bring into force, without appropriate prior consultation with the Commission and notwithstanding objections, reservations or conditions formulated by the Commission, a fishery conservation measure of the kind which forms the subject-matter of the Fishing Nets (North-East Atlantic) (Variation) Order 1979 (SI 1979 No 744).

2. Where criminal proceedings are brought by virtue of a national measure which is held to be contrary to Community law a conviction in those proceedings is also incompatible with that law.

Mertens de Wilmars Bosco Touffait

Due Pescatore Mackenzie Stuart O'Keeffe

Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 16 December 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 NOVEMBER 1981 [1]

Mr President,
Members of the Court,

The main action, which gave rise to the reference for a preliminary ruling which is to be considered today, concerns the point whether the United Kingdom Fishing Nets (North-East Atlantic) Order 1977, as amended by the Fishing Nets (North-East Atlantic) (Variation) Order 1979, is compatible with the provisions of Community law. Both the United Kingdom measures, which concern the conservation of fishing stocks, have already formed the subject-matter of proceedings for breach of Treaty obligations in which the Court of Justice was able to consider in detail the orders in question together with the relevant provisions of Community law. In its judgment of 4 October 1979 in Case 141/78, *French Republic* v *United*

1 — Translated from the German

Kingdom of Great Britain and Northern Ireland, ([1979] ECR 2923) it ruled that the United Kingdom, by bringing into force on 1 April 1977 the Fishing Nets (North-East Atlantic) Order 1977 without notifying in advance the Member States and the Commission of these provisions and thereby failing to seek the approval of the Commission, failed to fulfil its obligations under the EEC Treaty. In its judgment of 5 May 1981 in Case 804/79, *Commission* v *United Kingdom,* ([1981] ECR 1045) it ruled that the United Kingdom failed to fulfil its obligations under the EEC Treaty by enacting on 1 July 1979 *inter alia* the Fishing Nets (North-East Atlantic) Variation Order 1979, which prescribed an increase in the minimum mesh-size of the nets provided for in the above-mentioned 1977 Order, without appropriate prior consultation with the Commission and despite the objections of the latter.

On 16 October 1979 Mr Robert Tymen, a French national, the captain of a French trawler, was arrested by the Royal Navy for fishing for nephrops some 50 miles south-west of the Pembrokeshire coast in the fishing area of the United Kingdom and for having nets on board the meshes of which were less than the size permitted by Article 5 of and Schedule I to the said Order of 1977, as amended by the Order of 1979.

Prosecuted for this reason, Mr Tymen argued that the British provisions were contrary to Community law. The Cardiff Crown Court finally imposed a fine of £ 250, ordered the accused to pay £ 100 towards the costs of the case and ordered the forfeiture of the nets used in committing the offence.

Upon appeal to the Court of Appeal, Criminal Division, that court, by order of 14 November, stayed the proceedings and referred to the Court of Justice for a preliminary ruling under Article 17 of the EEC Treaty the following questions:

"1. Does a Member State have power to adopt and bring into force a fishery conservation measure prescribing a minimum mesh size for nephrops of a kind contained in the United Kingdom's Fishing Nets (North-East Atlantic) (Variation) Order 1979 (SI 1979 No 744) after the expiry of the period referred to in Article 102 of the Act of Accession on 31 December 1978?

2. If not, have individuals prosecuted under such a measure any and if so what rights which national courts must protect?

3. If the answer to 1 above is yes, would

(a) the procedural requirements or

(b) the other requirements of the following provisions:

(i) Article 3 of Council Regulation No 101/76 of 19 January 1976;

(ii) Annex VI to the Hague Resolution of 3 November 1976;

(iii) Decision 79/590/EEC of 25 June 1979;

(iv) Article 5 of the EEC Treaty,

have been satisfied by a Member State which, before adopting such a fishery conservation measure, acted in the way the United Kingdom acted as shown in the file marked 'Statement of Facts' annexed hereto?

4. Does the fact that the Court of Justice in Case 141/78 *French Republic* v *United Kingdom* [1979] ECR 2923 found that the United Kingdom, in bringing into force the Fishing Nets (North-East Atlantic) Order 1977 (SI 1977 No 440), failed to fulfil its obligations under the EEC Treaty, make any difference to the answer to 3 above?

5. If all or any of the aforesaid requirements were not satisfied, have individuals prosecuted under such a measure any and if so what rights which national courts must protect?"

