which has to be consulted at all stages of the procedure.

2. No fresh consultation of the Commission is required in the case of the re-enactment, without substantive amendment, of a national measure for the conservation of fishery resources which was previously adopted in conformity with the procedural and substantive conditions laid down by Community law.

The notification of new national measures nevertheless continues to be necessary, in order that the Commission may be accurately informed of the state of the law in force in the various Member States.

In Case 24/83,

REFERENCE to the Court under Article 177 of the EEC Treaty by the High Court of Justiciary, Scotland, for a preliminary ruling in the action pending before that court between

WOLFGANG GEWIESE AND MANFRIED MEHLICH

and

COLIN SCOTT MACKENZIE, Procurator Fiscal Stornoway,

on the interpretation of the provisions of Community law relating to the conservation of fishery resources,

THE COURT

composed of: J. Mertens de Wilmars, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco, O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

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. Legislative background to the main proceedings

Article 102 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties provides that from the sixth year after the accession at the latest, that is to say, from 1 January 1979, the Council, acting on a proposal from the Commission, is to determine conditions for fishing with a view to ensuring protection of the fishing grounds and the conservation of the biological resources of the sea.

On 19 January 1976 the Council adopted Regulation No 100/76 on the common organization of the market in fishery products (Official Journal 1976, L 20, p. 1) and Regulation No 101/76 laying down a common structural policy for the fishing industry (Official Journal 1976, L 20, p. 19).

By virtue of Article 4 of Council Regulation No 101/76:

"Where there is a risk of over-fishing of certain stocks in the maritime waters ... of one or other Member State, the Council, acting in accordance with the procedure provided for in Article 43 (2) of the Treaty on a proposal from the Commission, may adopt the necessary conservation measures."

At its meeting on 30 October 1976 in The Hague the Council drew up and formally adopted on 3 November 1976 a resolution to the effect that the Member States would by concerted action extend as from 1 January 1977 their fisheries jurisdiction to 200 miles off their North Sea and North Atlantic coasts.

The Council also agreed to a Commission declaration (Annex VI to the Resolution of 3 November 1976) worded as follows:

"Pending the implementation of the Community measures at present in preparation relating to the conservation of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.

However, if no agreement is reached for 1977 within the international fisheries Commission 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 avoids 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 will seek the approval of the Commission, which must be consulted at all stages of the procedures.

Any such measures shall not prejudice the guidelines to be adopted for the implementation of Community provisions on the conservation of resources."

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 1977, L 48, p. 28).

At its meeting on 30 and 31 January 1978, the Council reached agreement upon the following declaration:

"The Council of the European Communities approved the 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, were non-discriminatory and in conformity with the Treaty, and if the approval of the Commission had been sought beforehand" (Official Journal 1978, C 154, p. 5).

It is apparent from the foregoing that so long as the Community fails to exercise this exclusive competence it is still possible for Member States to take measures of limited scope, provided they comply with certain rules of substance and procedure.

With regard to substance, the measures must be necessary for the purpose of conservation of fishery resources. With regard to the procedural rules, these derive from the duty to facilitate the achievement of the Community's task, imposed by Article 5 of the Treaty and made specific in Annex VI to the Hague Resolution, and also of the task of supervision entrusted to the Commission by Article 155 of the Treaty.

On 4 May 1981 the United Kingdom Government notified two statutory instruments to the Commission: The West Coast Herring (Prohibition of Fishing) Order 1981 (S.I: 1981/585) and the North Coast (Prohibition of Herring Fishing) Regulations (Northern Ireland) 1981 (S.I. 1981/100), which had entered into force on 1 May and 27 April 1981 respectively and were intended only to correct a technical error noted in the West Coast Herring (Prohibition of Fishing) Order of 3 July 1978 (S.I. 1978/930) (hereinafter referred to as "the 1978 Order").

The 1978 Order, which prohibited herring fishing in the area designated Division VI by the International Council for Exploration of the Sea (hereinafter referred to as "ICES Divison VI(a)") had been adopted on the basis of the Commission proposal submitted to the Council on 16 June 1978 to reduce to zero, in accordance with the ICES recommendations, the total allowable catch of herrings in that division. Although at its meeting of 21 June 1978 the Council was unable to reach any agreement on the Commission proposal, the Commission expressly approved the 1978 Order on 22 December 1978.

On 27 May 1981 the Commission asked the United Kingdom Government to explain why the 1978 Order had been corrected.

