comparable obligation is imposed on its own nationals.
3. 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.

In Case 88/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the District Court for the District Court Area of Cork City (Ireland) for a preliminary ruling in the action pending before that court between

THE MINISTER FOR FISHERIES

and

C. A. SCHONENBERG, PETER STAM, NICO DE NIET, ARIE HOFLAND, J. V. RIJN, J. M. PLUG, HUIBERIUS R. PLUG, J. M. BAL, C. ZWAN AND PETER C. HAASNOOT, Masters of Netherlands trawlers,

on the interpretation of Article 7 of the EEC Treaty, of Articles 2 and 4 of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry and of Articles 100 to 103 of the Treaty, known as the Treaty of Accession, of 22 January 1972, with, regard to two orders made by the Irish Minister for Fisheries on 16 February 1977 in relation to sea fishing (Sea Fisheries (Conservation and Rational Exploitation) Orders 1977),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco, Presidents of Chambers, A. M. Donner, P. Pescatore, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and issues

The facts of the action, the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

In Ireland Article 35 of the Fisheries (Amendment) Act 1962 confers certain powers on the Minister for Fisheries as regards the conservation and management of fish stocks. It provides, in particular,

'Where the Minister, having regard to any International Agreement to which the State is a party is satisfied that it is necessary to do so, the Minister may by Order prescribe and adopt such measures of conservation of fish stocks and Rational Exploitation of Fisheries as the Minister thinks proper'.

Any offence against such a ministerial order is subject to a maximum fine of £100 and the provisions of Chapter IV of Part XIII of the Fisheries (Consolidation) Act 1959 are applicable to such offence.

The statutory consequence of conviction is the forfeiture of any fishing gear or fish.

The Irish Minister for Fisheries exercised those powers by two orders dated 16 February 1977.

The first, the Sea Fisheries (Conservation and Rational Exploitation) Order 1977, makes it an offence for any sea fishing boat to enter and remain and to fish in a maritime area situated within that portion of the exclusive fishery limits of Ireland which lies south of the parallel of 56° 30' North latitude, east of the meridian of 12° West longitude and north of the parallel of 50° 30' North latitude. It is also an offence under the order for any person on a sea fishing boat to fish or to attempt to fish in the area in question or for such a vessel to have fish on board unless the fishing was in accordance with law, or for the boat not to keep its fishing gear stowed away while in the area.

The second, the Sea Fisheries (Conservation and Rational Exploitation) (No 2) Order 1977 exempts from the foregoing prohibition any sea fishing boat not exceeding 33 metres in registered length or having a main engine or engines not exceeding a total of 1 100 brake horse-power.

The orders came into force on 10 April 1977.

On 29 April 1977 ten trawlers registered in the Netherlands, all of which exceeded the registered dimension and brake horse-power authorized by the Irish orders, fished in a group, accompanied by a hospital ship, between 25 and 28 miles from the Irish coast due South of the Old Head of Kinsale. When detected they were between 40 and 45 miles inside the reserved area. One of the Dutch boats, the VL 89 Monica, the Master of which was C. A. Schonenberg, was boarded by a boarding party from an Irish Naval Sea Fisheries Protection vessel, placed under arrest and brought to Cork Harbour, whereupon the other nine boats also proceeded to Cork. The Masters of the trawlers were arrested and the boats and their crews were detained.

On 2 May 1977 the Masters of the ten Dutch trawlers in question were pros-

ecuted before the Cork District Court for having entered into the area reserved by the orders of 16 February 1977, for having fished there, for having fish on board and for having failed to have their gear stowed away.

As the defendants alleged that the Irish orders were incompatible with various provisions of Community law applicable to fishing the District Court for the District Court Area of Cork City decided, by order of 7 July 1977, to stay the proceedings under Article 177 of the EEC Treaty until the Court of Justice has given a preliminary ruling on the following questions:

1. 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)?
2. 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)?
3. Would a conviction of the defendants by this court on the charges referred to in the Second Schedule hereto be incompatible with Community law?

The order of the District Court, Cork, was received at the Court Registry on 12 July 1977.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 26 August 1977 by the Commission of the European Communities, on 26 September by the Government of the Kingdom of the Netherlands, on 3 October by the Government of the French Republic and by C. A. Schonenberg and the other defendants in the main action, and on 12 October 1977 by the Irish Minister for Fisheries.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral proceedings without holding any preliminary inquiry.

However, at its request the Government of the French Republic and the Government of the Kingdom of the Netherlands gave the Court before the hearing certain information concerning the consequences of the Irish orders for the fishing industry in France and in the Netherlands.