As the court making the reference, the appellant, the British and the French Governments and the Commission, which submitted observations on the case, properly emphasize, the answer to these questions may be given only in the light of the judgment of the Court of Justice which has been delivered in the meantime in Case 804/79 in which it was also necessary to settle the question whether and under what conditions the Member States were empowered after the expiry of the period mentioned in Article 102 of the Act of Accession to take measures like the provisions in question.

I — 1. It is thus appropriate once again to recall the essential points of that judgment, which also appeared in the judgment of the Court of 2 June 1981 in Case 124/80 *(Officier van Justitie* v *J. Van Dam & Zonen* [1981] ECR 1447). The Court expressly stated in the former judgment *inter alia* with regard to the Order of 1979 issued by the United Kingdom that "since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession, power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community", and that the "Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction." The Court further emphasized that the fact that the Council, which since that time was competent to enact Community measures, had failed to act "could not in any case restore to the Member States the power and freedom to act *unilaterally* in this field" since the transfer to the Community of powers in this matter was total and definitive.

2. On the basis of these findings the first question should in principle be answered in the negative. The factual situation brought about by the Council's failure to act prompted the Court however to permit a departure from that principle — and the complete answer to the first question is only to be found through that departure — in that it made clear that ". . . however, it is not possible to extend that idea to the point of making it entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant

biological and technological facts in this sphere." As the judgment shows, however, such measures of amendment may be of a limited scope only and may not result in a new conservation policy on the part of a Member State.

3. With regard to the conditions under which such conservation measures may be taken unilaterally by States — that is the point of the third question — the Court stated as follows:

"As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which Article 155, in conjunction, in this case, with the Decision of 25 June 1979 and the parallel decisions, gives to the Commission.

Thus, in a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force at the expiration of the period laid down in Article 102 of the Act of Accession, the Decision of 25 June 1979 and the parallel decisions, as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers, imposed upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission."

Those quotations and other passages of the judgment which I presume to be known and which accordingly I need not cite word for word, show clearly that conservation measures taken by a Member State are only lawful when they are in accordance with both the formal and substantive requirements of Community law, which include in particular the provisions listed in the third question.

Since the Court found that those requirements were not fulfilled when the order in question was issued it accordingly ruled that the United Kingdom had failed to fulfil its obligations under the Treaty "by having prevented the Commission, by the consultation procedure adopted, from giving adequate consideration to the proposed measures and by having brought them into force in spite of the Commission's objections".

II — Placed in this context, there are ultimately, as all the participants in the proceedings point out, in substance two groups of questions to consider which were not expressly examined in the said judgment and which are based on the circumstance that it is not contested that, in principle at least, the Order issued by the United Kingdom on 1 July 1979 corresponded to the proposals made by the Commission to the Council at the same time. However, unlike the United Kingdom measures, those proposed by the Commission were not to enter into force until 1 September 1979.

Thus the first question which arises is whether, as the United Kingdom Government considers, it may be accepted that after that date the national measure must be considered as tacitly approved. Should this not be the case, there is a further question to be examined, namely what consequences arise in criminal law so far as individuals are concerned when, as in this case, the national measure which was not approved is in its essentials the same as the proposal of the Commission.

1. To begin with the first question, in the view of the United Kingdom, the objections of the Commission were primarily directed against the date of the entry into force of the United Kingdom measure but not against its subsequent maintenance in force. The reservations expressed by the Commission accordingly related exclusively to the premature entry into force of the measure in question; the measure was, then, approved subject to the condition that it should not enter into force before 1 September 1979. It has to be said, however, that after that date the national measure and the proposal of the Commission coincide, with the result that in so far as the national measure has regard for the Community interest and national interests it may no longer be regarded as contrary to Community law. Finally the Court stated clearly in its judgment in Case 804/79 that the charge of failure to fulfil obligations under the Treaty related to the premature entry into force of the measure. Experience, however, indicates that national measures are often accorded the approval of the Commission, even *ex post.* If that view is not accepted the failure of the Commission to grant approval nevertheless constitutes misuse of the law.

As the other parties to the proceedings point out these arguments are untenable for various reasons. As I have already stated, the judgment in Case 804/79 clearly establishes that the Member States, on the basis of the provisions of Community law, were obliged, after the expiry of the period laid down in Article 102 of the Act of Accession, in the event of a failure to act on the part of the Council, to undertake detailed consultations with the Commission before enacting conservation measures and to seek its approval in good faith. In addition they are also under a duty not to lay down national conservation measures in spite of *objections, reservations* or *conditions* which might be formulated by the Commission. National measures, the enactment of which was contrary to such positive and negative duties, are accordingly not compatible with Community law.

