States had the power to act in the place of the Council, in particular by extending the derogation beyond the prescribed time-limits.

It follows that between 31 December 1982, the date of the expiry of the period laid down in Article 100 of the Act of Accession, and the adoption of Regulation No 170/83 on 25 January 1983, Article 2 (1) of Regulation No 101/76, which provided for equal conditions of access to waters coming within the jurisdiction of Member States and, in consequence, the abolition of all discrimination based on nationality against nationals of Member States, was fully applicable.

2. National rules which prohibit access to national waters and which are not intended to achieve an objective of conservation cannot be covered by the power of Member States, where no Community rules exist, to take temporary conservation measures.

3. The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.

Consequently the retroactivity provided for in Article 6 (1) of Regulation No 170/83 of 25 January 1983 authorizing, as from 1 January 1983, the retention of the derogation regime defined in Article 100 of the 1972 Act of Accession cannot validate *ex post facto* national measures of a penal nature which at the time of their implementation were incompatible with Community law.

In Case 63/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Crown Court at Newcastle-upon-Tyne for a preliminary ruling in the proceedings pending before that court between

REGINA

and

KENT KIRK

on the right of a Member State after 31 December 1982 to bring into force a measure prohibiting vessels registered in another Member State from fishing within its 12-mile coastal zone,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, K. Bahlmann and Y. Galmot (Presidents of Chambers), P. Pescatore, A. O-Keeffe, G. Bosco, O. Due and C. Kakouris, Judges,

Advocate General: M. Darmon
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the written 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

It appears from the order making the reference that Kent Kirk, the master of the Danish fishing vessel the Sandkirk, sailed from Denmark and commenced fishing at about midday on 6 January 1983 within 12 miles of the British coastline. The Sandkirk was intercepted by HMS Dunbarton of the Royal Navy Fishing Protection Squadron and was escorted to the port at North Shields. The following day Mr Kirk appeared before North Shields Magistrates Court charged with the offence of:

"Being the master of the Danish fishing boat Sandkirk E550 which was used for fishing on 6 January 1983 ... within such part of British fishery limits as lies within 12 miles from the baselines adjacent to the United Kingdom in contravention of the Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982 and contrary to section 5 (1) of the Sea Fish Conservation Act 1967 as amended by the fisheries Act 1981".

It was submitted on behalf of Mr Kirk that the United Kingdom was not entitled to bring into force the Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982 (hereinafter referred to as "the Sea Fish Order 1982") and that as a consequence no offence had been committed.

That submission was overruled and an application that the issue should be referred to the Court of Justice of the European Communities was refused. Mr Kirk was duly convicted, fined UKL 30 000 and ordered to pay UKL 400 costs.

Mr Kirk then appealed against both conviction and sentence and on 8 March 1983 he appeared before the Newcastle-upon-Tyne Crown Court. On 9 March, having heard argument from both sides, that court referred the following question to the Court of Justice for a preliminary ruling:

"Having regard to all the relevant provisions of Community law did the United Kingdom have the right after 31 December 1981 to bring into force the Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982 to the extent that that Order prohibits only vessels registered in Denmark from fishing as specified in that Order?"

II — Relevant legislation

1. Article 2 (1), the relevant provision of Regulation (EEC) No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry (Official Journal, English Special Edition 1970 (III), p. 703), subsequently codified in Council Regulation (EEC) No 101/76 (Official Journal L 20 of 28. 1. 1976, p. 19) which is still in force, stipulates that:

"Rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction shall not lead to differences in treatment of other Member States.

Member States shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding sub-paragraph for all fishing vessels flying the flag of a Member State and registered in Community territory."

2. Derogations from that principle of "equal conditions of access" for a period of 10 years expiring on 31 December 1982 were authorized under Articles 100 and 101 of the Act of 22 January 1972 concerning the conditions of accession of the three new Member States. Article 100 authorized the Member States to restrict fishing within the six-mile zone "to vessels which fish traditionally in those waters and which operate from ports in that geographical coastal area".

Article 101 extended the limit of six miles to 12 miles in certain areas. It was stipulated that the two derogations were not to prejudice the "special fishing rights" which Member States might have enjoyed on 31 January 1971 and, in the areas where fishing limits were extended to 12 miles, they were subject to the condition that "existing fishing activities" be "pursued".

"The United Kingdom exercised that right in adopting the Fishing Boats (European Economic Community) Designation Order 1972 which came into force on 1 January 1973. The effect of that order was to grant to certain other Member States (Belgium, France, the Federal Republic of Germany, Ireland and the Netherlands) "special fishing rights" in reserved waters in the area between the six-mile and the 12-mile limit. No "special right" was granted to Danish vessels which were therefore denied access to, in particular, the zone off the North-East coast of England, and from the River Coquet to

Flamborough Head, the area where Mr Kirk was fishing on 6 January 1983.

Under Article 103 of the 1972 Act of Accession, "before 31 December 1982", in other words before the expiry of the 10-year period,

"... the Council, acting on a proposal from the Commission, shall examine the provisions which could follow the derogations in force until 31 December 1982".

3. At its meeting on 21 December 1982, the Council was unable to adopt measures concerning the organization of a common fisheries policy.

Following the Council's lack of success the Commission issued a declaration (Official Journal C 343 of 31. 12. 1982, p. 2) on 21 December 1982 in which it pointed out that the conservation of fishery resources had been the exclusive responsibility of the Community since 1 January 1979 but that the Community had still not succeeded in adopting a comprehensive system of conservation. It further stated that Member States not only had the right to adopt the necessary measures but were also under a duty to adopt those measures in the collective interest. The Commission called upon all Member States to notify it without delay of the national measures of conservation they planned to adopt, subject to approval by the Commission. It requested Member States' cooperation in order to ensure that the different national measures of conservation were coordinated and that they constituted a temporary system that was at once practical, effective and non-discriminatory.

4. By letter dated 22 December 1982, addressed to the Member of the Commission with responsibility for fisheries, the United Kingdom submitted four measures to the Commission for approval. The United Kingdom claimed that it was "unthinkable that the fish stocks should remain unprotected" and it emphasized that the measures were "in conformity with the current proposals of the Commission" and "acceptable to nine delegations". One of those measures was a ban on "fishing within the United Kingdom 12-mile limit by vessels registered in Denmark". That measure was submitted in the form of a draft of the Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982, the measure underlying the main proceedings.

Section 3 (1) of the Sea Fish Order 1982 provides that:

"... fishing within such part of British fishery limits as lies within 12 miles from the baselines adjacent to the United Kingdom by any fishing boat registered in Denmark is hereby prohibited."

The Sea Fish Order 1982 came into operation on 1 January 1983 and was intended to remain in operation until 31 December 1983.

In its letter of 22 December 1982 the United Kingdom stated that it "would naturally be prepared to amend or revoke [the Sea Fish Order 1982], which is necessary to avoid discrimination among fishermen from different Member States, when the Government of Denmark is able to give satisfactory assurances that this objective can be achieved in respect of Danish vessels".

5. By Decision 83/3/EEC of 5 January 1983 (Official Journal L 12 of 14. 1. 1983, p. 50), the Commission authorized on a provisional basis the national measures concerning fisheries notified to the Commission by certain Member States, not including Denmark, Belgium and Greece. Article 1 of that Decision, which was addressed to the Member States, provided that during a period to expire not later than 26 January 1983, fishing in Community waters was to be carried out in compliance with the Commission's proposals and that consequently the national measures notified to the Commission by a number of Member States, including the United Kingdom, which corresponded "in their results" to the Commission's proposals, were "provisionally authorized" for that period. The Decision was also stated to be "without prejudice to any subsequent decisions adopted by the Commission in which the substance of the measures notified shall be assessed" (Article 2).

