OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 6 JUNE 1979 [1]

Mr President,
Members of the Court,

The case on which I am giving an opinion today arises from a number of criminal proceedings against Netherlands fishing groups and fishermen, who are claimed to have infringed certain restrictions on catches of fish in the North Sea imposed by the Netherlands authorities. During those proceedings the question was raised whether the fixing of catch quotas is compatible with Community law, either as regards the division of competence between the Community and its Member States, or as regards the prohibition of discrimination which is enshrined in Community law. The Court has already dealt with this area of uncertainty to some extent in Joined Cases 3, 4 and 6/76 *Kramer and Others* [1976] 2 ECR 1279 (judgment of 14 July 1976), in Case 61/77 *Commission* v *Ireland* [1978] ECR 417 (judgment of 16 February 1978) and in Case 88/77 *Minister for Fisheries* v *Schonenberg* [1978] ECR 473 (judgment of 16 February 1978).

I do not really need to emphasize, therefore, that the Community is competent to take measures regulating the fishing sector, and that this competence extends to measures for the conservation of fish stocks. As the Court pointed out in the *Kramer* case, this competence is based on the general body of provisions concerning agriculture in the EEC Treaty, Regulation of the Council No 2141/70 of 20 October 1970 laying down a common structural policy for the fishing industry and Regulation of the Council No 2142/70 of 20 October 1970 on the common organization of the market in fishery products (Official Journal, English Special Edition 1970 (III), p. 703 and p. 704 respectively), which were replaced by Regulations Nos 100/76 and 101/76 of 19 January 1976 (Official Journal, L 20 of 28 January 1976, p. 1 and p. 19 respectively), and on Article 102 of the Act of Accession of 22 January 1972, which provides that from the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.

However, the system of Community rules in the fishing sector has, as you know, remained incomplete up to now, since the Council, failing in its duty, has been unable so far to agree on a comprehensive set of rules for the protection of fish stocks. Instead, Member States were empowered to adopt appropriate interim measures, in collaboration with the Commission, pending the implementation of a system of Community rules (see Annex VI to the decision of the Council of 3 November 1976 on the Conference held in The Hague on 30 October 1976), or to limit the catches of their fishing fleets in accordance with international undertakings entered into or to be entered into (see, for example, Regulation (EEC) No 811/76 of the Council of 6 April 1976 temporarily authorizing certain systems of catch quotas in the fisheries sector, Official Journal, L 94 of 9 April 1976, p. 1).

1 — Translated from the German.

EEC Member States which until the end of 1977 were parties to the North-East Atlantic Fisheries Convention of 24 January 1959 (United Nations Treaty Series, Vol. 486, 1964 No 7078) which came into force on 27 June 1963, that is to say, all except the Grand Duchy of Luxembourg and Italy, had entered into such international undertakings. According to the terms of this Convention the North-East Atlantic Fisheries Commission — a joint body set up under the Convention — could make binding recommendations to the Contracting States for, among other things, limiting catches to ensure the conservation of fish stocks in the waters specified. In Recommendation No 15 A of 25 November 1976 the Fisheries Commission laid down global quotas for catches of sole and plaice — the types of fish at issue in the main proceedings — in the North Sea for the year 1977 and divided this into individual quotas for the coastal states. The quotas allocated to the Netherlands amounted to 9 200 tonnes for sole and 47 000 tonnes for plaice.

After this Convention was denounced at the end of 1977 by the Netherlands and the other Member States following the decision adopted at The Hague on 3 November 1976 which is referred to above, no new international agreement, to which the Community should have been a party, was made.

When it became clear at the meeting held on 5, 6 and 7 December 1977 that the Member States in the Council were unable to agree on a set of Community rules for the conservation and management of fish stocks the Council decided to extend the validity of all the Community law provisions on the subject, which did not in fact concern sole and plaice, until 31 January 1978. At the same time it was agreed that the relevant national protective measures which were due to lapse at the year's end would also be extended until that date.