On the basis of that state of the law the Court of Justice then found that the consultation carried out by the Government of the United Kingdom was unsatisfactory and was not in accordance with the requirements of the Council decisions. Furthermore the Commission put forward its reservations at the very beginning of the consultation procedure and renewed them expressly on 22 and 27 June after taking note of the wording of the measures and making known its intention not to approve them until a more thorough examination had made it possible to find an area of agreement.

With regard to the question of the circumstances forming the basis for the Commission's complaints the Court gave a clear ruling in its judgment, emphasizing that:

"the criticisms made by the Commission are based on the consideration that measures of this type cannot be effectively adopted except for the whole of the Community, that the Council would have been in a position to adopt them in the form intended by the Treaty if the United Kingdom had not *itself* blocked the decision-making process in the Council and that by unilaterally adopting the measures in question the United Kingdom has encroached upon the powers which belong in their entirety, as from 1 January 1979, to the Community."

However, it was only in the alternative that the Commission considered the *substance* of the various measures adopted in order to show that, even though they were genuine measures of conservation, their adoption infringed the principle of equality of treatment of all Community fishermen, either as regards the time at which they came into force or as regards the detailed methods of their application. These findings show clearly that the objections formulated by the Commission did not relate solely to the date of the entry into force of the United Kingdom measures. A further consequence of this, however, is that, although the content of the United Kingdom measures was in accordance with the conservation measures proposed by the Commission at the time when the accused was arrested, the main objection of the Commission at that time was not removed through the passage of time.

In this connection it should also not be overlooked that the proposals of the Commission, which are addressed to the Council and not to the Member States, constitute the initiation of a specific Community procedure and accordingly they may not simply be regarded as constituting approval of a unilateral procedure of a Member State in a sphere where the powers of the Community take precedence.

In particular it is necessary to insist, in the interests of legal certainty that, when the Commission has formulated express objections, reservations or conditions in relation to the enactment of a measure by a Member State, such objections, reservations or conditions may only be considered to have been withdrawn when the Commission subsequently intimates clearly that it no longer wishes to insist on its objections. Until now there has been nothing to indicate that this is the case. Quite to the contrary, the Commission stated on this point, in the communication relating to the publication of national fishery conservation measures (Official Journal C 133, p. 2 of 4 June 1980), under the date 3 August 1979, that its prior disapproval of that measure still subsisted in that, when it agreed to the designation of sea perch as a protected species it did so "*without approving the order as such.*" If the Commission had wished its objections to be regarded as withdrawn after 1 September 1979 it must also be assumed that it would have said as much in the proceedings against the United Kingdom for failure to fulfil an obligation under the Treaty which only terminated in May 1981.

As the United Kingdom has properly remarked, I made it clear in my opinion of 12 February 1981 on that case that a national measure may be approved, even tacitly. Nevertheless there can, of course, be no such tacit approval when the Commission has put forward its reservations at the very beginning of the

consultation procedure and expressly maintained its objections. In this connection the argument of the United Kingdom that in other cases the Commission has subsequently approved measures which had already been put into force by the Member States is of no avail since *in these other cases* the possibility of approval of the measure would not be ruled out. In any event, as the Court in fact emphasized in its judgment in Case 804/79, these cases are not comparable with the contested measures of the United Kingdom concerning which the Commission put forward its reservations at the very beginning of the consultation procedure and expressly renewed its objections to them.

Finally, there is in addition a consideration based on legal policy which militates against the view that the measure objected to is subsequently justified because it coincides with the proposal of the Commission: the consequence of permitting such justification without fresh consultation with the Commission would be that whenever a proposal of the Commission was not accepted in the Council the Member States would be able to adopt corresponding national measures so that it would not always be possible to ensure the protection of the common interest, for example where the relevant biological and technological factors alter.

The outcome of the foregoing is that, from the point of view of Community law, the contested measures would only have been unobjectionable if the United Kingdom had, before 1 September 1979, observing all the procedural requirements, referred the measure again to the Commission in order to enable it thoroughly to consider the measure. Since the United Kindom failed to do so the Commission is not to be criticized on the ground that its subsequent disapproval of the measure constitutes misuse of the law.

2. In view of this conclusion it is accordingly necessary to go on to examine the group of points contained in Questions 2 and 5 regarding the extent to which individuals may claim protection against the application of the measures incompatible with Community law.