According to the preamble, that decision was based on the following reasons:

In view of the fact that certain Member States had not notified any measures, it was not yet possible to "coordinate between Member States"; A 21-day period was necessary for the Commission to consider whether the measures notified were "well founded" and to ensure that they were "coordinated as between the Member States";

It was appropriate for reasons of public order to avoid conflicts arising during that period in the absence of any provision applying to fishing in Community waters.

6. At its meeting on 25 January 1983 the Council was finally able to adopt a number of regulations establishing a new Community fisheries regime.

All those regulations came into force on the day of their publication in the Official Journal, namely 27 January 1983.

However some provisions were declared to apply also to the intervening period from 1 January 1983 to 26 January 1983. One such provision was Article 6 (1) of Council Regulation (EEC) No 170/83 establishing a Community system for the conservation and management of fishery resources (Official Journal L 24 of 27. 1. 1983, p. 1) which provides that:

"As from 1 January 1983 and until 31 December 1992, Member States shall be authorized to retain the arrangements defined in Article 100 of the 1972 Act of Accession and to generalize up to 12 nautical miles for all waters under their sovereignty or jurisdiction the limit of six miles laid down in that article."

III — Written procedure

The order making the reference was registered at the Court Registry on 20 April 1983.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community, written observations were submitted by the Commission of the European Communities, represented by Richard Wainright, a member of its Legal Department, acting as Agent, by the Netherlands Government, represented by the Secretary General at the Ministry for Foreign Affairs, in the person of E. F. Jacobs, by the United Kingdom, represented by W. H. Godwin, acting as Agent, by the Danish

Government, represented by Per Lachmann, a Legal Adviser at the Ministry for Foreign Affairs and by Kent Kirk, represented by Bawtree and Sons, Solicitors.

Upon hearing the report ot the Judge-Rapporteuer and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

IV — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community

The *Commission* begins by making two preliminary points:

(a) The question submitted for a preliminary ruling, as formulated by the national court, asks whether a specified national provision is compatible with Community law. The Court has no jurisdiction under Article 177 of the Treaty to decide upon such a question. Consequently the Commission proposes to rephrase the question so that those elements that come within the interpretation of Community law may be extracted from the wording of the question.

(b) As a Member of the European Parliament, Mr Kirk enjoys, in the territory of a Member State other than his own, immunity from legal proceedings provided that he is not "found in the act of committing an offence" according to Article 10 of the Protocol on the Privileges and Immunities of the European Communities. Since the question of immunity has not been raised in these proceedings, the Commission does not express any view on that point. However, it will submit its observations on that matter to the Court at a later stage if the question is raised in the course of the proceedings and if the Court so requests.

A — The Community law applicable to the rules on access at the material time

1. The *Commission* maintains that the fundamental rule governing access to fishing within the maritime waters of a Member State for vessels registered in another Member State is that laid down in Article 2 (1) of Regulation No 101/76. The Commission takes the view that the provisions of Regulation No 101/76 are "supplemented" but not repealed by Regulation No 170/83, which, according to the first recital in its preamble, was adopted by the Council on 25 January 1983 in the light of the extension of fishing zones and the "overfishing of stocks of the main species".

According to the Commission, Article 6 of that regulation authorized with retroactive effect and for 10 years Member States to retain the arrangements defined in Article 100 of the 1972 Act of Accession and to generalize up to 12 nautical miles for all their waters the limit of six miles.

The Commission considers that the derogations from the principle of equal conditions of access after 1 January 1983 are compatible with the Community law applicable provided that:

(a) Article 6 of Regulation No 170/83 authorized those derogations retroactively;

(b) Such a retroactive authorization is lawful; and

(c) A measure such as the Sea Fish Order 1982 constitutes a proper exercise of the authorization.

As regards (a), the Commission considers that Article 6 is to be interpreted as having retroactive effect to 1 January 1983. That conclusion is based on the clear and unambiguous wording of the article in question which provides that the authorization applies "as from 1 January 1983". The date of 1 January 1983 is consistent with the use of the word "retain" in Article 6 (1) which demonstrates the continuity in the arrangements defined under Article 100 of the 1972 Act of Accession. The date is also consistent with Article 103 of the 1972 Act of Accession which provides for arrangements "following" or succeeding those provided for up to 31 December 1982, as is made clear in the eighth recital of the preamble to that regulation.

The date is also consistent with the provisional TAC (total allowable catch) and quota arrangements for 1983 which are stated to apply as from 1 January 1983 (Regulation No 198/83, Article 2) and with the new system of "control measures" which was adopted on 29 June 1982 but which was to apply from a date not later than 1 January 1983 (Regulation No 2057/82, Article 16).

In the Commission's view, any other solution would have interrupted, for a short period of three weeks and for no good reason, the continuity of the management of Community fishery resources, at least as regards the pre-existing access derogations.

The Commission then expresses the view that the retroactive effect of the regulation in question is justified and lawful in the circumstances.

According to the case-law of the Court, Community measures may exceptionally have retroactive effect where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected (judgments of 25. 1. 1979 in Case 98/78 *Racke* [1979] ECR 69 and Case 99/78 *Decker* [1979] ECR 101).

As regards the objective pursued, the Commission considers that the above-mentioned principle has been applied by the Court, in circumstances similar to those of this case, when it confirmed the validity of the retroactive effect for a period of three weeks of a Council regulation re-establishing a system introducing the European Currency Unit for the purposes of the common agricultural policy (judgment of 19. 5. 1982 in Case 84/81 *Staple Dairy Products* [1982] ECR 1763). Still more recently, the Court applied the principle in the isoglucose cases (judgments of 30. 9. 1982 in Case 108/81, *Amylum*, Case 110/81, *Roquette*, and Case 114/81, *Tunnel Refineries*, [1982] ECR 3107 *et seq.*). In those judgments, the Court confirmed the principles to be applied in examining the validity of retroactive Community measures and, in particular, clarified the first condition to be applied regarding the purpose or objective to be achieved. Clearly that objective must be pursued "in the general interest" or be an objective of "public interest".

In the Commission's view, the general interest is protected by Article 6 of Regulation No 170/83 which gives effect to the second paragraph of Article 1 of the same regulation which provides that the Community system for the conservation and management of fishery resources will consist, in particular, of "special provisions for coastal fishing". Coastal fishing preferences have thus been recognized by Community law (see also Article 4 of Regulation No 2141/70 and

Articles 100 and 101 of the 1972 Act of Accession) and by international law (see Article 11 of the 1964 London Fisheries Convention). They therefore represent a legitimate objective of a common policy for the management of fishery resources which is in the general interest.

The Commission considers, moreover, that, in the circumstances, that objective made it necessary for the measures adopted to ensure the orderly and uninterrupted conduct of fishing activities and at least indirectly the conservation of maritime resources to be given retroactive effect.

As regards legitimate expectations, the Commission maintains that the situation at the time gave the fishermen concerned no cause to expect that the 12-mile coastal preference zones would be abolished at the end of 1982. On the contrary, those zones set up under Articles 100 and 101 of the 1972 Act of Accession had become a well-established feature of the system of conservation and management which operated during the period up to 1983. The Commission's proposals for their extension and generalization had been before the Council since March 1981. Those proposals were widely publicized and had appeared in the Official Journal. Moreover Community fishermen would have been aware on 6 January 1983 of the Commission Decision of 5 January 1983, which had been given wide coverage by radio stations and from which it coud be concluded that the Commission was maintaining its proposals concerning access. The fishermen therefore had every reason to expect that, if the Council succeeded in reaching agreement at its next meeting the measures it adopted would have retroactive effect to 1 January.

The Commission's observations on the question whether the Sea Fish Order 1982 constitutes a proper exercise of the authorization granted under Article 6 of Regulation No 170/83 are set out below under B.1.