By letter dated 1 July 1981, the United Kingdom Government stated that the error, which came to light in proceedings before the Divisional Court in England and gave rise to a finding by that court that the 1978 Order was partially invalid, derived from the fact that the small area of water which lay on the Northern Ireland side of the median line between Scotland and Northern Ireland to which that order applied was not within the scope of the enabling powers of the Sea Fish (Conservation) Act 1967. The error

was corrected by the two 1981 instruments, one of which was adopted under a statute applicable to Northern Ireland.

On 28 July 1981 the Commission asked the United Kingdom Government not to apply the measures notified on 4 May 1981 but "to repeal them and, where necessary, to replace them with measures compatible with the herring proposals made by the Commission ...". The grounds on which the letter was based were as follows.

Referring in the first place to the 1981 proposals to increase the total allowable catch of herring in ICES Division VI(a) from zero to 65 000 tonnes, of which 55 000 tonnes would be available to the Community, submitted to the Council on 12 June and 24 July on the basis of the report of the Herring Working Group given at the ICES meeting (27 April to 5 May 1981) and the recommendations of the ICES Advisory Committee on Fishery Management (hereinafter referred to as "the Advisory Committee") made on 3 July 1981, the Commission stated that it was unable to approve the United Kingdom 1981 measures as they were no longer justified by the requirements of conservation. The Commission stated that the same applied to the provisions of the other United Kingdom orders adopted in 1977 and 1978.

The Commission emphasizes in the second place that in its declaration made at the Council meeting of the day before, that is to say 27 July 1981, by virtue of the duty of supervision conferred on it by Article 155 of the Treaty, it called upon all the Member States "in view of the overriding public interest and as a precautionary measure, pending a final decision by the Council, ... to conduct their fishing activities in such a way as to ensure the compliance of vessels, which are flying their flag with ... these proposals [for total allowable catches] ... which it considers in the present situation as being legally binding upon the Member States" (Official Journal 1981, C 224, p. 1).

By letter dated 12 August 1981, the United Kingdom Government announced its intention to repeal the measures notified on 4 May 1981.

2. Procedure

On 10 July 1981 two German fishing boats were arrested by the United Kingdom authorities whilst fishing for herring to the west of Scotland in ICES Division VI(a).

On the complaint of the Procurator Fiscal, Stornoway, the masters of the vessels, Manfred Mehlich and Wolfgang Gewiese, were, in the Sheriff Court at Stornoway, tried for and convicted of a contravention of the 1981 Order. The accused were admonished and their catches were confiscated.

Those convictions were brought under review by the High Court of Justiciary, Scotland, by way of Stated Case, *inter alia* on the ground that the 1981 Order was invalid under Community law.

On 1 February 1983, the High Court of Justiciary decided to submit the following question to the Court for a preliminary ruling:

"Where, after 1 January 1979, a Member State notifies the Commission of a reenactment, without substantive amendment, of a national conservation measure which was itself made and maintained in conformity with Community law, does the measure so re-

enacted remain made and maintained in conformity with Community law in the absence of express Commission approval?"

The request for a preliminary ruling was registered at the Court Registry on 16 February 1983.

Pursuant to Article 20 of the Protocol on the Statute of the Court (EEC), written observations were submitted by the United Kingdom and the Procurator Fiscal, Stornoway, represented by Peter Fraser, Solicitor General for Scotland and W. H. Godwin, Treasury Solicitor's Department, acting as Agents, by the Government of the Federal Republic of Germany, represented by Martin Seidel, Ministerialrat in the Federal Ministry for the Economy, by Rudolf Illing, Ministerialrat in the Federal Ministry of Food, Agriculture and Forests and by Jochim Sedemund, Rechtsanwalt, Cologne, acting as Agents, and by the Commission of the European Communities, represented by Richard Wainwright, a member of its Legal Department, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, in accordance with Article 21 of the Protocol on the Statute and Article 45 of the Rules of Procedure, to prescribe measures of inquiry.

By letter of 17 October 1983, the Registrar of the Court asked the Commission to reply before 4 November 1983 to the following questions:

1. According to the Commission (observations, page 8, second paragraph), the "'interim measures' decisions adopted by the Council on 19 December 1978 and subsequently" establish that the procedural rules (prior notification to the Commission and the latter's approval of the measure before its entry into force) are only mandatory in respect of new measures and not when an earlier measure has been re-enacted without subsantial amendment. The Commission is requested to specify the decision or decisions to which it refers.

2. It appears from the written observations that, following its meeting of 16 December 1980, the Council requested that for 1981 Member States should act on the basis of the Commission's proposals of 18 November and 16 December 1980 for a negative total allowable catch and that, following its meeting on 27 March 1981, it requested that, in order to avoid serious consequences, Member States should adopt for 1981 appropriate conservation measures, as in previous years. The Commission is asked to state whether those statements were the subject of formal decisions.

