OPINION OF MR ADVOCATE GENERAL DARMON DELIVERED ON 3 APRIL 1984 [1]

Mr President,
Members of the Court,

1. On 6 January 1983 Kent Kirk, the master of the Danish vessel the *Sandkirk*, set out to fish within 12 miles of the British coastline. In so doing he was clearly acting in contravention of the Sea Fish (Specified United Kingdom Waters) (Prohibition of Fishing) Order 1982 (No 1849 of 22 September 1982), clearly and, indeed, deliberately. On board with Mr Kirk, who is a Danish Member of the European Parliament, were a number of journalists. The object of the exercise was, as he again pointed out in the course of argument, to challenge the validity under Community law of the Sea Fish Order 1982.

Mr Kirk was charged on the same day and on 7 January 1983 appeared before the North Shields Magistrates Court where he was fined UKL 30 000 and ordered to pay costs of UKL 400. He appealed against that judgment to the Newcastle-upon-Tyne Crown Court and by order of 9 March 1983 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 1982 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?"

That is exactly the sort of question which, as it stands, may not be answered within the framework of Article 177 of the EEC Treaty. The national court fails to cite any Community provision which is to be interpreted or whose validity is to be assessed. At the same time it asks the Court whether a clearly specified national provision is in conformity with Community law.

As is customary in such cases it is therefore necessary to establish which Community rules were applicable so that the national court may decide whether the national measure to which it refers was indeed in conformity with those Community rules and if not, declare it inapplicable.

2. In a recent article published in *Cahiers de Droit Européen*, Jörn Sack describes the fisheries policy as "a 'new problem' for which the Community was ill-prepared" [2].

Initially the fisheries question was merely an element of the common agriculture policy [3] but it acquired a new dimension and considerable importance on the accession to the European Community of Denmark, Ireland and the United Kingdom.

In the light of the general development of the fishing industry and the importance of that sector to the new Member States it was difficult to apply strictly and immediately the general

1 — Translated from the French.

2 — "La Nouvelle Politique Commune de la Pêche", *Cahiers de Droit Européen*, 1983, p. 437 *et seq.*

3 — Article 38 (1) of the EEC Treaty.

prohibition of discrimination on grounds of nationality laid down in Article 7 of the EEC Treaty and reaffirmed with regard to the fishing industry in Article 2 of Regulation (EEC) No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry [1].

Thus Article 4 of that regulation provided that:

"By way of derogation from the provisions of Article 2, access to certain fishing grounds ... may be limited, for certain types of fishing and for a period not exceeding five years ..., to the local population of the coastal regions concerned if that population depends primarily on inshore fishing".

Similarly, Article 100 of the Act of Accession authorized the Member States:

"until 31 December 1982, to restrict fishing in waters under their sovereignty or jurisdiction ... to vessels which fish traditionally in those waters ...",

Any provisions adopted under that derogation were however not to be "less restrictive than those applied in practice at the time of accession".

Under Article 103 of the Act of Accession, the Commission was required to present "before 31 December 1982, ... a report to the Council on the economic and social development of the coastal areas of the Member States and the state of stocks". It was stated that "on the basis of that report, and of the objectives of the common fisheries policy, the Council, acting on a proposal from the Commission, shall examine the provisions which could follow the derogations in force until 31 December 1982".

1 — Official Journal 1970, L 236, p. 1.

In the exercise of its power under Article 100 of the Act of Accession, the United Kingdom adopted the Fishing Boats (European Economic Community) Designation Order 1972, which came into force on 1 January 1973, recognizing that certain other Member States, not including Denmark, held certain special fishing rights.

Regulation No 2141/70 of the Council was repealed by Council Regulation (EEC) No 101/76 of 19 January 1976 [2], Article 2 of which reproduced in full the wording of Article 2 of the earlier regulation.

3. On 11 June 1982 the Commission submitted to the Council a "modified proposal for a Council Regulation establishing a Community system for the conservation and management of fishery resources" [3].

It is emphasized in the recitals of that proposal that:

"in view of the over-fishing of stocks of the main species, it is essential that the Community, in the interests of both fisherman and consumers, ensure by an appropriate policy for the protection of fishing grounds that stocks are conserved and reconstituted; ... it is therefore desirable that the provisions of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry be supplemented by the establishment of a Community system for the conservation and management of fishery resources that will ensure balanced exploitation;

2 — Official Journal 1976, L 20, p. 19.

