OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 19 JANUARY 1978 [1]

Mr President,
Members of the Court,

As regards the subject-matter of the reference for a preliminary ruling on which I am now giving my views, let me refer to my opinion in Case 61/77, which concerned the same problem.

In pursuance of his powers under Article 35 of the Fisheries (Amendment) Act 1962 the Irish Minister for Fisheries made two orders on 16 February 1977 which took effect on 10 April 1977. Under the terms of those orders permission to fish in an area of the Irish waters situated within certain specified degrees of latitude and longitude was granted only to boats which did not exceed a certain length and engine power.

At the end of April 1977 ten Netherlands boats whose dimensions exceeded those permitted under the Irish orders failed to comply with the terms of that provision when they fished at a distance of between 25 and 28 miles from the Irish coast. One of those boats was boarded, placed under arrest and brought to Cork Harbour. The other 9 boats also proceeded to Cork.

On 2 May 1977 the Masters of the aforementioned boats were prosecuted in Cork under the aforementioned Fisheries (Amendment) Act and the Irish Fisheries Consolidation Act 1959, under which foreign boats are forbidden to fish in exclusively Irish waters, that is, since 1964, within the 12-mile zone and since December 1976, after the fishery limits had been extended by a government order, within the 200-mile zone.

In their defence the defendants alleged that the two Irish orders of 16 February 1977 referred to above are incompatible with Community law. They maintain that by virtue of Articles 100 and 101 of the Act of Accession Ireland only has sovereignty within the 12-mile limit. In accordance with the Act of Accession and Council Regulation No 101/76 (OJ L 20 of 28. 1. 1976, p. 19) conservation measures outside that area can only be taken by the Council of Ministers. Furthermore, the aforementioned measures resulted in differences of treatment between the fishing fleets of the various Member States, which is contrary to Article 2 of Regulation No 101/76.

The Prosecutor is not willing to accept that. He considers that it cannot be inferred from either the Act of Accession and the measures relating thereto or from Regulation No 101/76 that Ireland has not been empowered to adopt the contested measures. Furthermore, there can be no question of discrimination; in any event, certain of the differences which may be noted in the effects on the fishing fleets of the Member States are justified.

However, in the light of the arguments based on Community law put forward by the defendants the judge hearing the case nevertheless decided to suspend the proceedings and by order of 7 July 1977 he referred the following questions to the Court for a preliminary ruling:

(a) Does Community law and in particular Article 7 of the Treaty of Rome or Article 2 of Council Regulation No 101/76 taken alone or read with Articles 100 and 101 of the Treaty of Accession preclude Ireland from taking measures such as are set out in the Sea Fisheries (Conservation and Rational Exploitation) Order 1977 (S.I. No 38 of 1977) and/or the Sea Fisheries (Conservation and Rational Exploitation) (No 2) Order 1977 (S.I. No 39 of 1977)?

1 — Translated from the German.

(b) Does Community law and in particular Articles 102 and 103 of the Treaty of Accession either taken alone or read with Council Regulation (EEC) No 101/76 Article 4, preclude Ireland from taking measures such as are set out in the Fisheries (Conservation and Exploitation) Order 1977 (S.I. No 38 of 1977) and/or the Sea Fisheries (Conservation and Rational Exploitation) (No 2) Order 1977 (S.I. No 39 of 1977)?

(c) Would a conviction of the defendants by this court on the charges referred to in the Second Schedule hereto be incompatible with Community law?

In the light of what has emerged from considerations of the action brought against Ireland in accordance with Article 169 of the EEC Treaty as a result of the adoption of the aforementioned measures — in which as you know I also considered in detail arguments put forward in the present proceedings — my opinion on the present reference for a preliminary ruling can be quite short. For the details of the arguments let me refer in particular to my opinion in Case 61/77.

1. As we have seen — and this relates to the second question referred by the Irish judge — neither Article 102 of the Act of Accession nor Article 4 of Regulation No 101/76 excludes in principle the adoption of national measures for the conservation of fish stocks. That is clear simply from a reference to the judgment in Joined Cases 3, 4 and 6/76 *(Kramer and Others*, judgment of 14 July 1976 [1976] ECR 1279), to Annex VI to the Hague Resolutions of 3 November 1976, the terms of which I have quoted in my opinion in Case 61/77, as well as to the recitals to Regulation No 350/77 (OJ L 48 of 19. 2. 1977, p. 28).

Admittedly, national measures drawn up on that basis can only be justified if they are genuine conservation measures and are limited to what is absolutely necessary. Moreover, in Case 61/77 it was also observed that even on that point serious doubts cannot be ruled out. However, a final decision on that point was not necessary since the Irish measures can be more clearly judged from other angles.

2. By that I refer — and this relates to the first question referred by the Irish judge — to compliance with the prohibition of discrimination, which emerges in particular from Regulation No 101/76 and Annex VI to the Hague Resolutions.

On that point it was maintained in Case 61/77 that the prohibition of discrimination contained in Regulation No 101/76 does not only refer to the waters which, as a result of its entry into force, came under the sovereignty of the Member States, but to all waters which are subject to national jurisdiction and thus also to the 200-mile limit, as determined in accordance with the Hague Resolutions.

It was further maintained that the Irish measures failed in various ways to comply with the prohibition of discrimination. The effects of the measures are such that the Irish fleet, which traditionally fishes in the disputed waters, was almost unaffected by them, whereas they resulted in considerable restrictions for the French and Netherlands fleets. It was, moreover, possible to speak of discrimination between the fleets of the other Member States, leaving aside the Irish fleet. For further details, in particular as regards the attempts of the Irish Government to provide legal justification for the measures, let me refer once again to my opinion in Case 61/77. Accordingly, the question whether further infringements of the aforementioned regulation or violations of other principles of

Community law are to be assumed did not need to be finally considered.

3. Since the prohibition of discrimination in Article 2 of Regulation No 101/76 is undoubtedly directly applicable in accordance with the relevant case-law of the Court, because it is contained in a regulation adopted in accordance with Article 189 of the Treaty and is formulated in clear, unambiguous and unconditional terms, it follows — and here I come to the main point of the third question — that national provisions which conflict with it cannot be applied. Consequently, Community citizens cannot be convicted under the Irish measures.

4. As a result of the foregoing the following answers may be given to the questions referred by the District Court of Cork:

(a) Community law, in particular Article 2 of Regulation No 101/76, excludes national measures which result in practice in the fishing fleets of the Member States being treated in different ways and do not guarantee them equal access to the fishing grounds in the waters under the jurisdiction of the Member State adopting the measure. In particular, a national measure is incompatible with the principle of equality of treatment if, without there being any compelling biological need for it, its effects on the fishing fleets of the other Member States which have traditionally fished in the area affected by the measure are considerably more restrictive than on the fleet of the Member State which adopts the measure.

(b) The rule contained in Regulation No 101/76 constitutes a directly applicable provision of Community law. National measures which are incompatible with that principle cannot be applied and must not, therefore, form the basis of a criminal conviction.