3. The Commission is requested to inform the Court of the date on which effect, was given to the United Kingdom's statement of 12 August 1981 in which it announced its intention to repeal the disputed provisions which entered into force on 1 May 1981.

The Commission complied with that request within the above time-limit, namely on 3 November 1983.

II — Summary of the written observations

The *United Kingdom,* having described the procedures for the adoption of the 1978 and 1981 Orders and the reasons

for which the earlier order was amended, states that the 1981 Order is in conformity with Community fisheries law. In support of that first observation, the United Kingdom puts forward the following arguments.

The United Kingdom points out that the 1978 Order had been approved by the Commission on 22 December 1978 and goes on to emphasize that the 1981 Order was adopted "without substantive amendment" of the previous order. The 1978 and 1981 instruments thus represent one single measure, in the sense of that concept in the case-law of the Court. In the opinion of the United Kingdom, which refers to paragraph 4 of the judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045, the 1978 Order remained valid in so far as it conformed to the series of interim measures adopted from time to time by the Council and the statements in Council minutes. The United Kingdom considers that the approval given to the 1978 Order must be taken to extend to the 1981 Order which was notified to the Commission as required by Article 3 of Council Regulation No 101/76 of 19 January 1976.

The United Kingdom considers, in the second place, that the 1981 Order is in conformity with Community law as regards both its content and the procedures by which it was adopted and brought into force.

The United Kingdom points out in that respect that whilst by virtue of the principle established by the Court in its judgment of 5 May 1981 (cited above) the power to take fishery conservation measures has passed to the Community, the Member States may enact national measures provided they comply with certain rules of substance and procedure. Referring to paragraphs 31 and 32 of the above-mentioned judgment of 5 May 1981, the United Kingdom considers that those rules have been respected.

As regards substance, the measures adopted must be necessary for conservation. In that connection the United Kingdom emphasizes that since 1978 the situation, which had not changed by 1981, required a prohibition of herring fishing in ICES Division VI(a). The Commission moreover made a proposal to that effect for 1981, on the basis of the most recent scientific knowledge and advice. In the view of the United Kingdom, it is moreover for that reason that the Commission made no objection or reservation in the weeks following the notification of the 1981 instruments.

As regards procedure, the United Kingdom recognizes that, in so far as the 1981 Order entered into force three days before it was notified to the Commission, the obligation of detailed consultation laid down in Annex VI to the Hague Resolution was not formally fulfilled. The United Kingdom considers however that that obligation is not an absolute one but must depend on the nature of the particular measure which, in this case, was merely a formal amendment of an order previously approved by the Commission.

The United Kingdom raises a third point, regarding the effects of Commission proposals made after the notification of the 1981 Order. Although that question is, in the opinion of the United Kingdom, irrelevant to the preliminary ruling to be given, it nevertheless states the reasons for which the said proposals would be of no legal effect in

the circumstances which gave rise to the main proceedings, in case the problem should be raised before or by the Court.

There are two reasons: the sequence of events on the one hand and the division of powers as between the Commission and the Council on the other.

The United Kingdom states that on 5 May, that is to say the day after the notification of the 1981 Order, an ICES working group recommended a positive total allowable catch for ICES Division VI(a). That recommendation was not then examined by the Advisory Committee, which converts recommendations of the working group into definitive advice. In the opinion of the United Kingdom, the Advisory Committee frequently modifies recommendations of the working group.

On 12 June the Commission amended its proposal for the 1981 total allowable catch, which had not yet been adopted by the Council, from zero to 65 000 tonnes, of which 55 000 would be available for the Community.

On 3 July the Advisory Committee gave its definitive scientific advice, endorsing the working group's recommendation of 5 May and increasing the total allowable catch to 65 000 tonnes.

On 24 July, on the basis of that advice, the Commission submitted a new proposal for a total allowable catch of 65 000 tonnes, of which 55 000 tonnes would be available to the Community.

The United Kingdom emphasizes that it was on 29 June that the Government of the Federal Republic of Germany issued licences to the appellants in the main proceedings for fishing in ICES Division VI(a).

At its meeting on 27 July, the Council did not however reach agreement on the Commission's proposals.

The United Kingdom declares that it is unable to accept that the mere existence of the Commission proposals, which on the date of the offences committed by the appellants in the main proceedings, that is to say 10 July 1981, had not yet been considered by the Council, could have deprived the 1981 Order of legal force under Community law.

The United Kingdom emphasizes that the Commission's proposals are addressed exclusively to the Council and not to the Member States.