3 — Official Journal 1982, C 228, p. 1 (a proposal had previously been submitted on 8. 10. 1976 and was published in Official Journal 1976, C 255, p. 3).

... conservation and management of resources must contribute to a greater stability of fishing activities and must be appraised on the basis of a reference allocation reflecting the orientations given by the Council;

... that stability, in consideration of the temporary biological situation of stocks, must safeguard the particular needs of regions where local populations are especially dependent on fisheries and related industries as decided by the Council in its resolution of 3 November 1976 and in particular Annex VII thereof;

...

... there should be special provisions for inshore fishing to enable this sector to cope with the new fishing conditions resulting from the institution of 200 mile fishing zones; ... to this end, Member States should be authorized to maintain in a first stage until 31 December 1992 the derogation régime defined in Article 100 of the Act of Accession and to generalize up to 12 miles the limit of six miles prescribed in that article;

... these measures constitute, pursuant to the Act of Accession, the arrangements succeeding those provided for up to 31 December 1982; ... this régime, after possible adjustments, will be applicable for a further period of 10 years and after this period the Council is asked to decide upon the provisions which could follow the régime referred to in Articles 6 and 7".

The proposal contains 16 articles including the following:

Article 1:

"In order to ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and appropriate economic and social conditions, a Community system for the conservation and management of fishery resources is hereby established.

For these purposes, the system will consist, in particular, of conservation measures, rules for the use and distribution of resources, special provisions for coastal fishing and supervisory measures."

Article 6 (1):

"From 1 January 1983 to 31 December 1992 Member States are authorized to maintain the régime defined in Article 100 of the Act of Accession annexed to the Treaty establishing the European Communities and to generalize up to 12 nautical miles for all waters under their sovereignty or jurisdiction the limit of six miles prescribed in that article."

4. Those proposals were discussed at the Fisheries Council of 21 December 1982 which, as a result of the opposition of the Danish Government, failed to reach an agreement.

On the same day the Commission addressed to the Council a declaration [1] in the following terms:

"The Commission recalls that the Member States not only have the *right* to adopt the necessary measures, subject to their approval by the Commission, but

1 — Official Journal 1982, C 343, p. 2.

also have the *duty* to take these measures in the collective interest, this being a duty which the Commission can ask them to accept".

...

The Commission consequently calls upon all Member States:

to notify it without delay of the national measures of conservation they plan to adopt;

to confirm at the same time their intention to take the necessary action, at national level, to ensure that national measures of conservation planned, which the Commission approves, are complied with;

the Commission will, in carrying out its responsibilities, and particulary when approving national conservation measures, act on the basis of the proposals that it has submitted to the Council;

the Commission will ensure that the different national measures of conservation are as well coordinated as possible and requests the Member States' cooperation in this. The national measures must constitute a temporary system that is at once practicable, effective and non-discriminatory."

On 22 December 1982 the United Kingdom adopted Order No 1849 which entered into force for one year as from 1 January 1983, and according to which, subject to certain conditions:

"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."

On the same day the United Kingdom expressed its disappointment at the failure of the negotiations which had taken place the previous day and submitted the measure that it had just adopted to the Commission for approval. It confirmed that it would naturally be prepared to amend or revoke that measure:

"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."

By Decision 83/3/EEC of 5 January 1983 [1] the Commission, while reserving its decision on the substance of the measures, authorized the national measures which had been notified to it by certain Member States including the United Kingdom order adopted on 22 December 1982.

That authorization was given "for reasons of public order to avoid conflicts arising" during the period when the measures in question were being examined "in the absence of any provision applying to fishing in Community waters" and was given "provisionally ... for a period to expire not later than 26 January 1983".

The Fisheries Council met on 25 January 1983. In the words of Mr Sack it produced "results beyond all expectations" [2]. In particular the Council

1 — Official Journal 1983, L 12, p. 50.

2 — *Loc. cit.*, p. 444.

adopted Regulation (EEC) No 170/83 which incorporated the substance of proposal submitted by the Commission on 11 June 1982 and, almost word for word, the provisions which are cited above.