On 29 December 1977 the Netherlands Minister of Agriculture and Fisheries issued two decrees under Articles 3, 4 and 6 of the Regulation concerning Sea and Coastal Fishing 1977 (Staatsblad No 666), which enabled him *inter alia* to adopt measures implementing international agreements or resulting from the decisions of international organizations. These two decrees came into force on 1 January 1978.

By virtue of Article 2 of the Beschikking Voorlopige Regeling Vangsteperking Tong en Schol 1978 [Decree provisionally laying down restrictions on catches of sole and plaice, 1978] it was prohibited once the provision came into force to fish in certain maritime zones, in particular the North Sea, which is under the jurisdiction not only of the Netherlands but also of Belgium, Denmark, the Federal Republic of Germany, the United Kingdom and Norway. By way of exception to this prohibition Netherlands fishermen were permitted under Article 3 (1) of the decree to fish for sole up to a maximum of 765 tonnes and for plaice up to a maximum of 2 950 tonnes in the North Sea. In implementation of this article the Beschikking Voorlopige Regeling Contingentering Tong en Schol Noordzee 1978 [Decree provisionally laying down quotas for North Sea sole and plaice, 1978] then determined in more detail the monthly catch quotas to be allocated to individual Netherlands fishing vessels.

The fishermen accused in the main proceedings are charged with having infringed the provisions mentioned above by landing from their fishing vessels a larger quantity of sole and/or plaice from the North Sea than was allowed

according to the quota fixed for those vessels. When they claimed that the provisions in question were incompatible with Community law, the Economische Politierechter [magistrate in commercial matters] of the Arrondissementsrechtbank [District Court], Rotterdam, made an interim judgment on 18 July 1978 referring the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. On what date did the period referred to in Article 102 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties expire?

2. Are the measures pursuant to the Reglement Zee- en Kustvisserij 1977 (Regulation concerning sea and coastal fishing, 1977 — Staatsblad 1977, 666) as set out in the Beschikking Voorlopige Regeling Vangstbeperking Tong en Schol 1978 (Decree provisionally laying down restrictions on catches of sole and plaice, 1978) and the Beschikking Voorlopige Regeling Contingentering Tong en Schol Noordzee 1978 (Decree provisionally laying down quotas for North Sea sole and plaice, 1978 — Staatscourant 1977, 255) based on decisions of the Community or on obligations imposed by the Community on the Member States by treaty as referred to in Article 5 of the EEC Treaty or on powers conferred on the Member States by the Community?

3. Is the content of the aforesaid measures compatible with Community law?"

My opinion on these questions is as follows:

The Court of Justice has already made it clear in the *Kramer* judgment that the Community has power to take conservation measures in the fisheries sector. In Case 61/77 (*Commission* v *Ireland*) it went further and decided that in so far as this power has been exercised by the Community, the provisions adopted by it preclude any conflicting provisions by the Member States. So long as the transitional period laid down in Article 102 of the Act of Accession has expired and the Community has not yet exercised its power in the matter, however, Member States are entitled, according to the judgment mentioned above, to take conservation measures within their own jurisdiction, subject to certain conditions.

1. As to the *first question*, the accused in the original proceedings infer from the judgments in the cases of *Kramer*, and *Commission* v *Ireland*, that the Community had exclusive competence, from the end of the period mentioned in the relevant provision at the latest, to adopt conservation measures for fish stocks. Since the accession of the new Member States took place on 1 January 1973, the measures provided for in the article referred to above had to have been taken by the Council on 1 January 1978 at the latest, with the consequence that the Member States must have lost their powers from that moment on. The accused contend that according to the ordinary use of language the period came to an end not later than *the beginning of the sixth year*. They also point out that the Act of Accession generally provides for transitional periods of five years, or sometimes ten years, but not six years.

Opposing that interpretation, the Governments of Denmark, France, the Netherlands and the United Kingdom, which are taking part in the proceedings, and also the Commission, consider that the period laid down in Article 102 of

the Act of Accession did not expire until 31 December 1978.