The United Kingdom further observes that although the Council's failure to act entitles the Member States to take the appropriate measures, that failure to act should not be presumed and the Council should be allowed a reasonable period upon the expiry of which it may be found that there was such a failure. The United Kingdom considers in that connection that the lapse of time between the first Commission proposal, made on 12 June 1981 and, on the one hand, 29 June, the date on which the authorities in the Federal Republic of Germany issued fishing licences and, on the other hand, 10 July, the date of the offences committed by the appellants in the main proceedings, cannot justify the adoption by the Member States of new measures in that field.

The United Kingdom emphasizes, finally, that following the letter which the Commission sent to it on 28 July 1981, it lifted the ban on fishing in ICES Division VI(a).

The United Kingdom considers that the question put by the High Court of Justiciary should be answered in the affirmative.

The *Government of the Federal Republic of Germany* points out that it was on the basis of the Council statement of 16 December 1980, by virtue of which fishing in the Member States should take

account of the total allowable catch proposed by the Commission, and on the basis of the Commission's proposal dated 12 June 1981, that it decided on 29 June 1981 to grant fishing licences for herring in ICES Division VI(a). Those licences were issued on the understanding that they might be withdrawn at any time and on the condition that the quantity of each catch was to be notified in order to ensure that German fishermen were not able to procure unfair advantages. The Government of the Federal Republic of Germany emphasizes in that regard that the catches of the German fishing fleet amounted to 5 500 tonnes, that is to say a quantity falling short of the catch quota of 6 150 tonnes allocated by the Commission to the Federal Republic of Germany in its proposal of 24 July 1981.

The Government of the Federal Republic of Germany considers that the unsuccessful Council meetings in 1981 made it all the more necessary, according to the principles established by the Court in its judgment of 5 May 1981 in Case 804/79 *Commission* v *United Kingdom,* cited above, to comply with the Commission proposals and in particular with the proposal of 12 June 1981 in which the Commission declared that it was "necessary to re-open the herring-fishing grounds west of Scotland as soon as possible".

Before considering whether the 1981 Order is compatible with Community law, the Government of the Federal Republic of Germany reviews the legislative and case-law background in its entirety which, in its opinion, must be borne in mind in answering the question submitted for a preliminary ruling.

The Government of the Federal Republic of Germany emphasizes in particular that by virtue of the Hague Resolution and the Council's declaration issued at the end of its meeting of 30 and 31 January 1978, national measures can only be taken in so far as they are "strictly necessary" for the conservation and management of fishery resources and "if the approval of the Commission [has] been sought beforehand". According to the judgment of 5 May 1981 cited above, that principle derives from the transfer of powers from the Member States to the Community which, with regard to the conservation of fishery resources, has been total and definitive since 1 January 1979.

According to the Government of the Federal Republic of Germany, the United Kingdom 1981 Order was in breach of the substantive and formal requirements of Community law. Referring to the opinion of Mr Advocate General Reischl of 11 November 1981 in Case 269/80 *Tymen* [1981] ECR 3095, it states that the overriding need to respect *both* types of requirement (the emphasis is its own) derives from the importance which the Court attributes to the total and definitive transfer of powers to the Community.

As regards observance of the substantive conditions, the Government of the Federal Republic of Germany states that the absolute prohibition of fishing renewed by the 1981 Order was no longer justified in so far as, in view of the scientific information produced at the beginning of that year, it was no longer, in the terms of the Council declarations of 30 and 31 January 1978, "strictly necessary" for the management and conservation of fishery resources.

Following on from this, it argues in the first place that whilst for the years 1979, 1980 and 1981 the Commission proposed that the Council should maintain the total allowable catch for herring in ICES Division VI(a) at zero, it was known to specialists in the field from the first months of 1981 that the stock of herrings in that area had considerably exceeded the level indicated in earlier ICES opinions as a pre-condition for the resumption of fishing.

Thus, in the absence of any such need, the United Kingdom Government ought to have acted as a "trustee of the common interest", taking into account the objective of the common fisheries policy which is intended not only to maintain certain stocks of fish but also to use existing resources as rationally as possible, taking into account the interests of all fishermen in the Community.

The Government of the Federal Republic of Germany states, in the second place, that the purely formal justification given by the United Kingdom Government, to the effect that the Commission had authorized measures comparable to the 1981 Order a number of years earlier, proves its disregard of the substantive requirements for conservation measures which change inevitably over the years and must therefore be reconsidered in detail in the light of the most recent scientific data produced at least once each year. Moreover, the fisheries policy operates on a yearly basis.