That then is the "Community context" of the case which is before the Court. Clearly it follows that the maintenance, for a further period of 10 years, of the derogatory rules based on Article 100 of the Act of Accession is an integral part of the common fisheries policy.

5. The question is therefore whether that objective was achieved by proper means.

There would be no difficulty if Regulation No 170/83 had been adopted and had entered into force before 1 January 1983. That is not the case. The regulation is dated 25 January and under Article 16 thereof, it entered into force on 27 January, the day of its publication in the Official Journal of the European Communities.

There has been some discussion as to the retroactive effect of the regulation or, more specifically, of Article 6 thereof which, it may be recalled, authorizes Member States to maintain the previous arrangements "as from 1 January 1983". That discussion has been concerned in particular with the effects of such retroactivity in criminal law. Provisions relating to criminal law cannot be retroactive. However it does not seem that the question arises in those terms in this instance.

What then was the situation shortly before 1 January 1983? The regulation that was then in the course of preparation could not yet apply. The Court has already ruled that "the effect of the Council's inability to reach a decision ... has not been to deprive the Community of its powers" in the conservation of fishery resources. The Court stated: "In such a situation, it was for the Member States, as regards the maritime zones coming within their jurisdiction, to take the necessary conservation measures in the common interest and in accordance with both the substantive and the procedural rules arising from Community law" [1]. The Court further developed that principle, which has now become established, in its other judgment in *Commission* v *United Kingdom* [2], stating that Article 5 of the Treaty "impose on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action". It also pointed out that as "trustees of the common interest" the Member States are under "an obligation to undertake detailed consultation with the Commission and to seek its approval in good faith".

It would seem that those principles laid down in respect of the conservation of fishery resources may be applied to the question of access to the 12 mile coastal zone,

first, because regulation of access is one of the preconditions for conservation, and

1 — Judgment of 10. 7. 1980 in Case 32/79 *Commission* v *United Kingdom* [1980] ECR 2403, at p. 2434, paragraph 15 of the decision.

2 — Judgment of 5. 5. 1981 in Case 804/79 [1981] ECR 1045, at pp. 1075 and 1076, paragraphs 27 to 31 of the decision.

secondly, because of the need to "safeguard the particular needs of regions where local populations are especially dependent on fisheries and related industries" [1].

The Commission's declaration to the Council of 21 December 1982 expressly drew attention to the Court's decisions which are cited above. In accordance with those principles, the United Kingdom, complied with the Commission's request and submitted the measure in question to the Commission for approval. The Commission authorized the measure on a provisional basis on 5 January 1983.

6. It remains to consider the substance of the contested order and its conformity with the relevant requirements of Community law. That raises the question of the discriminatory effect alleged both by Mr Kirk and by the Danish and Netherlands Governments. It must be recalled that the Sea Fish Order 1982 prohibited from fishing in British coastal waters only fishing vessels registered in Denmark.

Such a measure, although perhaps maladroit in form, is discriminatory only in appearance. From the point of view of Community law it was possible lawfully to exclude the Danish vessels, which did not traditionally fish in the waters concerned, on the basis of the authorization contained in Article 100 of the Act of Accession. The Commission's proposals, approved by the Council on 25 January 1983, did not create new rights for such vessels in this respect

The matter in point in this case, therefore, is not discrimination but a derogation which is based on the respective situations of the two States concerned and which the United Kingdom has extended by adopting the contested order.

Indeed it might be thought that there was a particular need for that measure since, in contrast to most of the other Member States, Denmark had refused at the time to give the United Kingdom assurances that it would respect the status quo pending the adoption of a Council regulation.

I am therefore of the opinion that the Court should rule as follows:

Given that the authority that would normally have been responsible for laying down Community rules for the conservation and management of fisheriy resources had failed to act and in view of the state of Community law, a Member State was entitled, provided that it complied with the relevant procedural rules, to bring into force after 31 December 1982 a measure maintaining on a temporary basis a prohibition of fishing within 12 miles of its coast by vessels registered in another Member State.

1 — Sixth recital in the preamble to Council Regulation (EEC) No 170/83 of 25. 1. 1983.