The Commission maintains that at the material time the Community provision governing the question of access was Article 6 (1) of Regulation No 170/83, which, by virtue of its retroactive effect, had continued without interruption the system of derogation from the principle of free access established by the 1972 Act of Accession.

In the alternative and should the Court not accept its argument, the Commission then considers the question in the absence of any Community rules.

It maintains that after the end of 1978 the power to adopt measures for the conservation and management of fishery resources belonged fully and definitively to the Community, pursuant to Regulation No 101/76 and Article 102 of the Act of Accession. Member States are therefore no longer entitled to exercise any power of their own in those matters. However, so long as the Community failed to exercise that exclusive competence, it was still possible for Member States to take measures of limited scope provided that they complied with certain rules of substance and procedure. If circumstances required, Member States were even under an obligation to take such measures.

As regards the substance, the measures must be non-discriminatory and necessary for the purpose of conservation. The requirements as to procedure derive from

the Member State's duty to "cooperate" and to facilitate the achievement of the Community's tasks.

Member States are therefore acting merely as "trustees" of the common interest and are under an obligation to undertake detailed consultations with the Commission and to seek its approval for their measures in good faith.

2. The *United Kingdom* submits that throughout the period during which the common fisheries policy was being developed there had never been a régime of free access to coastal waters. Regulation No 2141/70 and Articles 100 and 101 of the 1972 Act of Accession restricted such access. Article 103 of that Act of Accession recognizes the need to restrict access even after the end of the transitional period on 31 December 1982.

Moreover, Annex VII to the Hague Resolution of October 1976 made it clear that it was intended to restrict access to coastal waters. That intention was confirmed by the Council Declaration of 30 May 1980 (Official Journal C 158 of 27. 6. 1980).

The United Kingdom also maintains that control of access to inshore waters is linked to objectives pursued under the common fisheries policy such as: (a) the protection of coastal population dependent on fishing, and (b) the rational development of the fishing industry.

Measures such as the total allowable catch and the quota system are intended to protect the populations of coastal areas. Moreover the desire to ensure a fair standard of living for coastal fishermen was the underlying theme of the measures regulating access provided for in Articles 101 and 102 of the 1972 Act of Accession and in Articles 1 and 9 of Regulation No 101/76, and also the Commission proposals which led to Regulation No 170/83 and indeed the Hague Resolution of 1976 and the Council Declaration of 30 May 1980.

In the United Kingdom's opinion, control of access still contributes to the objective of the rational and orderly development of the fishing industry. That objective is reflected in the preamble to Regulation No 101/76 and Articles 1 and 9 thereof, in the Council Declaration of 30 May 1980 and in the Commission's proposals to the Council (Official Journal C 228 of 1. 9. 1982, p. 1) which were adopted by the latter in Regulation No 170/83.

3. The *Netherlands Government* maintains that the Community law applicable in the period after 31 December 1982 and before the agreement of 25 January 1983 was that which applied before the Act of Accession.

The Community law applicable at that time consisted of the principle of non-discrimination, on which the EEC Treaty is based, which was implemented by Article 2 of Regulation No 101/76 replacing the identical provision in Article 2 of Regulation No 2141/70. Although after 31 December 1982 that legal situation was different in formal terms, in substance it was absolutely the same as that which existed prior to the Act of Accession.

The Netherlands Government moreover rejects the argument that in view of the Council's failure to act Member States were under an obligation to take certain national measures in the interests of the Community and using a procedure whereby such measures were authorized

by the Commission. That argument has been accepted by the Court on the conservation question but may not be applied to the question of access. The provisions of the Act of Accession are too clear for that. The duration of the derogations is limited and they expire on 31 December 1982. Moreover the task assigned to the Council by Article 103 of the Act of Accession is a fairly tentative one: the Council must "examine" the provisions which "could follow" the derogations. The fact that after 31 December 1982 the Council did not establish any new rules on access does not necessarily indicate remissness.

4. The *Danish Government* submits that the Community provision applicable in this instance is that contained in Article 2 (1) of Regulation No 101/76 which implements with regard to the fishing industry the prohibition of discrimination laid down in Article 7 of the Treaty. It therefore represents a fundamental element of the common fisheries policy which was implemented in 1970. Article 100 of the 1972 Act of Accession established a derogation for a period of 10 years until 31 December 1982.

Article 103 of the Act of Accession provides that the Council "shall examine the provisions which could follow the derogations in force until 31 December 1982". It follows from that text that:

No decision was taken as to whether the Council had any power at all to allow the exceptional arrangements to continue after that time or whether it might merely make other appropriate arrangements;

The Council was not obliged to adopt any provisions replacing Articles 100 and 101.

There can be no doubt that the foregoing means that the transitional period ended on 31 December 1982 after 10 years had elapsed and that thereafter the authority of the Member States to maintain or establish national coastal zones terminated unless the Council were to adopt measures allowing them to do so.

That is confirmed, in the view of the Danish Government, by the Court's judgment of 29 March 1979 in Case 231/78 *Commission* v *United Kingdom* ([1979] ECR 1447) in which it was held that the expiry of a transitional period laid down in the Act of Accession meant that a national organization of the market in potatoes which was already in existence was rendered inoperative when the Commission had submitted a proposal on the establishment of the common organization of the market in that product, although the Council had not acted on the proposal.

In this instance the United Kingdom Sea Fish Order 1982 must *a fortiori* be inapplicable in view of the following factors:

In contrast to Case 231/78, there is a common policy which has already been adopted, namely that under Article 2 (1) of Regulation No 101/76;

In contrast to the situation in Case 231/78, the Council did not fail to fulfil one of its obligations by not acting on the Commission's proposal; on the contrary, the Council was instead subject to a general duty to avoid, as far as it could, extending and expanding an exceptional arrangement which was

contrary to the most fundamental principle of the Treaty, namely the principle of non-discrimination;

In this case, the national measure in question was specially enacted on the occasion of the expiry of the transitional period.

The Danish Government therefore concludes that the adoption and the enforcement of the Sea Fish Order 1982 is contrary to Article 100 of the Act of Accession which expressly fixes a 10-year time-limit for exclusive coastal zones, and to Article 103 of the Act of Accession, which empowers the Concil to adopt "the provisions which could follow the derogations in force until 31 December 1982".

5. *Mr Kirk* submits that once the derogations contained in Articles 100 and 101 of the Act of Accession had expired, the Community provisions on fishing, in particular Article 2 (1) of Regulation No 101/76, under which the general principle contained in Article 7 of the EEC Treaty is applied to the fishing sector, must be considered to apply with all their vigour.

Article 100 of the Act of Accession provided a specific derogation from the basic rule governing access contained in Article 2 of Regulation No 101/76, which authorized Member States to restrict access in waters under their jurisdiction until 31 December 1982. Without such a derogation there can be no doubt that the principles of full and equal access would have applied with full force after 1 January 1973 as they did before that date.

The position after the expiry of the derogation is considered in Article 103 which exhorts the Council to "examine the provisions which could follow the derogations in force until 31 December 1982". In view of the fact that the Council adopted the common fisheries policy only on 25 January 1983, the principle of freedom and equality of access reflected in Article 2 (1) of Regulation No 101/76 automatically re-asserted itself during the period between 1 January 1983 and 25 January 1983.

In addition Mr Kirk maintains that the compatibility of the Sea Fish Order 1982 should not be examined solely in the context of the common fisheries policy. It should be examined in the light of the principles contained in Articles 52 and 59 of the Treaty requiring complete freedom of movement for self-employed people and others wishing to engage in an economic activity in the Community. It should also be examined from the point of view of ensuring that competition is not distorted. Mr Kirk cites the Court's judgment in Case 48/75 *Royer* ([1976] ECR 497) to show that the Sea Fish Order 1982 not only offended against the principles contained in Articles 52 and 59 but also distorted competition to the prejudice of Danish fishermen.