II — Written observations submitted before the Court

After observing that to a considerable extent the legal questions raised in the present case are similar to those raised in Case 61/77 *(Commission* v *Ireland)* which is also pending before the Court, the *Irish Minister for Fisheries,* the complainant in the main action, maintains that none of the submissions made in their defence by the defendants in the main action can be accepted.

(a) The argument that by virtue of Articles 100 and 101 of the Act of Accession Ireland has no jurisdiction whatever over the maritime waters outside its 6 to 12 mile limits, as the case may be, and within the 200 mile

limit recently adopted is quite unsustainable.

Articles 100 and 101 of the Act of Accession, by which the Member States are authorized to restrict fishing in waters under their sovereignty or jurisdiction, situated within a limit of 6 or, in certain cases, 12 nautical miles, does not mean that the waters under the sovereignty or jurisdiction of Member States are only those within the 6 or 12 mile limit.

It is clear from its very wording ('notwithstanding the provisions of Article 2 of Regulation (EEC) No 2141/70') that the terms of Article 100 of the Act of Accession are a limited derogation from provisions which clearly applied to the whole of the waters under the jurisdiction of the original Member States at the time when the regulation was made. It is quite clear that the limitation of 6 to 12 miles contained in Articles 100 and 101, which appears in no other provision of Community law, has nothing to do with the extent of the waters under the sovereignty or within the jurisdiction of Member States.

In accordance with the Resolution adopted by the Council at its meeting at The Hague on 30 October 1976 and formally adopted on 3 November, Ireland extended its exclusive fishery limits as from 1 January 1977 to 200 miles from the base line by an order dated 22 December 1976, entitled the Maritime Jurisdiction (Exclusive Fishery Limits) Order 1976. In several regulations enacted in 1977 the Council took full account of the steps taken to extend the fishery limits of the Member States. In the course of Case 61/77 neither the Commission nor the Government of the Kingdom of the Netherlands contended that Member States, and Ireland in particular, did not have jurisdiction, in accordance with Community law, over the maritime waters within the 200 mile limit. In its order of 22 May 1977 on the application for interim measures in Case 61/77 the Court also recognized 'the extension of the exclusive fishing zones'.

(b) Contrary to the argument put forward by the defendants in the main action, Articles 102 and 103 of the Act of Accession empowered Ireland to take measures for the conservation of fisheries such as those in question in the present case.

The right of a Member State to take proper conservation measures in accordance with Community law has been repeatedly recognized by the organs of the Community, in particular by the Commission in Case 61/77 and by the Council in the recitals to Regulation No 350/77 of 18 February 1977 laying down certain interim measures for the conservation and management of fishery resources (OJ L 48, p. 28).

The terms of Article 4 of Regulation No 101/76 are the same as those of Article 5 of Regulation No 2141/70 of the Council of 20 October 1970 laying down a common structural policy for the fishing industry (OJ, English Special Edition 1970 (III), p. 703). In its judgment of 14 July 1976 in Joined Cases 3, 4 and 6/76 *(Kramer and others* [1976] ECR 1279) the Court held that 'A Member State does not jeopardize the objectives or the proper functioning of the system established by Regulations Nos 2141/70 and 2142/70 if it adopts measures involving a limitation of fishing activities with a view to conserving the resources of the sea'.

There can be no room for doubt as to the competence of Member States to take appropriate conservation measures; that competence is retained, at the very least, up to the time when the procedure outlined in Articles 102 and 103 of the Act of Accession has been carried into effect.

(c) As regards the allegation of discrimination the following factors

must be borne in mind: the urgency and necessity of proper measures for conservation of fish stocks is universally recognized; pending the adoption of a Community regime the jurisdiction to introduce such measures is vested in Member States; any measures introduced will, of necessity, have different effects on different Member States; since the Irish measures are real and genuine conservation measures their validity cannot be challenged merely because they weigh more heavily on some Member States than on others; the Irish measures are not discriminatory either in form or in substance and the fact that they have a somewhat more severe effect on the Dutch fishing industry emerges not from any discriminatory content but from the fact that the conservation effects of the measures, in themselves, have a greater impact on the fishing fleet which takes most fish from the Irish waters.

The question of the validity of the Irish measures must be viewed in the light of the serious situation which justified their introduction and implementation and which still prevailed at the time of the existence of the facts which form the subject of the main action. The urgent necessity for conservation measures and the rights of the Member States were recognized by the Commission in the draft regulations which it submitted to the Council on 3 December 1976, 14 January and 11 March 1977. Since no conservation measures could be adopted at Community level, despite the insistence of the Irish authorities, the Irish Minister for Fisheries found himself faced with the need to act quickly to introduce measures which are genuine conservation measures, lead to a reduction of fishing effort in the short term and are capable of speedy implementation and effective enforcement by an admittedly small protection fleet. The measures chosen were, in their nature, based on the draft regulation proposed by the Commission on 14 January 1977. Because it feared that the 85 feet limit might be unduly harsh on some traditional fishermen the Irish Government increased it to 33 metres (approximately 110 feet) so as to lessen impact of the measure. It was of course absolutely necessary to extend the area of its operation outside the old 12 mile limit. The orders of 16 February 1977, implemented only in April 1977, are genuine, real and reasonable conservation measures.

