2. Article 7 of Regulation No 2527/80 does not prohibit the use of devices designed to protect fishing nets, provided that the use of such devices is compatible with the purpose of Article 7.

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 11 May 1983.

P. Heim
Registrar

P. Pescatore
President of the Second Chamber

OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 28 APRIL 1983 [1]

Mr President,
Members of the Court,

The reference for a preliminary ruling made by Plymouth Magistrates' Court on which I give my opinion today arose out of a prosecution in relation to a fishing incident.

I — The facts of the case are as follows:

In the prosecution brought in the name of Lieutenant Commander Anthony George Rogers, Royal Navy, for the Ministry of Agriculture, Fisheries and Food of the United Kingdom, Hubert Bernard Louis Darthenay, a French national from Caen, is charged with being in his fishing-boat, the *Christine Marie*, which was not registered in the United Kingdom, on 5 August 1981 within British fishery limits, in a position 50° 23.6' N and 2° 54.2' W, and carrying on board and using within British fishery limits a trawl, Danish seine or similar net, having attached to it on the top a device consisting of a second piece of net which had the effect of obstructing or diminishing the mesh in contravention of Article 7 of Regulation (EEC) No 2527/80 of 30 September 1980. [2] That regulation lays down technical measures for the conservation of fishery resources [3] and its validity was extended by

1 — Translated from the French.

2 — "No device shall be used by means of which the mesh in any part of a fishing-net is obstructed or otherwise effectively diminished. This provision does not exclude the use of the devices referred to in the detailed implementing rules to be adopted in accordance with the procedure laid down in Article 20."

3 — Official Journal 1980, L 258, 1. 10. 1980, p. 1.

subsequent regulations to 31 October 1981, but it has not since been replaced.

The prosecutor claimed that the accused had thus infringed Article 8 of the Fishing Nets (No 2) Order 1980 (Statutory Instruments 1980, No 1994), the validity of which was extended with effect from 30 June 1981 by the Fishing Nets (No 2) (Variation) (No 5) Order 1981 (Statutory Instruments 1981, No 906). Article 8 (1) prohibited in particular the carrying within British fishery limits of a trawl, Danish seine or similar net having attached to it a device having the effect of obstructing or diminishing the mesh in contravention of Article 7 of the said Council regulation.

Article 8 (2) provided that the provisions of paragraph (1) were not to prevent the use of a device attached to the underside of the net in a certain way in order to prevent or reduce wear and tear.

Darthenay argued that the prohibition contained in Article 7 of Council Regulation No 2527/80 was not applicable until the exception to that prohibition had been determined in accordance with the second sentence of Article 7. He contended that at the material time there were no Community provisions implementing Article 7. The United Kingdom did indeed permit a number of exceptions for certain devices in Statutory Instrument No 1994 of 1980 but according to the case-law of the Court of Justice it was no longer entitled to adopt such provisions after the end of the transitional period provided for in Article 102 of the Act of Accession.

In view of that dispute, Plymouth Magistrates' Court referred to the Court of Justice under Article 177 of the EEC Treaty four questions on the interpretation of Article 7 of Regulation No 2527/80. In the first question the national court seeks clarification generally as to whether the provision in question has any effect if no special provisions have been adopted for its implementation in accordance with the Management Committee procedure. If that question is answered in the negative, the national court wishes to know whether the Member States were still entitled to adopt a measure such as the contested Statutory Instrument No 1994 of 1980. The third question asks, in the event of the first question's being answered in the affirmative, whether, if no detailed implementing rules have been adopted, the Member States had any power to lay down exceptions such as those contained in Statutory Instrument No 1994 of 1980 and to take the place of the Management Committee. Finally, the fourth question is intended essentially to ascertain whether an individual may be prosecuted on the basis of provisions of national law which are incompatible with Community law.

II — I shall examine each of the questions asked.

1. First question

Darthenay contends that the applicability of the prohibition laid down in the first sentence of Article 7 of Regulation No 2527/80 depends upon the adoption of the detailed implementing rules referred to in the second sentence of that article. In his opinion, that condition follows from the very language of the provision in question. He considers that any other interpretation would be absurd because, on the one hand, it is inconceivable that the net should be used without a device to protect it against wear and tear and, on the other hand, fishermen would be forced to incur great expense to buy nets

without protective devices for a limited period. The extract submitted by the Commission from the minutes of the meeting of the Council of Ministers at which Regulation No 2527/80 was adopted shows, the accused claims, that both the Commission and the Council shared his opinion. Indeed, both Article 6 of the regulation, which provides that the mesh size is to be measured in accordance with rules which are also to be adopted in accordance with the Management Committee procedure, and Article 7 are regarded in that extract as "incomplete" rules. Consequently the minutes provide that, until the entry into force of the provisions laid down in Articles 6 and 7, the Member States are to apply the same measures in accordance with the procedures and criteria laid down in Annex VI to the so-called Hague Resolution of the Council of 3 November 1976.

In my view, however — and here I find myself in agreement with the Commission and the United Kingdom, which have submitted observations on the reference for a preliminary ruling — such an interpretation is not tenable.

In fact the very *wording* of the provision in question, which provides that "No device shall be used by means of which the mesh in any part of a fishing net is obstructed or otherwise effectively diminished", contains a clear and unconditional prohibition of the use of such devices. The second sentence of the article provides for a derogation only in relation to the devices referred to in the detailed implementing rules to be adopted in accordance with the Management Committee procedure. Nevertheless, that "reservation for authorization" does not make the applicability of Article 7 conditional upon the adoption of such implementing rules.

