringement of essential procedural requirements*

1. The *United Kingdom* claims that the decision fails to state reasons for the refusal to finance the relevant expenditure. The United Kingdom concedes that the Court held in its judgment of 27 January 1981 in Case 1251/79 *Italy* v *Commission* [1981] ECR 205 that the Commission need not state its reasons for refusing finance in the actual decision. In the context of the present case, however, the United Kingdom asks the Court to distinguish the earlier decisions and to hold that the Commission's reasons for disallowing the expenditure ought to have been stated in the decision in accordance with Article 190 of the Treaty. In any event, even if the Commission is entitled to rely on its summary report, that summary report is inadequately reasoned and lacks the necessary evidential foundation.

2. The *Commission* sees no reason for departing from the case cited. In the present case the invariable practice for the preparation of decisions on the clearance of the accounts was followed. In a series of bilateral discussions the United Kingdom has had ample opportunity not only to put its case, but also to question the Commission. There has also been considerabale correspondence. The Commission contends that as a result of those contacts and the summary report the United Kingdom was well aware of the reasons for the decision and that is also clear from the application.

F. Schockweiler
Judge-Rapporteur

OPINION OF MR ADVOCATE GENERAL DA CRUZ VILACA

(see Case 325/85, p. 5055)