They are not contrary to Article 2 of Regulation No 101/76.

That article does not affect the Irish measures: it took effect only in relation to the maritime waters coming under the sovereignty or within the jurisdiction of Member States at the time of the adoption of the regulation and does not relate to the maritime waters coming under the sovereignty or within the jurisdiction of Ireland subsequent to that date.

Furthermore, at all events, granted the genuine nature of the conservation measures, they do in fact allow equal conditions of access for all Community vessels. Given that the Irish Government had the right to introduce conservation measures and that limitations on boat size were the appropriate, if not the only, means of action, it is not open to an individual boat- owner or even to a particular Member State to complain that such measures are discriminatory merely because of their very nature they affect him.

The criterion relating to the size of the fishing boats is objective in nature and has already been applied within the context of the North East Atlantic Fisheries Convention and in the proposals of the Commission itself.

There is no legal authority for the statistical tests adopted by the Commission to establish the discriminatory nature of the Irish orders. It would be difficult to tailor conservation measures so that they would have precisely similar effects

on all Member States. Any measures whatever are bound to bear differently on the fishing fleets of different Member States. Conservation measures in relation to any particular waters affect most severely those which use those waters most.

The fact that the Dutch fishing fleet and, in particular, the trawler fleet which has traditionally fished in Irish waters, has been reduced substantially since 1975 is not disputed. It gives even more cause for concern in respect of conservation in Irish waters in future, in particular, by reason of the foreseeable diversion of fishing effort and a greater concentration on larger vessels. The Irish measures involve no discrimination against Dutch vessels as such; the trend of the Dutch fishing industry in the past two years has in itself tended to increase the necessity for conservation and has made it particularly vulnerable to any serious conservation measures which might be taken.

(d) The following replies should be given to the questions referred:

1. Ireland was not at any time material to proceedings now pending before the District Court in Cork City, precluded 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), whether by Article 7 of the Treaty of Rome or by Article 2 of Regulation (EEC) No 101/76 of the Council, taken alone or read with Articles 100 and 101 of the Act of Accession, or otherwise howsoever under the law of the Community;
2. Ireland was not precluded at any time material to the proceedings now pending before the District Court in Cork City, from taking measures such as are set out in the said Irish orders already referred to, whether by Articles 102 and 103 of the Act of Accession either taken alone or read with Regulation (EEC) No 101/76 of the Council, Article 4, or otherwise howsoever under the law of the Community;
3. Having regard to the answers suggested in the last two preceding subparagraphs, it is unnecessary for the Court of Justice to proceed to give a preliminary ruling in relation to the question referred to at paragraph 7 (c) of the reference.

Mr C. A. Schonenberg and the other defendants in the main action make in essence the following observations:

(a) The essence of the second question, which must logically be dealt with first, relates to the extent of the powers retained by the Member States in relation to the making of conservation orders in fishery matters, a matter which has been, to some extent, transferred to the organs of the European Communities.

In order to decide whether Ireland has any authority under Community law to make orders aimed at the conservation and the rational exploitation of fishing stocks within its 200 mile fishing zone particular reference is necessary to Articles 100, 101, 102 and 103 of the Act of Accession, Council Regulations Nos. 100/76 and 101/76, the Council Resolution of October/ November 1976 providing for the Member States to extend their fishing zones to 200 miles and the judgments of the Court of 31 March 1971 in Case 22/70 *(Commission* v *Council (Accord Européen sur les Transports Routiers)* [1971] ECR 263) and of 14 July 1976 in Joined Cases 3, 4 and 6/76 *(Kramer and others* [1976] ECR 1279) in which the Court considered the effect of Community law on the power of the Member States to adopt unilateral measures in areas to which common rules apply.

As regards the facts, there are important differences between the present case and the *Kramer* case: the Irish Government was acting unilaterally, it was not responding to any international commitments and, indeed, was opposing the Commission's view as well as the view of other Member States. The Irish measures were covertly, if not overtly, discriminatory on the basis of nationality. They applied in the area defined for Community action in Articles 1 and 4 of Regulation No 101/76. Far from complementing Community action, the Irish Government was therefore usurping Community functions. It was not merely anticipating Community actions but was acting contrary to the Commission's stated position. There is no scientific basis for the action of the Irish Government.