Nor do I consider that any other interpretation is called for if the provision is placed in the *context* of Regulation No 2527/80 laying down technical measures for the conservation of fishery resources. Here it should first be borne in mind that as from the end of the transitional period provided for in Article 102 of the Act of Accession on 1 January 1979, jurisdiction to adopt measures for the conservation of the resources of the sea lies with the Community in the framework of the common fisheries policy. Accordingly on 30 September 1980 the Council adopted the said regulation which necessarily had to include rules on the mesh size.

It should be noted that it would be impossible to check whether the prescribed mesh sizes were being used if devices by means of which the mesh of the net could be obstructed or effectively diminished were allowed; thus, the use of such devices was in principle prohibited by the first sentence of Article 7 of the regulation. Similarly, if that prohibition were not applicable until detailed implementing rules were adopted pursuant to the second sentence, the efficacy of the regulation would be gravely jeopardized. Finally, the prohibition would have no effect if the Member States were at the same time unable to maintain in force corresponding conservation measures after the transfer of power to the Community. There would be a legal vacuum which, as the Court has consistently stressed, must be avoided in connection with the conservation of the biological resources of the sea.

Moreover, correctly understood, the provision contained in the first sentence of Article 7 of the regulation in question does not prevent the use of devices which are intended solely to prevent or lessen wear and tear of the nets and are

not liable to obstruct or effectively diminish the mesh. In this regard, the distinction to be drawn by the court of reference between prohibited devices and permissible net attachments may in practice prove difficult. Such difficulty must be diminished by the detailed implementing provisions to be adopted under the second sentence. Consequently, it cannot justify the suspension of the prohibition laid down in the first sentence.

However, it is the *detailed implementing rules* and not the prohibition laid down in the first sentence of Article 7 which are referred to in the following passage of the minutes of the meeting of the Council: The Council and the Commission agree that until the entry into force of the provisions laid down in Articles 6 and 7 the Member States are to apply the same measures in accordance with the procedures and criteria laid down in Annex VI to the Hague Resolution of 3 November 1976.

That resolution, the provisions of which are set out in the judgment of the Court in *Commission* v *Ireland*,[1] in principle excludes unilateral measures by the Member States and in the absence of Community measures permits only such measures as are adopted by way of interim measures and in a form which avoids discrimination. Moreover, it stresses that such measures may not prejudice the guidelines to be adopted for the implementation of the common policy on the conservation of fishery resources and that the Member State concerned must, before such measures are brought into force, seek the approval of the Commission, which must be consulted at all stages of the procedure.

As the Court stated in its judgment in *Commission* v *United Kingdom*,[2] the requirements which were originally designed for the transitional period laid down by Article 102 of the Act of Accession must be considered in a new setting after the expiration of that period, inasmuch as the Member States, as trustees of the common interest, are not only obliged to undertake detailed consultations with the Commission but are also under a duty not to adopt national conservation measures which are contrary to any objections, reservations or conditions formulated by the Commission.

That procedure is intended to ensure that, until the adoption of the detailed implementing rules mentioned in the second sentence of Article 7 of the regulation in question, the Member States should permit only such devices as are not covered by the first sentence of that article. It was followed, as the Commission expressly assured the Court, both in the adoption of the Fishing Nets (No 2) Order 1980 and the Fishing Nets (No 2) Order (Variation) (No 5) Order 1981, which merely extended the first-mentioned order. By approving those orders, the Commission in particular expressed the view that the devices referred to in Article 8 (2) of the Fishing Nets (No 2) Order 1980, that is to say the devices attached to the underside of the cod-end of a net for the purpose of preventing or reducing wear and tear, should not be regarded as prohibited devices for the purposes of the first sentence of Article 7 of the regulation.

1 — Judgment of 16 February 1978 in Case 71/77 [1978] ECR 417.

2 — Judgment of 5 May 1981 in Case 804/79 [1981] ECR 1045; confirmed by the judgments of 16 December 1981 in *Regina* v *Tymen* [1981] ECR 3081 and of 30 November 1982 in *Regina* v *Noble Kerr* [1982] ECR 4053.

In that regard, the position is not the same as that considered by the Court in the *Tymen* case. [1] The first question should therefore be answered in the affirmative.

2. Second question

Since the first question is, as I have suggested, to be answered in the affirmative, it is unnecessary to consider the second question.

3. Third question

The answer to this question is clear from the considerations set out in relation to the first question. Consequently, until the adoption of the detailed implementing rules provided for in the second sentence of Article 7 of the regulation, the Member States were permitted to designate, with the Commission's approval, those devices which did not have the effect referred to in the first sentence of Article 7.

4. Finally, the Court has already answered the fourth question in its judgment in *Tymen:*

"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." [2]

Under those circumstances, I conclude that the Court should rule as follows:

The prohibition laid down in the first sentence of Article 7 of Council Regulation (EEC) No 2527/80 of 30 September 1980 was applicable as a result of the extension of that regulation until 31 October 1981, even though the detailed implementing rules provided for in the second sentence of that article had not been adopted;

That prohibition did not prevent the use of devices which were not likely to obstruct or otherwise effectively diminish the mesh in any part of a fishing net and which were used above all to prevent or reduce wear and tear of the net. It is for the national court to determine whether that was the case.

1 — Judgment in *Tymen,* cited above, [1981] ECR 3092, paragraph 11.

2 — Judgment in *Tymen,* cited above, [1981] ECR at p. 3095.