B — The United Kingdom's power to adopt the Sea Fish Order 1982

1. Since it considers that during the period in question, the Community provision applicable was Article 6 (1) of Regulation No 170/83 by virtue of its retroactive effect, the *Commission*

submits that the United Kingdom was entitled, in pursuance of that provision, to adopt the Sea Fish Order 1982, provided that it constitutes a proper exercise of the authorization contained in the abovementioned regulation.

According to the Commission that was indeed the position having regard to the particular circumstances and the limited duration of the Sea Fish Order 1982. The fact that the order discriminated exclusively against Danish vessels would be unacceptable in normal circumstances but in this case was justified because, of the other Member States concerned, Denmark alone refused to give assurances that it would restrict the access of its own vessels to British waters or to express its intention of so doing. In those circumstances a more general measure was not necessary.

Subsequently the United Kingdom regularized the position from that point of view by adopting the Fishing Boats (European Economic Community) Designation Order 1983, which came into operation on 9 March 1983. That order defined comprehensively the right of vessels of other Member States to fish within the United Kingdom's twelve-mile limit.

In the alternative and in the event of the Court's holding that Article 6 (1) of Regulation No 170/83 cannot have retroactive effect, the Commission further maintains that the United Kingdom was entitled to adopt the order in question because it followed the prescribed procedure (see above p. 2697) inasmuch as it sought the Commission's authorization and because, in addition, the particular circumstances justify such a measure.

The Commission considers that in the absence of a definitive Community system, particular circumstances might justify a Member State's maintaining, on a temporary basis, the exclusion from its coastal waters of vessels from other Member States, in so far as the later have not restricted the access of their vessels to those waters and provided that there were no objections from the Commission.

The application of the Sea Fish Order 1982 on a provisional basis may therefore be regarded as a kind of "emergency measure" designed to avoid social problems.

Further, the Commission states that the case-law of the Court regarding the Member States' power to take conservation measures (Cases 32/79 and 804/79, cited above) is not directly in point in so far as a measure that restricts access may not be regarded as intended primarily for the conservation of resources. Nevertheless the underlying theme of that case-law may be applicable, namely the principle that in certain particular circumstances Member States may, in cooperation with the Commission, take measures that would normally lie outside the scope of their powers in order to safeguard the general interest of the Community and to ensure that it carries out its responsibilities. On that basis, the Commission "provisionally authorized" the Sea Fish Order 1982.

2. The *United Kingdom* submits, in the first place, that it was not only entitled to adopt the measure in question but indeed was under a duty so to do as a trustee of the common interest in view of the Council's failure to act and the potential consequences for the Com-

munity interests as regards fisheries policy.

In the second place, the United Kingdom maintains that its action was not discriminatory, that it has met with the approval of the Commission and that its validity has been confirmed by Article 6 of Regulation No 170/83.

The Council's failure to act could not have meant that Member States were powerless to take action to control access to coastal zones, as moreover has been emphasized by the Court in Cases 61/77, 32/79 and 804/79 (cited above). Although that case-law is concerned with conservation, inasmuch as the objectives to be achieved are the same, there can be no justification for not applying it to the question of access. The aims of conservation and restricting access overlap. The abovementioned Case 287/81 is an illustration of the overlapping of the concepts of access and conservation. "Access" means access to fish stocks in coastal waters, which in turn implies fishing in competition with the coastal fishermen. In that respect, the question concerns the existence of stocks and that is a matter of conservation.

3. In its observations, the *Netherlands Government* submits that the United Kingdom was not entitled to adopt the measure in question. It considers that the United Kingdom Sea Fish Order 1982 is incompatible with the principle of non-discrimination which was enshrined in the Community law applicable at the time and, more specifically, in Article 2 of Regulation No 101/76.

The United Kingdom created, after the expiry of the transitional period, conditions for access to certain waters which were more favourable to its own fishermen than to those from another Member State. There are no objective grounds capable of justifying a breach of the prohibition of discrimination provided for in the EEC Treaty and in Article 2 of Regulation No 101/76.

The imposition of the 12-mile zone accessible only to United Kingdom fishermen definitely cannot be regarded as a conservation measure. A measure may be said to be a conservation measure if, for example, on account of an evident biological need, a limit is imposed on catches or if a certain vulnerable area is closed or is opened only for a limited period of time. None of those kinds of situations existed. United Kingdom fishermen continued to have free access to the zone in question whilst those from another Member State were barred from it.

The fact that Denmark could not claim any historical fishing rights in the 12-mile zone which was to be imposed is not a ground of justification either. Article 2 of Regulation No 101/76 cannot be reconciled with unilateral restrictions based on historical rights. That would be to fly in the face of the principle of "equal conditions of access to and use of the fishing grounds" for all fishing vessels of the Community.

Finally the Council's failure to act can justify Member States adopting appropriate measures for the purpose of conservation only, as the Court has already stated. As regards access, in the light of the clarity of the wording of the 1972 Act of Accession, the Council's failure to act does not necessarily indicate that it has been remiss.

4. The *Danish Government* notes that it is clear from an examination of the

Community law applicable (Article 2 (1) of Regulation No 101/76, Article 7 of the EEC Treaty and Articles 100 and 103 of the 1972 Act of Accession) that the Member States were not entitled either acting individually or collectively to enact provisions contrary to the common policy adopted by the Council in Regulation No 101/76. In contrast to the situation in Case 231/78 (cited above), the Council did not fail to fulfil one of its obligations by not fixing a new system after 1 January 1983. On the contrary, the Council was subject to a general duty to avoid, in so far as possible, extending and expanding an exceptional arrangement which was contrary to the most fundamental principle of the EEC Treaty, namely the principle of non-discrimination.

5. Mr *Kirk* analyses the difference between access and conservation and concludes that the United Kingdom was not entitled to bring into force the order restricting the access of Danish vessels to the 12-mile zone.

He notes that a distinction is to be drawn between access and conservation and that it is clear from the case-law and Community legislation that such a distinction was intended to be drawn.

Access is the right to gain entry to fishing grounds and subsequently fish there whereas conservation measures are either short-term or long-term measures taken to protect fish stocks.

Mr Kirk then considers in detail the case-law of the Court, concentrating on the characteristics of conservation measures, since the majority of fishing cases decided by the Court deal with that matter. It follows from that case-law that measures which are intended to protect the biological resources of the sea must be urgent and necessary (Joined Cases 3, 4 and 6/76 *Kramer* [1976] ECR 1279, the Advocate General's opinion; Case 61/77 *Commission* v *Ireland* [1978] ECR 417, the Advocate General's opinion) and further, there must be "a compelling biological justification" (judgment in Case 88/77 *Schonenberg* [1978] ECR 473). Examples of such measures are the fixing of total allowable catches and quotas (Case 287/81 *Noble Kerr* [1972] ECR 4053), regulation of the number of boats, authorized fishing zones, fishing periods, and methods and tackle so that nothing is "likely to interfere with reproduction or feeding or to injure the marine ecosystem" (Case 61/77, cited above, at p. 413).

It follows that access can be related to conservation but only in so far as such conservation measures may ultimately affect the individual fisherman's right to fish in certain places in a certain way. Such measures may affect access but they are not access measures.

In the light of those considerations, Mr Kirk maintains that the Sea Fish Order 1982 is plainly not a conservation measures. It is an access measure.

