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

Mr President,
Members of the Court,

As in Case 269/80 *Robert Tymen* [1982] ECR (non-published), on which I have recently delivered my opinion, this reference for a preliminary ruling from a Belgian court arises out of criminal proceedings, brought as a result of a fishing incident, the outcome of which depends on whether Member States still had power at the relevant time to adopt measures to limit fishing in their territorial waters.

On 7 May 1980 the Netherlands fishing vessel, K.67 *Christina* having a tonnage of 67 gross registered tonnes (GRT) and equipped with an engine of 300 bhp was fishing by boom trawl for sole, plaice and cod in Belgian coastal waters with nets having an average mesh-size of 79 mm. The vessel was arrested and tied up in the harbour at Ostend. The vessel was released again after an amount of BFR 300 000 had been paid by way of security. The vessel's catch was auctioned and the nets were seized.

Daniël Bout, the Netherlands captain of the vessel, was charged, before the Rechtbank van Eerste Aanleg [Court of First Instance] Bruges, with offences against Belgian fishery rules. He was charged with having used in Belgian coastal waters a fishing vessel having a tonnage of more than 50 GRT and an engine in excess of 300 bhp and nets made of double twine having a minimum mesh-size smaller than 80 mm, contrary to the Koninklijke Besluit van 23 April 1979 houdende maatregelen om de visstand en de schaaldieren- en weekdierenstand in de Belgische visserijzone te beschermen [Royal Decree of 23 April 1979 laying down measures for the protection of resources in fish, crustaceans and molluscs in the Belgian fishing zone] (Belgisch Staatsblad [Belgian Gazette] No 93 of 15 May 1979) as amended by the Koninklijke Besluit houdende tijdelijke maatregelen om de visstand en de schaaldieren- en weekdierenstand in de Nordzee te beschermen [Royal Decree of 20 December 1979 laying down interim measures for the protection of resources in fish, crustaceans and molluscs in the North Sea (Belgisch Staatsblad [Belgian Gazette] of 29 February 1980) and of de Wet van 10 October 1979 houdende vastelling van een Belgische Visserijzone [Law of 10 October 1978 laying down a Belgian fishing zone].

The Third Chamber of the Rechtbank van Eerste Aanleg [Court of First Instance], Bruges, considered that it was questionable whether at the time of the alleged offences the Kingdom of Belgium still retained the power to adopt such measures. In addition, the accused relied on Council Regulation (EEC) No 2527/80 of 30 September 1980 (Official Journal 1980 L 258, p. 1) laying down technical measures for the conservation of fishery resources since that regulation contains provisions more favourable to him than the Belgian provisions. The Third Chamber of the Rechtbank van Eerste Aanleg therefore stayed the proceedings by interlocutory judgment of 19 January 1981 and, pursuant to Article 177 of the EEC Treaty, referred the following questions to the Court of Justice for a preliminary ruling:

"1. Did the Member States at the time of the occurrences submitted for judgment to this court remain competent to enact provisions for

1 — Translated from the German.

the limitation of fishing such as those embodied in the Royal Decree of 23 April 1979 laying down measures for the protection of resources in fish, crustaceans and molluscs in the Belgian fishing zone (Belgisch Staatsblad [Belgian Gazette] of 15 May 1979) and were they entitled to enforce compliance with such provisions within the zone coming within their jurisdiction having regard to Articles 30, 34, 38 to 47 of the EEC Treaty of 25 March 1957, Article 102 of the Act of Accession and of Regulations (EEC) Nos 100/76 and 101/76 on the common organization of the market in fishery products and laying down a common structural policy for the fishing industry respectively (Official Journal 1976, L 20)?

2. May retroactive effect be conferred upon Council Regulation (EEC) No 2527/80 laying down technical measures for the conservation of fishery resources or any subsequent regulations governing the same matters?"

My opinion on those questions is as follows:

1. The first question mentions expressly only the Royal Decree of 23 April 1979 laying down measures for the protection of resources in fish, crustaceans and molluscs in the Belgian fishing zone. If those measures, expressly referred to by the court making the reference, are examined in the light of the judgments of the Court in Cases 84/79 (judgment of 5 May 1981 in *Commission* v *UK* [1981] ECR 1045) and 124/80 (judgment of 2 June 1981 in *Firma J. Van Dam Zonen* [1981] ECR 1447) there is, as the Belgian Government and the Commission, which have submitted observations on the case, have rightly pointed out, nothing which may give rise to doubts as to their compatibility with Community law. The Commission had been consulted in good time and had in fact expressly approved the measures, as may be seen from the "communication from the Commission relating to the publication of national fishery conservation measures" (Official Journal 1980, C 133, p. 2)

On the other hand the Royal Decree laying down interim measures for the protection of resources in fish, crustaceans and molluscs in the North Sea of 20 December 1979, which is only mentioned in the statement of the grounds upon which the judgment making the reference is based was, as the Commission points out, never submitted to it for approval and accordingly could not be adequately examined by the Commission owing to the lack of consultation. Those provisions did, however, increase the minimum mesh-size of double-twine nets laid down in the Royal Decree of 23 April 1979 from 75 to 80 mm.

By using nets with a minimum mesh-size of 79 mm the accused can therefore only have committed an offence contrary to the Royal Decree of 20 December 1979. Those provisions were, however, adopted in contravention of the formal requirements of Community law and as I explained in my opinion in Case 269/80 *Robert Tymen* [1981] ECR (non-published), a criminal conviction based upon such measures is similarly incompatible with Community law.

2. By its second question the court making the reference seeks to ascertain whether Council Regulation (EEC) No 2527/80, which was adopted after the occurrences in question, or other relevant rules of Community law may have retroactive effect.

In answering that question I should point out that Article 22 of the Regulation of 30 September 1980 provides that the regulation is to enter into force on 1 October 1980 and at the same time lays down the date on which it is to cease to apply. There is, however, a general principle of law, which is also recognized and applied by the Court of Justice, that legislative rules take effect, unless they contain any provision to the contrary, as from the date of their entry into force (cf. judgment of 5 July 1973 in Case 1/73 *Westzucker GmbH* v *Einfuhr- und Vorratsstelle für Zucker* [1973] ECR 723, and judgment of 31 March 1977 in Case 88/76, *Société pour l'Exportation des Sucres SA* v *Commission* [1977] ECR 709). As the Belgian Government and the Commission have rightly pointed out, nothing may be derived from the regulation to support the interpretation that the Council intended that the regulation should take effect retroactively at a time before its entry into force. Nor is it possible to find any Community measure for the conservation of fishery resources adopted after 30 September 1980 which might have taken effect retroactively at the time of the fishing incident.

I thus propose that, in reply to the questions raised by the national court, the following answers should be given:

1. Measures adopted by a Member State to preserve the biological resources of the sea, such as the measures taken by the Kingdom of Belgium to restrict catches in 1979, are compatible with Community law only if they have been adopted by reason of the inaction of the Council and if the Commission had an opportunity to examine the measures adequately and has formulated no objections, reservations or conditions in regard to the entry into force of those measures, or has expressly approved such measures.

2. An examination of Council Regulation (EEC) No 2527/80 of 30 September 1980 laying down technical measures for the conservation of fishery resources or of any subsequent Community measures relating to this matter does not disclose any factor of such a nature as to indicate that the Council intended to endow such measures with retroactive effect.