I share this view. It cannot be denied that the meaning of this provision is obscure in all the Treaty languages. This obscurity arises from the fact that the point at which a period ceases to run is defined by a time-limit which itself spans a year. Consequently a literal interpretation on grammatical principles does not help to make it clear whether the period laid down in Article 102 of the Act of Accession expires at the beginning or only at the end of the sixth year. All that one can conclude with certainty from the wording is that the period referred to expires *at the latest* on 31 December 1978.

In that case it is surprising, however, that those who drafted the Treaty, contrary to the normal practice, did not provide for a time-limit by giving an exact date. This seems to me — and the Commission stresses the point — too strange to be treated as a mere oversight on the part of the draftsmen.

I find a further indication that the period should only expire at the end of the sixth year in the positioning of the provision in relation to the structural scheme of the Act of Accession. The article in question is in Part Four of the Act of Accession, which bears the title "Transitional Measures". It is thus governed by the basic principle in Article 9 (2) of the Act of Accession, according to which the application of the transitional measures shall terminate at the end of 1977, but "subject to the dates, time-limits and special provisions provided for in this Act".

It is quite obvious that the Act of Accession provides for transitional measures in order to make adaptation to the rules in force within the Community easier for the new Member States.

In principle it is the Member States which are given a duty to perform after the end of the year 1977, but in fact Article 102 of the Act of Accession is directed, not to the Member States, but to the Community institutions. That is enough to show that it is a special provision within the meaning of Article 9 (2), to which the transitional period mentioned therein does not apply. Besides, the parties to the Treaty would surely have referred to the expiry of the transitional period if they had had 31 December 1977 in mind. From the fact that instead of this being done express mention was made of the sixth year after accession I conclude that the period referred to in Article 102 did not expire until 31 December 1978.

It follows, in the light of the case-law of the Court of Justice, that at the time in question the Netherlands still had power to adopt measures for the conservation of fish stocks, since the Community had not yet fully exercised the powers given to it.

2. In the judgment to which I have referred however, the Court expressly stated — and here I come to the difficulty broached in the *second preliminary question* — that the residual powers left to the Member States are purely transitional in character and Member States are bound by Community obligations. Accordingly measures adopted by Member States are only permissible if they are necessary or at least appropriate and not unilateral, but taken in consultation with the Commission and the other Member States. Lastly, their content must not

conflict with the prohibition of discrimination enshrined in Community law.

If we judge the Netherlands measures in dispute by the yardstick of these criteria, which are also to be found in Annex VI to The Hague Resolution of 3 November 1976 mentioned above, the first thing we find is that the disputed Netherlands measures expressly emphasize their transitional character and that none of the parties disputes the necessity or appropriateness of the measures.

However, the accused in the main proceedings contend that the duty to conserve fish stocks which existed until 1977 under the North-East Atlantic Fisheries Convention could only be extended by an official Council decision. The agreement made at the Council meeting on 5, 6 and 7 December 1977 to extend national conservation measures too was purely a political agreement which, although the result of a Council meeting, had nothing to do with the EEC as such. Nor do the agreements in question meet the requirements of form laid down in the EEC Treaty. Admittedly the Council endorsed a declaration by the Commission at its meeting on 30 and 31 January 1978, which stated that national measures adopted in the absence of a common fisheries policy could only be taken if they fulfilled the conditions listed above. But this endorsement, which was unpublished, cannot be taken as retrospective approval of the measures taken by the Netherlands.

As I have already explained, the case-law of the Court shows clearly that before the expiry of the period referred to in Article 102 of the Act of Accession a formal authorization from the Council was not required for adopting national conservation measures in the fisheries sector. Moreover, no other interpretation is possible of Annex VI to the Resolution of The Hague adopted by the Council on 3 November 1976, which the Council merely reconfirmed at its meeting on 30 and 31 January 1978. But even the accused in the main proceedings do not deny that the Member States came to an agreement in consultation with the Commission during the Council meeting in December 1977. Hence the Netherlands was empowered on that basis, before expiry of the transitional period prescribed by Article 102 of the Act of Accession, to adopt the conservation measures in dispute.