The 1972 Act of Accession also reflects the difference between conservation and access. The mandatory nature of Article 102 with the requirement that measures be taken to ensure conservation contrasts with the exhortative nature of Article 103. That contrast emphasizes the different approach adopted. Therefore in the event of no measures being adopted

by the Council, it is unthinkable that fishing stocks should remain unprotected. In such circumstances Member States can act but only as trustees of the Community interest and solely in respect of conservation measures, as the Court has held in Case 804/79 *Commission* v *United Kingdom* ([1981] ECR 1045) and Case 269/80 *Tymen* ([1981] ECR 3079).

As regards access, on the other hand, the Court emphasized in Case 804/79 (cited above, at paragraph 29 of the decision) that Community fishermen must have equal access to the fishery stocks coming within the jurisdiction of the Member States and that the Council alone has the power to determine the detailed conditions of such access in accordance with the procedures laid down in the third subparagraph of Article 43 (2) of the Treaty and Article 102 of the Act of Accession. That legal situation cannot be modified by measures adopted unilaterally by the Member States.

That is so, *a fortiori*, after the expiry of the derogation period on 31 December 1982. In Mr Kirk's view, there can be no doubt that any restriction upon rights of access allowed thereafter, other than by the Council, is incompatible with the regime of free and equal access which prevails in the absence of derogating measures provided for under a new common fisheries policy.

In consequence, the United Kingdom Government had no legislative competence to enact or to bring into force access measures for the period from 1 January 1983 until 25 January 1983, since between those dates a regime of free and equal access applied, in pursuance of Regulation No 101/76 and Article 7 of the EEC Treaty.

In the alternative, Mr Kirk submits that, even if the United Kingdom did have the power to legislate on and implement access measures as trustee of the Community interest, or even if the Sea Fish Order 1982 can be regarded as a conservation measure, the United Kingdom failed to act in accordance with that Community interest inasmuch as it adopted a measure which was discriminatory and excessively severe and therefore in breach of the principle of proportionality.

C — The nature of the Sea Fish Order 1982

1. In the course of its main argument, the *Commission* notes that the Sea Fish Order 1982 was discriminatory and incompatible with the general scheme of Article 6 of Regulation No 170/83 and Annex I thereto in so far as the United Kingdom refused Danish ships all access, while not restricting the access of vessels of other Member States. Nevertheless, the Commission considers that in the particular circumstances, namely that all the Member States, with the exception of Denmark, had taken measures restricting the access of their own nationals to United Kingdom waters and since the period of application was short, the order conforms to Article 6 of Regulation No 170/83.

In the alternative, if the Court holds that there were no Community rules applicable at that time, the Commission submits that the Sea Fish Order 1982 was lawful on the grounds that in the

particular circumstances of the case it was "an emergency measure".

2. The *United Kingdom* submits that the Sea Fish Order 1982 was not discriminatory since different situations were treated differently on the basis of objective criteria.

Those criteria were (a) the need to protect coastal States whose local populations were dependent on fishing and (b) the historical fishing activities of Member States.

As regards the first criterion the United Kingdom refers to its argument summarized above under A.2, on page 2698.

As regards the second criterion, the United Kingdom points out that Denmark was not entitled to fish in United Kingdom coastal waters under the London Fisheries Convention 1964. The importance of historical fishing activities is reflected in Article 100 (2) of the 1972 Act of Accession, in Annex VIII to the Hague Resolution, in the Council Declaration of 30 May 1980, and in the judgment of the Court in Case 287/81 (cited above). That judgment recognized the need to advance the objectives of the common fisheries policy even if that involved different treatment of vessels from different Member States.

The fact that Danish vessels were prohibited from fishing in United Kingdom waters after 31 December 1982 reflects Denmark's lack of historical fishing rights under the London Fisheries Convention 1964.

Moreover if the United Kingdom had failed to take measures in respect of vessels from Denmark, the only country which had not enacted measures restricting access to United Kingdom waters, it would have been discriminating against all the other Member States who had adopted measures restricting the access of their nationals to United Kingdom waters. The United Kingdom therefore adopted a protective measure which was both effective and workable, which conformed to the Commission's proposals and which pursued the objectives of the common fisheries policy.

Nor was the United Kingdom measure contrary to Article 2 of Regulation No 101/76, since that provision is only a particular aspect of Article 7 of the EEC Treaty. Furthermore, a wide interpretation of Article 2 as establishing a "free-for-all" is contrary to the aims of the common fisheries policy. Article 2 must be interpreted in accordance with Article 39 of the EEC Treaty, with the preamble to Regulation No 101/76 and with Articles 1 and 9 of that regulation. The latter articles envisage further measures for the establishment of a common structural policy for the fishing industry.

In view of the fact that such measures had still not been adopted on 31 December 1982, equal conditions of access must be interpreted in a way consistent with all the objectives of the common fisheries policy. The United Kingdom's action was consistent with those objectives. In the United Kingdom's view differences in treatment in relation to access are lawful if they are objectively justified.

3. The *Netherlands Government* considers that the Sea Fish Order 1982 is incompatible with Article 2 of Regulation No 101/76 which relates to equal access and with Article 7 of the EEC Treaty.

The fact that that measures applied only to Danish fishermen makes no difference. Even if fishermen from other Member States, except the United Kingdom, were barred from fishing within the 12-mile limit the conclusion would be no different. The essential point is that after the expiry of the transitional period prescribed in the 1972 Act of Accession, the United Kingdom had created conditions for access to certain waters which were more favourable to its own fishermen than to those from another Member State.

Moreover the fact that Denmark is unable to claim any historical fishing rights cannot justify a unilateral restriction, contrary to Article 2 of Regulation No 101/76. In addition, there are no other objective reasons capable of justifying a breach of the prohibition of discrimination.

4. The *Danish Government* cites several judgments of the Court and submits that the Sea Fish Order 1982 is clearly and directly contrary to Article 2 (1) of Regulation No 101/76 and, therefore, also contrary to Article 7 of the EEC Treaty. In addition, in its view, that emerges clearly from Article 100 of the Act of Accession, which authorizes exclusive coastal zones, by way of exception, for a 10-year period "notwithstanding the provisions of Article 2 of Regulation (EEC) No 2141/70" (now Regulation No 101/76).

In the opinion of the Danish Government the fact that the Sea Fish Order 1982 concerned fishing vessels exclusively from one Member State constitutes an aggravating circumstance.

The Court of Justice laid down in its judgment of 30 November 1982 in Case 287/81 (cited above) that regard for the interestes of the coastal population constituted an element which might properly be taken into account in allocating a total allowable catch which was biologically necessary. Nevertheless that does not justify the view that such regard should permit exclusive coastal zones when they are clearly and unequivocally prohibited.

The fact that other Member States may also have enacted provisions concerning coastal zones does not justify the United Kingdom Order.

Even if all the other Member States, including Denmark, had denied their fishermen access to the coastal zones of other Member States the outcome would in any case simply have been the establishment of exclusive coastal zones contrary to Article 2 (1) of Regulation No 101/76, Article 7 of the EEC Treaty and to Articles 100 and 103 of the 1972 Act of Accession.

In the opinion of the Danish Government, it is clear from those provisions that the Member States had no power either acting individually or collectively to enact provisions contrary to the common policy adopted by the Council.

Even if it were to be accepted, contrary to the view of the Danish Government, that it was not contrary to Article 2 (1) of Regulation No 101/76 for a Member State itself to divest its citizens of rights which they otherwise enjoy in other Member States' fishing grounds, it does not follow that the United Kingdom is entitled to take such rights away from Danish nationals, in direct contravention

of Article 2 (1) of Regulation No 101/76.

In the view of the Danish Government the fact that the Sea Fish Order 1982, unlike the Commission's proposal, applied exclusively to Danish fishing vessels constitutes an aggravating circumstances.

As a result, the nationals of a number of other Member States were free to fish within the United Kingdom's coastal zone on 6 January 1983 whilst only Danish, Irish and Netherlands fishermen were excluded.