In the opinion of the Government of the Federal Republic of Germany, the fact that, on the one hand, at the end of the meeting of 16 December 1980 the Council stated that for 1981 the Member States should take account of the Commission's proposals on total allowable catches dated 18 November and 16 December 1980 and that, on the other hand, in its statement of 27 March 1981 the Council noted that, out of a desire to avoid serious disruptions, the Member States would take measures similar to those which they had taken in previous years, does not in any way detract from that observation. Those statements could not relieve the Member States of their obligation not to renew the earlier measures until they had examined the most recent scientific information and taken into account the Commission's proposals drawn up on the basis thereof.

As regards observance of procedural requirements, the Government of the Federal Republic of Germany considers that the 1981 Order was adopted in breach of the obligations to give notice of and obtain approval for it before bringing it into force.

In the opinion of the Government of the Federal Republic of Germany, which refers to paragraph 27 of the judgment of 5 May 1981 in Case 804/79, cited above, the lack of consultation "at all stages of the procedure", a requirement laid down in Annex VI to the Hague Resolution, is sufficient to establish that the national measure is "illegal".

The absolute nature of the obligation to consult the Commission before bringing the national measure into force reflects the transfer of powers to the Community and the Commission's supervisory task under Article 155 of the Treaty. It is for that reason that the Commission must be enabled "to undertake an appropriate examination of the measures contemplated" (judgment of 16. 12. 1981 in Case 269/80 *Tymen* [1981] ECR 3079, at p. 3093, paragraph 13) and "to weigh up all the implications of the provisions proposed" (judgment of 5. 5. 1981 in Case 804/79, cited above, paragraph 35).

According to the Government of the Federal Republic of Germany, it is apparent from the foregoing that if a Member State adopts a national fisheries conservation measure by presenting the Commission with a *fait accompli*, it is exceeding its powers and disregarding an essential procedural requirement within the meaning of Article 173 of the Treaty, as interpreted by the Court in particular in its judgment of 29 October 1980 in

Joined Cases 209 to 215 and 218/78 *(H. van Landewyck* [1980] ECR 3125, paragraph 47 of the decision).

Expanding on that observation, the Government of the Federal Republic of Germany refers to the principle upheld by the Court in its four judgments of 11 December 1973 (Case 120/73 *Lorenz* [1973] ECR 1471; Case 121/73 *Markmann* [1973] ECR 1495; Case 122/73 *Nordsee, Deutsche Hochseefischerei* [1973] ECR 1511; Case 141/73 *Fritz Lohrey* [1973] ECR 1527), according to which breach of the obligation to give notice of aid measures, in accordance with Article 93 (3) of the Treaty, confers rights on individuals which the national courts are bound to safeguard. That principle, which may be transposed to the present case, authorizes the appellants in the main proceedings to claim that the 1981 Order is not applicable to them.

The Government of the Federal Republic of Germany considers that even if the lack of prior consultation is not sufficient to entail the "illegality" of the 1981 Order, such illegality must derive from the lack of prior authorization by the Commission.

In support of that view, the Government of the Federal Republic of Germany refers to the observations of the Commission in Case 804/79, cited above, to the effect that the Member States are not entitled in any circumstances to adopt measures other than those which it has proposed or approved (judgment of 5. 5. 1981, [1981] ECR 1057). It refers in the second place to the judgment of 16 December 1981 in Case 269/80 *Tymen* [1981] ECR 3079, in which the Court held to be contrary to Community law a national conservation measure the content of which corresponded essentially to the Commission's proposals but which had been adopted without the latter's approval. It is apparent from that judgment that such a national measure could not constitute grounds for conviction in criminal proceedings.

The Government of the Federal Republic of Germany emphasizes the fact that the question whether approval given subsequently by the Commission remedies the breach of the duty of consultation is irrelevant in so far as that argument was rejected by the Court in paragraph 37 of the judgment of 5 May 1981 cited above and since in any case no such authorization was given to the United Kingdom Government.

Concluding its observations, the Government of the Federal Republic of Germany states that even if the adoption of the 1981 Order was not contrary to Community law, its retention after the Commission's proposal of 12 June 1981 and its application beyond 10 July 1981 are incontestably contrary to Community law.

Retention of the 1981 Order was improper because of the importance attached to the Commission's proposals in the event of the Council's failing to act. The fact that the Commission proposal is discussed by the Council or that the Council does not reach an agreement in no way affects the legal nature of the proposal.

In that connection the Government of the Federal Republic of Germany observes that the Commission's proposal of 12 June 1981, which was expressly based on the necessity of re-opening herring-fishing in ICES Division VI(a) very soon and was based on the recommendations of the ICES Herring Working-Group continued to be a point of departure of which the Member States should take account in accordance with Article 5 of the Treaty with a view to concerted Community action which required, if not the annulment of the 1981 Order, then at least the non-application thereof.