Quite apart from that, however, we have heard from the participating Member States and from the Commission that the Council decided at the meeting it held at the time that besides the Community conservation measures, the national measures would also have their validity extended to 31 January 1978. Since fisheries policy, as already explained, is within the competence of the Community and the Council is expressly empowered by Article 4 of Regulation No 101/76 in conjunction with Article 102 of the Act of Accession to adopt the necessary measures for the conservation of fish stocks, I have no difficulty in concluding that the agreement described is a Council decision, which imposed a formal obligation on Member States to extend the period of validity of national conservation measures. I do not need to stress the point that the Council is not necessarily bound in the performance of its duties to observe the requirements of form laid down by Article 189 of the

EEC Treaty. There is no question of failure to publish or state the reasons for the decision in the present case, for the decision imposed duties only on the participating Member States and the Community institutions, not on individuals.

Accordingly, the conservation measures taken by the Netherlands met the requirements of Community law.

3. I can now turn to examination of the *third question*. It appears from the arguments put forward by the accused in the main action that this question depends on the interpretation of Article 7 of the EEC Treaty and Article 2 of Regulation No 101/76. It is to enable the national court to assess the compatibility of the content of the Netherlands measures in question with the principle of equal treatment laid down in the above-mentioned provisions. Article 7 of the EEC Treaty prohibits in principle any discrimination on the ground of nationality, whilst Article 2 of Regulation No 101/76 provides 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 and that equal conditions of access to and use of the fishing grounds situated in the territorial waters of the Member States must be granted to the fishing vessels of Member States.

The accused in the main action contend that independently of whether or not there was a duty in Community law to take the measures in question it is certain that the other Member States took no corresponding conservation measures at the time in question, which in itself places the Netherlands fishermen at a disadvantage. In addition to that, however, the disputed Netherlands decrees themselves conflict with the prohibition against discrimination.

For if the prohibition applies to all fishermen, only Netherlands fishermen are exempt up to the limit of the quotas allocated, and they are thus placed in a better position than fishermen from the other Member States. If the prohibition applies only to Netherlands fishermen, however, it means that fishermen from the other Member States are free to fish as they please, whilst Netherlands fishermen are restricted to the quotas and therefore at a disadvantage. In effect, though, the Netherlands rules refer only to Netherlands fishermen, since the Netherlands authorities have no jurisdiction over fishing vessels from other Member States outside the fishing zone of 200 miles, and even within the 200-mile zone the rules are only applied to Netherlands fishermen.

The Governments taking part in the proceedings and the Commission refute this argument as in their opinion the rules in question constitute discrimination, if any, "in reverse", which is not prohibited by Article 7 of the EEC Treaty.

I, too, do not see in the measures in question any infringement of Community law's requirement of equal treatment.

I have already mentioned that the Member States were bound by the Council decision taken at the meeting on 5, 6 and 7 December 1977 to extend until 1 February 1978 the protective measures adopted for the year 1977 under Recommendation No 15 A of the Fisheries Commission of 25 November

1976. In doing so the Council was acting on the assumption that the conservation of the biological resources of the sea can only be effectively and properly ensured by a system of control which so far as possible is binding on all the States concerned.

The conservation measures taken on the basis of Recommendation No 15 A divided the yearly global quotas for catches of sole and plaice in the North Sea into individual quotas for the countries with coast-lines on the North Sea. The geographical sphere of application of the recommendation covers maritime waters subject to the jurisdiction of Member States and also of Norway. Within this zone it is immaterial where the relevant quotas are caught; all that matters is that the level should not be exceeded, and this is to be guaranteed by the States parties to the agreement. In this connexion I need not emphasize that rules fixing quotas cannot in themselves infringe the prohibition of discrimination if, as has been shown, they are expressly allowed for in Community law.

After the Netherlands had followed the recommendation of the Fisheries Commission by issuing the Beschikking Vangstbeperking Tong en Schol 1977 (Decree laying down restrictions on catches of sole and plaice, Staatscourant 1976, No 251) and to implement it had published the Beschikking Contingentering Tong en Schol Noordzee 1977 [Decree laying down quotas for North Sea sole and plaice, Staatscourant 1976, No 251], they extended the period of validity of these measures, in accordance with the Council decision of December 1977, as the representative of the Netherlands Government has told us, by means of the decrees of 29 December 1978 and at the same time, in view of the provisional nature of their validity, replaced the yearly quotas by monthly catch quotas, which were roughly equal to one twelfth of the yearly quota.