A further consequence is that any penalties for failure to comply with that prohibition are not uniform, as they would have been under the Commission's proposal.

In addition, the Danish Government concedes that in the period between 1 January 1973 and 31 December 1982 there was no traditional fishing by Danish fishermen in what was then the United Kingdom's exclusive coastal zone.

However, that in no way supports the view that Danish fishermen could not exercise the right incontestably conferred upon them by Article 2 (1) of Regulation No 101/76 and Article 7 of the EEC Treaty which they have enjoyed throughout the 10 years which have elapsed, so far as the coastal zones of the United Kingdom are concerned, where, until 1 January 1983, there were only exclusive zones within a limit of six nautical miles, pursuant to Article 100 of the Act of Accession.

Article 100 (2) and (3) of the Act of Accession show clearly that the 10-year authorization to establish exclusive zones was precisely concerned — in derogation from the provisions of Regulation No 101/76 — to exclude non-traditional fishing since traditional fishing rights could be exercised throughout the whole of the 10-year period until 31 December 1982.

5. Mr *Kirk* takes the view that the Sea Fish Order 1982, which is an access measure, discriminates on grounds of nationality and, in consequence, is incompatible with Article 2 (1) of Regulation No 101/76, the provision which applies in the fishing sector the general principles of equality laid down in Article 7 of the EEC Treaty.

In particular, he maintains that the order is plainly discriminatory. It is a blatantly discriminatory measure aimed at treating nationals of some Member States, and in particular United Kingdom nationals, more favourably than Danish nationals.

To exclude Danish fishermen from all United Kingdom waters from 1 January 1983 amounts to dissimilar treatment of comparable situations and places Danish fishermen at a severe competitive disadvantage.

Nevertheless, differentiation can be justified and may be permissible when based on objective criteria, as the Court recognized in Case 11/74 *Union des Minotiers de la Champagne* ([1974] ECR 877).

The justifications which the United Kingdom sought to rely on in support of its action do not however satisfy that requirement.

It was submitted, in particular, before the national court that the differentiation was intended to protect coastal fishery,

fishing communities and the local population dependent on fishing, objectives which are recognized in Articles 3 (d) and 39 of the EEC Treaty. Mr Kirk contests that submission and notes that the judgment of the Court in Case 287/81 *(Noble Kerr,* cited above) in which the contested measure was held to be valid on the ground that it was intended to protect the local population is of no binding authority in this instance for two reasons:

The Sea Fish Order 1982 is not a conservation or management measure; it is merely a measure relating to access;

It is discriminatory, like the measures in Cases 61/77 and 88/77 (cited above). Even if it had been necessary to take the measure concerned on environmental or social grounds, that fact may not be relied on to justify blanket discrimination against nationals of a Member State.

Mr Kirk also disputes the argument advanced in the main proceedings, that since Denmark could not lay claim to historical fishing rights under the London Fishery Convention 1964, Danish vessels were precluded from fishing in the disputed area after 31 December 1982. That argument is not relevant and it in no way affects the principle of freedom and equality of access laid down by the EEC Treaty.

Moreover it was submitted on behalf of the prosecution that the Sea Fish Order 1982 had been adopted at a time of great uncertainty. In that respect Mr Kirk notes that an order made by a Member State spurred on by a sense of unease or uncertainty cannot legalize an otherwise illegal act; nor can it constitute a justification for adopting measures contrary to Article 7 of the EEC Treaty.

The United Kingdom Government is under an obligation to give priority to the interests of the Community by adopting a provisional measure, in accordance with the Commission's proposals and the principle of Article 7 of the EEC Treaty. The United Kingdom measure exceeded those proposals inasmuch as it discriminated against Danish vessels.

Finally, Mr Kirk submits that, inasmuch as it was more far-reaching than was required to do what it set out to do, the Sea Fish Order 1982 constitutes a breach of the principle of proportionality, a principle which has been recognized in the consistent case-law of the Court.

More specifically, Mr Kirk draws attention to the following factors:

The extreme nature of the order and penalties which may be imposed under it;

The fact that such a drastic measure was not necessary at all;

The fact that it jeopardizes the objectives and functioning of the Community system.

He maintains that the desired objective could have been attained by other methods.

D — The Commission's approval of the Sea Fish Order 1982

1. The *Commission* explains that by its Decision of 5 January 1983 (see above p. 2694) it "provisionally" authorized several national measures including the

Sea Fish Order 1982 for the period up to 26 January 1983 whilst reserving its position on the substance of the measures notified. The provisional authorization was based on the following two considerations:

the impossibility in the short time available of deciding whether the measures were "well founded" or "coordinated";

the risk for public order in the absence of any provisions, taking into account the United Kingdom and Irish measures which restricted access to their own coastal waters and of the measures notified by a Member State which restricted its vessels' access to the coastal waters of another Member State.

The Commission concedes that the legal basis for such an authorization is fragile. It derives from the Commission's supervisory duties under the EEC Treaty, particularly Article 155, and under Annex VI to the Hague Resolution of 3 November 1976, in conjunction with the general principles of law relating to the exercise of emergency powers by the executive and, in particular, the principle of "continuity". That principle requires public authorities to ensure that the services for which they are responsible function properly and continuously. Where there are exceptional circumstances, interpreted strictly, the concept of continuity recognized in the case-law of several Member States has also been recognized, to a certain extent in the case-law of the Court of Justice, in particular in connection with Article 76 of the Euratom Treaty, in respect, of which the Court refused to adopt an interpretation which would have involved a "break in continuity" (judgment of the Court in Case 7/71 *Commission* v *France* [1974] ECR 1003). The principle of continuity is also implicit in the Court's conclusion that despite the "total and definitive" transfer to the Community of powers relating to the conservation of fishery resources, Member States may still amend existing conservation measures in case of need and where the Community has failed to act (judgments of the Court in Case 804/79, cited above, and Case 124/80 *Van Dam* [1981] ECR 1447).

Article 155 of the EEC Treaty, and in particular the first indent thereof, empowers the Commission to act in order to prevent undue disruption of the common fisheries policy as a result of an interruption in the system. That interpretation of Article 155 is supported by the two judgments of the Court in Case 804/79 and Case 124/80 (cited above).

However, the Commission notes that the Court has not yet given a clear decision on the validity of the exercise of such powers by the Commission. Nor will it be obliged to do so in the present case if it accepts the Commission's primary contention that the gap was filled retroactively by the adoption of Council Regulation No 170/83.

2. The *United Kingdom* submits that the Sea Fish Order 1982 was part of a concerted Community effort undertaken within a legal framework based on the Court's own case-law and in consul-

tation with the Commission. The Commission was able to take a balanced view and to eliminate any inequalities by consultation. On that point, the United Kingdom refers to Joined Cases 185 to 204/78 (cited above) as regards the importance of collaboration with the Commission. The United Kingdom acted in accordance with Community law inasmuch as the measure exactly reflected the proposals of the Commission (Official Journal C 228 of 1 September 1982). The measure was submitted to the Commission which approved it by decision of 5 January 1983.

3. The *Netherlands Government* considers that the national measure had considerable political support inasmuch as the Commission had authorized it. Whatever the Commission's reasons for taking its decision, the Netherlands Government believes that they cannot be powerful enough to set aside the principle of non-discrimination underlying the EEC Treaty and the specific application thereof in Article 2 of Regulation No 101/76. The Commission should not have approved the measure, no matter how great the pressure of circumstances, but should have rejected it. The Commission's Declaration to the Council on 21 December 1982 related only to national conservation measures and was wholly in accordance with the case-law of the Court. However, the United Kingdom's measure cannot be regarded as a conservation measure.