The Government of the Federal Republic of Germany proposes that the question submitted by the High Court of Justiciary be answered as follows:

"The adoption of a national conservation measure which according to the existing scientific information is objectively unnecessary and which has been enacted by a Member State without prior consultation with the Commission and without the latter's approval is incompatible with Community law even if it replaces a conservation measure of broadly similar scope which was adopted at an earlier date in conformity with Community law. The retention of a national conservation measure which was approved by the Commission several years earlier ceases in any case to be compatible with Community law from the time when it is no longer objectively necessary according to existing scientific information and the Commission has submitted in the light of that information a proposal with which the national conservation measure conflicts."

If the question submitted to the Court is answered in the affirmative, contrary to the view set out above, the Government of the Federal Republic of Germany wishes that answer to be accompanied, in accordance with the case-law of the Court, by all information necessary for appraisal from the point of view of Community law. In its opinion it is thus necessary to refer to the legal principle recognized by Community law to the effect that culpability is a pre-condition for a criminal conviction and that an unavoidable mistake excludes culpability. The latter view is confirmed in the main proceedings since Messrs Mehlich and Gewiese had acted under the licences issued to them by the Federal authorities on 29 June 1981 on the basis of the Commission proposal of 12 June 1981.

If an affirmative answer is given by the Court to the High Court of Justiciary, the Government of the Federal Republic of Germany suggests that it be supplemented as follows:

"If a person against whom criminal proceedings are brought on the ground that he has infringed that national conservation measure is found to be in a position where a mistake was unavoidable, that fact is to be regarded as a ground excluding culpability."

The *Commission*, having described the legislative context of the main proceedings, states that the question submitted by the High Court of Justiciary for a preliminary ruling is essentially concerned with the status under Community law of a national conservation measure which re-enacts without substantive amendment a previous measure but which had not received express Commission approval.

The Commission states that that question is based on two correct hypotheses, namely on the one hand that the 1978 Order was made and maintained in conformity with Community law until 1 May 1981, since that Order was consistent with the guidelines laid down by the Council at its meeting in March 1981 and, on the other hand, that the 1981 Order amounted to no more than a re-enactment of the 1978 Order.

The Commission, which refers to the judgment of 4 October 1979 in Case 141/78 *French Republic* v *United Kingdom* [1979] ECR 2923, the judgment of 10 July 1980 in Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2327 and the judgment of 5 May 1981 in Case 804/79 cited above, considers that the obligation of prior

consultation does not apply to the re-enactment of an existing measure without substantive amendment. Thus the United Kingdom did not in this case in any way disregard the general duty of cooperation provided for in Article 5 of the Treaty or fail to respect the Commission's duty of supervision.

Although by virtue of Annex VI to the Hague Resolution the Member States must, before adopting national conservation measures, seek the Commission's approval by consulting it "at all stages of the procedure", the Commission considers that both in terms of its objectives and of its context the resolution must be taken to refer to new measures and not to the re-enactment of existing measures.

This interpretation is confirmed by the wording of the "interim measures" decisions adopted by the Council on 19 December 1978 and subsequently. They provide, with regard to technical measures for the conservation and surveillance of fishery resources, that Member States are to apply the *same measures* as they applied on 3 November 1976, as well as *other measures* (emphasis supplied by the Commission) which were adopted in accordance with the procedures and the criteria of Annex VI to the Hague Resolution. According to the Commission, a clear distinction is made in those decisions between existing measures and new measures; only the latter fall within the prior consultation procedure.

This interpretation is also confirmed by the constant practice of the Member States and of the Commission in the consultations on national conservation measures, whereby, on the one hand, the Member States do not seek the approval of the Commission for provisions which merely re-enact without amendment existing measures and, on the other hand, the Commission does not require a procedure of prior consultation and approval unless the provision is intended to extend an existing measure which was limited in time since in such a situation the extension would amount to a new measure requiring its approval.

The Commission also states that it reserves the right, by virtue of the powers conferred on it by Article 155 of the Treaty, to require the revocation or amendment of existing national measures no longer compatible with the requirements of conservation, and as it in fact did in its letter of 28 July 1981 addressed to the United Kingdom.

The Commission, which refers to paragraph 46 of the judgment of 10 July 1980 in Case 32/79, cited above, nevertheless wishes to make the point that a Member State which fails to give adequate advance notice of a re-enactment takes the responsibility if it turns out that the new provision involves some substantive amendment to existing measures. In such a case the proper procedure would not have been followed and the new measure could not have been validly brought into force.