From the disputed measures themselves it is not hard to see that, even if they do not expressly say so, they only apply to Netherlands fishermen. For the prohibition in Article 2 of the Decree provisionally laying down restrictions on catches of sole and plaice, 1978 applies not only to the North sea, but also to the English Channel, the Bristol Channel and the Irish Sea, that is to say, to waters which are either not at all, or are only to a small extent, under Netherlands jurisdiction. Owing to territorial sovereignty, a prohibition against all fishing vessels could only be made for maritime waters within Netherlands jurisdiction, whereas the sovereignty exercisable over a State's own nationals made it posible to prohibit fishing by them even in waters outside the 200-mile fishing zone. But in any case there was no occasion to extend the application of the disputed regulations to non-Netherlands fishing vessels. It is obvious that the Netherlands authorities have no power to make rules governing foreign fishing vessels in maritime waters outside Netherlands jurisdiction. As regards the waters within their jurisdiction there is already, however, a general prohibition against fishing by foreign fishing vessels by virtue of Article 5 (1) of the Netherlands Fisheries Law of 1963 (Staatsblad No 312). According to paragraph (2) of that article this prohibition does not apply, however, if anything to the contrary is adopted by

international agreement or by decisions of organizations recognized by international law. The Council decision taken in December 1977 to the effect that national conservation measures based on the quota restrictions of the North-East Atlantic Fisheries Convention should be extended constitutes such a legal act. Consequently fishing vessels belonging to other Member States are not subject to the prohibition in paragraph (1), or at least only in so far as the quota allocated to the Member State concerned is not exceeded, whilst Netherlands fishermen, so long as they comply with the quota restrictions, are exempt under Article 3 of the Decree provisionally laying down restrictions on catches of sole and plaice, 1978.

This being the law, it is clear that by virtue of the disputed Netherlands measures for conservation of sole and plaice stocks Netherlands fishing vessels, which without this control would be favoured, are treated equally with vessels flying the flag of another Member State. That is, of course, assuming that the other Member States have also extended their national quota restrictions in compliance with the Council decision in question.

Should it be that the other Member States have failed to comply fully with the Council decision of December 1977, the result could well be that Netherlands fishermen are at a disadvantage. But the fact that other Member States act against the interests of the Community must not expose the Netherlands, which acted in accordance with the Treaty, to a charge of infringing the prohibition of discrimination in Article 7 of the Treaty or Article 2 of Regulation No 101/76.

To close my examination, permit me to make a brief comment on the complaint about discrimination in prosecution practice. As you know, each party to the North-East Atlantic Fisheries Convention has to guarantee by legislation that the catch quotas allocated will not be exceeded. So it is possible in principle for the prosecuting authorities in the Netherlands to take proceedings against both Netherlands fishermen and fishermen of other nationalities if catch quotas are exceeded. But it would be difficult to prosecute foreign nationals in that case owing to the difficulty of ascertaining whether the national quotas had been exceeded. The difference in treatment results therefore from a difference in actual circumstances and as such does not infringe the prohibition of discrimination in Community law.

I propose, therefore, that the reply to the questions put by the Economische Politierechter of the Arrondissementsrechtbank, Rotterdam, be as follows:

1. The period referred to in Article 102 of the Act concerning the Conditions of Accession and the Adjustments to the Treaties expired at the end of the year 1978. Therefore at the time of the events to be ruled upon by the court making the reference the Netherlands had the power to adopt measures for restricting fishing activities for the purpose of conserving the resources of the sea such as those contained in the Beschikking Voorlopige Regeling Contingentering Tong en Schol Noordzee 1978.

2. These measures do not conflict with either Article 7 of the EEC Treaty, which prohibits discrimination on the ground of nationality, or Article 2 (1) of Regulation No 101/76, under which 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.