The *Danish Government* submits detailed observations concerning the Commission Decision approving, *inter alia*, the United Kingdom measure.

The Danish Government submits that the grounds on which the Commission's Decision is stated to be based are not relevant to the question of access to fishing waters. Since the Member States were not able, and in any event were not obliged, to adopt national measures contrary to Article 2 (1) of Regulation No 101/76 and to Article 7 of the EEC Treaty, they were under no obligation to enact legislation in accordance with the Commission's proposal concerning reserved areas within 12 miles of the coast. Accordingly there was no justification for instituting proceedings under Article 169 for failure to notify the United Kingdom measure concerning access to fishing areas.

In relation to reserved coastal areas, it is inconceivable that public order could be jeopardized by "conflicts arising ... in the absence of any provision applying to fishing in Community waters". Such provisions are in fact contained in Article 2 (1) of Regulation No 101/76 and Article 7 of the EEC Treaty. The Council's failure to act could not therefore have given rise to legal uncertainty.

Consequently, in so far as the decision concerns exclusive coastal areas, the Danish Government considers that it is invalid because the statement of the reasons on which it is based is inadequate or incorrect.

As regards the operative part of the Decision, the Danish Government maintains that, as may be seen from the second recital of the preamble to the Decision and Article 2 thereof, the national measures were not assessed in relation to Community law. The object of the decision could only have been to

inform the Member States that the Commission, for its part, did not object to national measures which were in accordance with its proposal. It was therefore of limited scope.

The Danish Government considers that in this case it is unnecessary to decide whether the Commission was empowered to grant temporary authorization for national measures without a separate examination as to the justification of such measures in the context of Community law.

It is sufficient to find that it must be completely excluded that the Commission, without carrying out such an inquiry, can have intended to permit national measures which might be contrary to Community law.

Furthermore, if the Commission had intended by its authorization to remedy the effects of a measure which was potentially incompatible with Community law, such an aim, which is quite extraordinary, should have been set out clearly in the decision, which is not the case. In such circumstances, the Commission would have cast its measure in the form of a regulation.

The Danish Government therefore considers the Commission's Decision irrelevant to the reply to be given to the question submitted by the Crown Court.

If, contrary to the Danish Government's interpretation, the object of the Commission's Decision was to legalize a national measure that is at variance with substantive provisions of Community law, the Danish Government claims that the Decision must be invalid on the grounds that it is *ultra vires* and substantively incompatible with the relevant provisions of Community law.

The Danish Government submits that the Sea Fish Order 1982 does not conform to the Commission's proposal and thus is certainly not covered by the Commission Decision of 5 January 1983, because the 1982 Order excluded only Danish fishermen from the United Kingdom coastal area and thereby discriminated against them.

Finally the Danish Government draws attention to the problem of legal certainty which would arise in relation to the legitimate expectation of persons subject to Community law in connection with applicable Community regulations and their primacy over national law if a fisherman might be convicted on the basis of a decision adopted by the Commission after he had left his home port and not published until a week after he had been arrested and convicted where the decision was published only in Part II of the L Series of the Official Journal, which contains acts whose publication is not obligatory.

5. Mr *Kirk* emphasizes that the Commission's Decision authorized the national measures only provisionally until 26 January 1983.

It contained no legal assessment of the validity or the status of the measures adopted. That is made clear by the Decision itself in which it was stated that the merits of the national measures would be assessed in due course.

Mr Kirk points out that, in any event, in January 1983 Denmark complained to the Commission about the Sea Fish Order 1982 and that the Commission

could not approve that measure without following the procedures laid down in Article 170 of the EEC Treaty.

Moreover, the Commission was not legally entitled to approve the measures. That was a matter for the Council.

In Mr Kirk's view the whole process was a redundant exercise since the Commission's action was not legally valid and since there was no uniform notification of national measures by the Member States.

In any event, such a decision cannot retroactively validate prior legislation, particularly legislation creating criminal offences, especially since the decision was adopted after Captain Kirk had left port and was not published in the Official Journal until well after he had been convicted.

E — Replies to be given to the question referred to the Court

1. The *Commission* proposes the following reply:

"Having regard to all the provisions of Community law, and in particular Article 6 of Council Regulation No 170/83, a Member State had the right, subject to the provision of Annex I to that regulation, after 31 December 1982 to bring into force a measure prohibiting fishing in a 12-mile zone around its coast by a vessel registered in another Member State."

2. The *United Kingdom* considers that the question submitted concerning its right to adopt and implement the Sea Fish Order 1982 should be answered in the affirmative.

3. The *Netherlands Government* concludes by asserting that "the imposition by the United Kingdom of a 12-mile zone in which Danish fishing vessels may not fish must be considered to be contrary to Article 2 of Regulation No 101/76 read together with Article 7 of the EEC Treaty".

4. The *Danish Government* considers that the Court should reply to the question submitted as follows:

"Under Community law — in particular Article 7 of the EEC Treaty, Article 2 (1) of Regulation No 101/76 and Articles 100 and 103 of the Act of Accession — the United Kingdom was not entitled after 31 December 1982 to adopt or enforce national measures prohibiting only vessels registered in Denmark from fishing within 12 nautical miles from the baselines of the United Kingdom."

5. Finally Mr *Kirk* proposes that the reply should be to the effect that the United Kingdom had no right or power to bring into force the Sea Fish Order 1982 after 31 December 1982.

V — Oral procedure

At the hearing on 28 February 1984 oral argument was presented by Mr Kirk, represented by David Vaughan Q.C., the United Kingdom, represented by the Solicitor General, Sir Patrick Mayhew, Q.C., M.P., the Government of Denmark, represented by Per Lachmann, acting as Agent, and the Commission of

the European Communities, represented by Richard Wainwright, acting as Agent.

In his oral submission, counsel for Mr Kirk referred, in particular, to the question of the retroactive validity of penal measures in that Regulation No 170/83 validated with retroactive effect the United Kingdom measures which were of a penal nature. He contended that it was contrary to a fundamental principle of law contained in the laws of all the Member States and also in the Convention on Human Rights to impose sanctions in respect of an act which did not infringe the law as it stood at the time when the act was committed.

The Advocate General delivered his opinion at the sitting on 3 April 1984.

Decision

1 By order of 9 March 1983, received at the Court on 20 April 1983, the Newcastle-upon-Tyne Crown Court referred a question to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty on the interpretation of the Community law on fisheries in order to enable it to determine whether a measure adopted by the United Kingdom prohibiting vessels registered in Denmark from fishing within its 12-mile coastal zone was compatible with that law.

2 By the Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982 (hereinafter referred to as "the Sea Fish Order 1982") the United Kingdom prohibited "fishing within such part of British fishery limits as lies within 12 miles from the baselines adjacent to the United Kingdom by any fishing boat registered in Denmark . . .". Kent Kirk, the master of a Danish fishing vessel, was intercepted in that vessel on 6 January 1983 by a ship of the Royal Navy whilst he was engaged in fishing within the coastal zone and was fined UKL 30 000 by North Shields Magistrates Court. He appealed to the Newcastle-upon-Tyne Crown Court where he claimed that the United Kingdom was not entitled to bring into force the Sea Fish Order 1982 and that, consequently, no offence had been committed.

3 The Newcastle-upon-Tyne Crown Court took the view that in order to enable it to determine whether the Sea Fish Order 1982 was compatible with Community law a preliminary ruling from the Court of Justice was necessary. It therefore stayed the proceedings and referred the following question to the Court:

"Having regard to all the relevant provisions of Community law did the United Kingdom have the right after 31 December 1982 to bring into force the Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982 to the extent that the Order prohibits only vessels registered in Denmark from fishing as specified in that Order?"