The Commission proposes that the Court reply to the question submitted by the High Court of Justiciary as follows:

"Where after 1 July 1979 a Member State brings into force without prior consultation of the Commission a re-enactment, without substantive amendment, of a national conservation measure which was itself made and maintained in conformity with Community law, the measure so re-enacted remains made and maintained in conformity with Community law."

III — The Commission's replies to the questions put by the Court

1. The decisions on "interim measures" referred to at page 8 of the Commission's Written Observations are those adopted by the Council during the period 1979 to 1982 in the absence of the necessary Community provisions for the conservation of fishery resources in the waters under the jurisdiction of the Member States. Interim measures were first decided on 19 December 1978 for a limited period. They were subsequently extended from time to time (see Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045 at 1068 — paragraph 4). However there were no "decisions" of this kind in force during the period material to this case, that is May to July 1981 (see paragraph 7 of the Written Observations of the Commission and the Answer to Question 2 below).

2. The statements made by the Council following the meetings of 16 December 1980 and 27 March 1981 were recorded in its minutes, but were not the subject of formal decisions.

3. The disputed United Kingdom provisions, which entered into force on 1 May 1981, were repealed with effect from 11 August 1981.

IV — Oral procedure

At the sitting on 1 December 1983 oral argument was presented by Colin Scott Mackenzie and the United Kingdom, represented by Peter Fraser Q. C., M. P., W. H. Godwin and A. C. Normand, the Government of the Federal Republic of Germany, represented by Martin Seidel, Rudolf Illing and Jochim Sedemund, and the Commission of the European Communities, represented by Richard Wainwright.

The Advocate General delivered his opinion at the sitting on 15 December 1983.

Decision

1 By order of 1 February 1983 the High Court of Justiciary, Scotland, submitted a question for a preliminary ruling under Article 177 of the EEC Treaty on the interpretation of the provisions of Community law relating to the conservation of fishery resources.

2 The question is submitted in the context of proceedings instituted against two German fishermen by the United Kingdom authorities following the confiscation on 10 July 1981 of their herring catches taken, in contravention

of the relevant United Kingdom legislation, in the area to the west of Scotland designated Division VI(a) by the International Council for the Exploration of the Sea (hereinafter referred to as "ICES Division VI(a)").

3 The national legislation under which the two German fishermen were convicted was the West Coast Herring (Prohibition of Fishing) Order 1981 (S.I. 1981/585) (hereinafter referred to as "the 1981 Order") which was brought into force on 1 May 1981. There was also in force at the material time the North Coast (Prohibition of Herring Fishing) Regulations (Northern Ireland) 1981 (S.I. 1981/100) which related to an adjoining maritime zone. These two measures are hereinafter referred to as "the 1981 measures". According to the order making the reference for a preliminary ruling the two measures re-enacted, without substantive amendment, the provisions of the West Coast Herring (Prohibition of Fishing) Order of 3 July 1978 (S.I. 1978/930) solely in order to correct a procedural irregularity by which the latter order was partially invalidated since it covered a small area of sea, not relevant to the present case, which fell to be dealt with under a statute applicable to Northern Ireland.

4 After they had been convicted of a contravention of the 1981 Order by the Sheriff of Grampian Highlands and Islands at Stornoway, the fishermen brought their convictions under review by the High Court of Justiciary, Scotland, claiming that the order was not in conformity with Community law. The national court requests the Court of Justice to give a ruling on the following question:

"Where, after 1 January 1979, a Member State notifies the Commission of a re-enactment, without substantive amendment, of a national conservation measure which was itself made and maintained in conformity with Community law, does the measure so re-enacted remain made and maintained in conformity with Community law in the absence of express Commission approval?"

5 It must be borne in mind that by virtue of Article 102 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties, the power to adopt measures for the protection of the biological resources of the sea has since 1 January 1979 been vested exclusively in the Council, acting on a proposal from the Commission.

6 The legal context of the main proceedings has to be viewed in the light of the situation created by the fact that the Council did not lay down for 1981 the conservation measures provided for in Article 102 of the Act of Accession.

7 Although, as the Court made clear in its judgment of 5 May 1981 (Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045) the 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 by the Council in Annex VI to the Hague Resolution of 3 November 1976 which were confirmed by the Council Declaration of 31 January 1978.

8 It follows from the terms of the above-mentioned resolution and declaration, taken together, that as regards the procedural rules the Member State concerned must not bring national conservation measures into force until it has sought in good faith the approval of the Commission, which has to be consulted at all stages of the procedure.

9 It is not in dispute that the 1981 Order, which entered into force on 1 May 1981, was not notified to the Commission until 4 May 1981 and that therefore that condition was not satisfied.