In regard to that matter the United Kingdom argues in the alternative that where national provisions are compatible with proposals of the Commission, it need not necessarily be assumed that they are inapplicable despite the infringement of a formal provision of Community law. Since the provisions of Community law concerning conservation measures are in fact directed exclusively to the Member States, they do not have any direct effect within the meaning of the case-law of the Court of Justice so that individuals may not obtain any rights from failure to comply with those provisions. Finally, it is in the interest of the Community that individuals should not be able to rely on such provisions where the Member State has merely infringed the provisions on cooperation with the Commission.

This argument, which clearly relates to the question whether individuals have rights which the courts must protect disregards, however, the fact, as in particular the French Government and the Commission have also properly pointed out, that this case does not concern the question whether Community law has direct effect in the sense that individuals may rely upon it before

the national courts but relates only to the problem of its *direct applicability* within the legal systems of the Member States.

Since there exists, on the question of the effects of the direct applicability of a Community provision where a provision of the law of a Member State is incompatible with it, an established line of decisions of the Court of Justice, it is sufficient for me, instead of citing numerous decisions, to refer to the judgment of the Court of 9 March 1978 in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* ([1978] ECR 629) in which the Court of Justice summarized the essence of such applicability, characterizing it as follows (loc. cit., p. 643 *in fine*):

"Direct applicability ... means that rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force.

These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law."

Furthermore it is necessary in this connection to recall *the principle of the precedence of Community law* in accordance with which, as it is further stated in the said judgment (loc. cit. p. 643):

"... the relationship between provisions of the Treaty and directly applicable measures of the institutions on the one hand and the national law of the Member States on the other is such that those provisions and measures not only by their entry into force render automatically inapplicable any conflicting provision of current national law but — in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the Member States — also preclude the valid adoption of new national legislative measures to the extent to which they would be incompatible with Community provisions. Indeed any recognition that national legislative measures which encroach upon the field within which the Community exercises its legislative power or which are otherwise incompatible with the provisions of Community law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by Member States pursuant to the Treaty and would thus imperil the very foundations of the Community".

In accordance with these considerations, and on the basis of the spirit and essence of Article 177 of the EEC Treaty, the Court accordingly emphasized:

"... every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."

This applies with even greater force when the Court of Justice has ruled authoritatively in a judgment that there has been a breach of a provision of the Treaty (cf. in this connection the judgment of 13 July 1972 in Case 48/71 *Commission* v *Italian Republic*, ([1972] ECR 527).

In this connection it is irrelevant, contrary to the views of the United Kingdom, in the context of criminal

proceedings whether the appropriate provision of Community law is capable of providing rights for individuals. Instead it is sufficient with regard to direct applicablility and the precedence of application that the requirement or prohibition of Community law is sufficiently clear, which is beyond dispute as regards the conservation measures enacted in pursuance of the duty of cooperation undertaken by the Member States under Article 5 as the judgment in Case 804/79 shows.

The effectiveness of Community law, as thus described, would however be frustrated if a Member State were entitled on the basis of a national provision declared contrary to Community law and which has accordingly become inapplicable, to impose penalties under criminal law. It follows, as the Court has already declared in Case 88/77 (judgment of 16 February 1978, *Minister for Fisheries* v *C. A. Schonenberg and Others,* [1978] ECR 473) that where criminal proceedings are brought by virtue of a national measure which has been held to be contrary to Community law a conviction in those proceedings is also incompatible with that law. It makes no difference that there existed a proposal of the Commission which, in its essentials, was in accordance with the national provision since, as the Court made clear in its judgment of 10 October 1973 in Case 34/73, *F.lli Variola SpA.* v *Amministrazione Italiana delle Finanze,* ([1973] ECR 981), in particular with regard to its jurisdiction under Article 177 of the EEC Treaty, all procedures "whereby the Community nature of a legal rule is concealed from those subject to it" are unlawful.

III — In view of this conclusion the fourth question need not be considered. I therefore propose that the questions should be answered as follows:

1. After the expiry of the transitional period laid down in Article 102 of the Act of Accession the Member States are no longer entitled to exercise the unilateral power of enacting measures for the conservation of fish stocks in waters under their sovereignty. If the Council fails to act the Member States may, however, act as trustees of the common interest only if regard is had for the formal and substantive provisions of Community law. Accordingly such measures may in particular be taken only after appropriate consultation with the Commission and on condition that the Commission has not formulated any objections, reservations or conditions.

2. The imposition of penalties under criminal law or other coercive measures on the basis of a provision of national law which has been held to be contrary to Community law is incompatible with that law.