4 The purpose of that question is essentially to establish whether at the time when the Sea Fish Order 1982 was adopted, it was permissible for a Member State, under Community law in the matter of fishing, to prohibit vessels registered in another named Member State from fishing within a coastal zone specified by that order.

5 Mr Kirk takes the view, and is supported in that respect by the Governments of Denmark and the Netherlands, that the rules which applied prior to the 1972 Act of Accession became fully applicable on the expiry of the derogations permitted during the transitional period, which ended on 31 December 1982. Those rules, codified in Council Regulation (EEC) No 101/76 (Official Journal L 20 of 28. 1. 1976, p. 19), include the principle of non-discrimination and therefore the exclusion of Danish vessels under the Sea Fish Order 1982 is contrary to Community law.

6 It should be borne in mind, in this respect, that Article 7 of the EEC Treaty provides that within the scope of application of the Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality is prohibited.

7 Council Regulation (EEC) No 101/76 laying down a common structural policy for the fishing industry, which replaced Regulation (EEC) No 2141/70 of the Council of 20 October 1970 (Official Journal, English Special Edition 1970 (III), p. 703), provides, in Article 2 (1), which is identical to Article 2 (1) of Regulation No 2141/70, that rules applied by

each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction must not lead to differences in treatment of other Member States. Member States must ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to for all fishing vessels flying the flag of a Member State and registered in Community territory.

8 Article 100 (1) of the 1972 Act of Accession authorized a derogation from those principles for a period expiring on 31 December 1982, so that the Member States could restrict fishing by nationals of other Member States in waters under their sovereignty or jurisdiction, situated within a limit which was fixed in principle at 6 nautical miles.

9 Under Article 103 of the 1972 Act of Accession, before 31 December 1982 the Council, acting on a proposal from the Commission, was to examine the provisions which could follow the derogations in force until 31 December 1982.

10 The modified proposal for a Council Regulation establishing a Community system for the conservation and management of fishery resources, submitted by the Commission to the Council on 11 June 1982 (Official Journal C 228 of 1. 9. 1982, p. 1) proposed that the zone covered by the derogation defined in Article 100 of the 1972 Act of Accession should be extended to 12 nautical miles and should remain in force for a period expiring on 31 December 1992.

11 Following the Council's failure to adopt the proposed provisions at its meeting on 21 December 1982, the Commission that same day made a declaration (Official Journal C 343 of 31. 12. 1982, p. 2), in which it pointed out that the conservation of fishery resources had been the exclusive responsibility of the Community since 1 January 1979 but that the Community had still not succeeded in adopting a comprehensive conservation system. It further stated that Member States not only had the right to adopt the necessary measures but also had the duty to take those measures in the collective interest. The Commission therefore:

called upon all Member States to notify it without delay of the national measures of conservation they planned to adopt, subject to approval by the Commission;

requested Member States' cooperation in order to ensure that the different national measures of conservation were coordinated and that they constituted a temporary system that was at once practicable, effective and non-discriminatory.

12 On 22 December 1982 the United Kingdom notified the Sea Fish Order 1982 to the Commission, which approved it by decision of 5 January 1983 (Official Journal L 12 of 14. 1. 1983, p. 50). In that decision the Commission stated that the authorization was only provisional until 26 January 1983, subject to a subsequent assessment of the substance of the measure. In the preamble, the Commission referred to the fact that "whereas certain Member States have notified to the Commission national measures ... Belgium, Denmark and Greece have not notified any such measures ..." and emphasized that the decision had been adopted "for reasons of public order to avoid conflicts arising during this period in the absence of any provision applying to fishing in Community waters."

13 On 25 January 1983 the Council adopted Regulation (EEC) No 170/83 establishing a Community system for the conservation and management of fishery resources (Official Journal L 24 of 27. 1. 1983, p. 1), Article 6 (1) of which authorizes retroactively, as from 1 January 1983, the retention of the derogation regime defined in Article 100 of the 1972 Act of Accession for a further 10 years, and extends the coastal zones from six to 12 nautical miles. The events at issue in the main proceedings occurred in the intervening period between 1 January and 25 January 1983.

14 It follows from the abovementioned provisions of Articles 100 and 103 of the 1972 Act of Accession that the measures derogating from a fundamental principle of Community law, namely non-discrimination, were limited to the transitional period and that the power to bring into force any provisions thereafter was entrusted to the Community authorities, in particular to the Council.

15 It cannot be concluded from the fact that the Council failed to adopt such provisions within the period provided for in Article 103 that the Member States had the power to act in the place of the Council, in particular by extending the derogation beyond the prescribed time-limits.

16 It follows that at the time of the events at issue before the national court, Article 2 (1) of Regulation No 101/76, which provided for equal conditions of access to waters coming within the jurisdiction of Member States and, in consequence, the abolition of all discrimination based on nationality against nationals of Member States, was fully applicable.

17 The United Kingdom and the Commission claim that the fact that after the end of the transitional period the measures prescribed by Article 103 of the 1972 Act of Accession were not adopted created a legal vacuum which the Member States were entitled to fill as "trustees" of the common interest by measures approved by the Commission, as was recognized by the Court in its judgment of 5 May 1981 (Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045).

18 In the said judgment of 5 May 1981 the Court stated that in the absence of Community rules, Member States had the power to take temporary measures for the conservation of fishery resources in order to avoid irreparable damage contrary to the objectives of the common conservation policy.

19 Although, as the United Kingdom points out, rules relating to access may in certain cases constitute a response to a concern to conserve fishery resources, it is clear that in this instance the disputed measure was not intended to achieve such an objective. National rules which prohibit access to national waters and which are not intended to achieve an objective of conservation can not be covered by the power of Member States, recognized in the aforementioned judgment of 5 May 1981, to take temporary conservation measures.

20 The Commission nevertheless contends that the Member States were empowered to adopt measures such as the Sea Fish Order 1982 by Article 6 (1) of Regulation No 170/83 of 25 January 1983 which authorize retroactively, as from 1 January 1983, the retention of the derogation regime defined in Article 100 of the 1972 Act of Accession for a further 10 years, and which extends the coastal zones from six to 12 nautical miles. In the Commission's view, the Sea Fish Order 1982 constituted a proper exercise of the authorization under Regulation No 170/83 in view of the particular circumstances prevailing at that time.

21 Without embarking upon an examination of the general legality of the retroactivity of Article 6 (1) of that regulation, it is sufficient to point out that such retroactivity may not, in any event, have the effect of validating *ex post facto* national measures of a penal nature which impose penalties for an act which, in fact, was not punishable at the time at which it was committed. That would be the case where at the time of the act entailing a criminal penalty, the national measure was invalid because it was incompatible with Community law.

22 The principle that penal provisions may not have retroactive effect is one which is common to all the legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice.

23 Consequently the retroactivity provided for in Article 6 (1) of Regulation No 170/83 cannot be regarded as validating *ex post facto* national measures which imposed criminal penalties, at the time of the conduct at issue, if those measures were not valid.

24 It follows from the foregoing considerations that Community law regarding fishing did not authorize a Member State, at the time of the adoption of the Sea Fish Order 1982, to prohibit vessels registered in another named Member State from fishing within a coastal zone specified by that order and not covered by conservation measures.

Costs

25 The costs incurred by the Governments of Denmark and the Netherlands, by the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Newcastle-upon-Tyne Crown Court, by order of 9 March 1983, hereby rules:

Community law regarding fishing did not authorize a Member State, at the time of the adoption of the Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982, to prohibit vessels registered in another named Member State from fishing within a coastal zone, specified by that order and not covered by conservation measures.

Mackenzie Stuart Koopmans Bahlmann Galmot

Pescatore O'Keeffe Bosco Due Kakouris

Delivered in open court in Luxembourg on 10 July 1984.

D. Louterman
Administrator

A. J. Mackenzie Stuart
President