10 It thus appears that the national court is asking the Court of Justice whether the obligation to consult the Commission and seek its approval before bringing national conservation measures into force is absolute and whether, consequently, that obligation extends to the adoption of every national measure, including the re-enactment, without substantive amendment, of measures approved at the appropriate time by the Commission.

11 The binding force of the procedural rules laid down in the above-mentioned resolution and declaration must be judged in the light of the objectives pursued by the Community.

12 In that respect, it should be emphasized that the procedural rules in question are intended to ensure compliance with the substantive conditions which were laid down by the Council in the said documents, and which are binding on the Member States, in a situation marked by the failure to implement a common policy regarding the conservation of fishery resources.

13 As the Court acknowledged in the above-mentioned judgment of 5 May 1981 (Case 804/79 *Commission* v *United Kingdom*), the requirements inherent in the safeguarding by the Community of the common interest and of the integrity of its own powers impose upon the Member States in such circumstances the obligation not to lay down national conservation measures in the face of objections, reservations or conditions which might be formulated by the Commission.

14 It follows, on the other hand, from the foregoing considerations that in principle no fresh consultation of the Commission is required in the case of the re-enactment by a Member State, without substantive amendment, of a national measure for the conservation of fishery resources which was adopted previously in conformity with the procedural and substantive conditions laid down by Community law. The notification of new national measures nevertheless continues to be necessary, in order that the Commission may be accurately informed of the state of the law in force in the various Member States.

15 It is important to note that in its statement of 27 March 1981, which was annexed to the minutes of its meeting, the Council noted that out of a desire to avoid serious disruptions the Member States would take for 1981 measures similar to those which they had taken in previous years.

16 By Regulation No 754/80 of 26 March 1980 (Official Journal 1980, No L 84, p. 36), the Council fixed, for 1980, the total allowable catch for herring in ICES Division VI(a) at zero; on 18 November and 16 December 1980 the Commission proposed that the total allowable catch for herring in the same division for the year 1981 should be zero.

17 It was not until after the bringing into force of the 1981 measures that, on 12 June and 24 July 1981, the Commission amended its initial proposals for a total allowable catch of zero for that year — proposals which had not yet been adopted by the Council — and, on 27 July 1981, notified the Member States that its latest proposal for a total allowable catch of 65 000 tonnes of herring should be regarded as binding upon them (Official Journal 1981, C 224, p. 1).

18 According to the observations submitted to the Court by the Government of the Federal Republic of Germany, a situation may arise in which a national conservation measure previously adopted in compliance with Community law cannot be retained without substantive amendment — that is to say where

the trend revealed by the relevant available scientific data shows that the earlier protection measures are no longer strictly necessary for the management and conservation of the fishery resources. It is therefore for the national authorities to take the initiative by amending their rules, in conformity with the procedural and substantive conditions referred to above, in order to adapt them to the new situation.

19 That argument cannot be upheld. It fails to take account of the power vested in the Community since 1 January 1979 to adopt measures for protection of the biological resources of the sea. The determination that the former rules on protection are no longer appropriate in the light of scientific information newly available and the adoption of the measures called for by that situation are therefore matters exclusively for the Community authorities.

20 In view of the foregoing considerations, the answer to be given to the national court should be that no fresh consultation of the Commission is required in the case of the re-enactment, without substantive amendment, of a national measure for the conservation of fishery resources, which was previously adopted in conformity with the procedural and substantive conditions laid down by Community law.

Costs

21 The costs incurred by the United Kingdom and the Procurator Fiscal, Stornoway, the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, so far as the parties to the main proceedings are 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 reply to the question referred to it by the High Court of Justiciary, Scotland, by order of 1 February 1983, hereby rules:

No fresh consultation of the Commission is required in the case of the re-enactment, without substantive amendment, of a national measure for the conservation of fishery resources, which was previously adopted in conformity with the procedural and substantive conditions laid down by Community law.

	Mertens de Wilmars	Koopmans	Bahlmann
Galmot	Pescatore	Mackenzie Stuart	O'Keeffe
Bosco	Due	Everling	Kakouris

Delivered in open court in Luxembourg on 14 February 1984.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 15 DECEMBER 1983

My Lords,

The masters of two German fishing vessels, the *Hannover* and the *Kiel* were found fishing for herring off the west coast of Scotland on 10 July 1981. They were arrested and prosecuted for an offence under the West Coast Herring (Prohibition of Fishing) Order 1981, which was made under the Sea Fish (Conservation) Act 1967 (as amended) and which prohibited fishing in the area where the vessels were found. On 13 July 1981, after trial, the masters were convicted and admonished, their catch being confiscated. They appealed to the High Court of Justiciary on the ground that the Order infringed Community law. That court has referred to the Court of Justice under Article 177 of the EEC