Therefore, the principles established in the *Kramer* case should not automatically extend to the conservation measures adopted by the Irish Government.

Article 4 of Regulation No 101/76 does at least prevent the Member States from taking any unilateral action which would impede the Council and the Commission in discharging their functions under that provision. The unilateral action of the Irish Government has made the task of the Council and the Commission more difficult in three ways: it is liable to jeopardize the success of the Community deliberations which aim at the elaboration of a common fishing policy; because of its discriminatory nature, it might provoke other Member States into taking retaliatory action to protect their own interests; it could prejudice the Community's position in negotiations with third countries.

In taking the unilateral measures in question the Irish Government disregarded the obligation imposed upon it by Article 5 of the EEC Treaty.

Furthermore, the method adopted by the Irish Government, consisting in a total ban on boats exceeding a certain length or a certain brake horse-power, did not, as required by the judgment in the *Kramer* case, 'keep the effects on the functioning of' the common organization 'to a minimum'. A scientifically based quota system would have achieved the conservation objectives with less disruption to the common organization, as would observation of the procedure laid down in Annex VI to The Hague Resolutions. The Irish measures discriminated against large boats *per se* by abolishing the advantages associated with the economies of scale. Furthermore, for technical reasons the Irish measures do not in fact promote conservation objectives.

The Irish measures also constitute measures having an effect equivalent to quantitative restrictions and are as such prohibited by Article 30 *et seq.* of the EEC Treaty and, in particular, by Article 34. They must be considered to be 'trading rules which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade' within the meaning of the case-law of the Court.

Regulation No 100/76 sets up a common organization of the market in fishery products. Certain of its provisions affect the production stage of the fishing industry. According to the reasoning followed by the Court in its judgment of 30 October 1974 in Case 190/73 (*Officier van Justitie* v *Van Haaster* [1974] ECR 1123) the Irish measures should be struck down as hindering intra-Community trade covered by a common organization of the market.

Nor can the Irish measures be excused under Article 36 of the EEC Treaty. That article must be construed narrowly in the present circumstances and, in any event, must be read as permitting only

those measures which place no more burden on intra-Community trade than is strictly necessary to achieve the desired end. The Irish measures could have achieved their conservation objectives with less disruption to intra-Community trade if a scientifically based quota system had been adopted or if the procedure established by Annex VI to the Resolutions adopted at The Hague had been adhered to.

The Irish Government's action was in breach of its obligations under the EEC Treaty in that it usurped Community functions and rendered more difficult the attainment of the objectives of the Treaty. Its action is contrary to Regulation No 100/76 and to Articles 30 et seq. of the EEC Treaty. It is also contrary to Article 4 of Regulation No 101/76 and Article 5 of the EEC Treaty. The answer to the second question must therefore be in the affirmative.

(b) The conservation measures adopted by the Irish Government are contrary to Article 2 (1) of Regulation No 101/76.

They discriminate in substance, if not in form, on the basis of nationality and as such are in direct conflict with Article 7 of the EEC Treaty and the first subparagraph of Article 2 (1) of Regulation No 101/76.

The Irish measures are also in direct conflict with the second subparagraph of Article 2 (1) of Regulation No 101/76 in that they do not ensure equal conditions of access for all fishing vessels from the Member States.

The rule on equality of treatment is one of the fundamental legal provisions of the Community. It is directly applicable and capable of being invoked by nationals of all Member States. The prohibition against discrimination applies not only to formal and obvious discriminatory measures but also to covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

Although discriminating only by size of boat and engine, the Irish measures discriminated in fact, and intended to do so, on the basis of nationality. That admission was made in a public statement by the newly appointed Irish Minister for Fisheries. The structure and drafting of the two orders in question tends to support the view that their objective was to impose a total ban on all fishing in the area designated and then to exempt the whole of the Irish fleet.

If conservation of fishery stocks had been the primary objective of the measures in question the best way of achieving it without discriminating on the basis of nationality was for the Irish Government to adopt a quota system or to modify the fishery order in the light of a system which was envisaged in the Commission's proposals discussed at the meeting of the Council on 25 to 27 March 1977. If the Irish Government considered itself to be acting as an 'agent of necessity' for Community interests in the matter of conservation then surely the proper way for it to do so would have been to adopt the scheme which had the support of the Commission and Ireland itself and of all but one of the other Member States. Such a course of action, operating by way of quota, would have achieved the conservation objectives that Ireland was promoting and would not necessarily have involved herein measures which discriminate on the basis of nationality.

Only two fishing boats in the entire Irish fleet of 2 346 vessels were prohibited from fishing in the designated areas mentioned in the orders. The concepts of discrimination and of nationality must be interpreted on the basis of factual criteria. A purely theoretical idea is not sufficient. Rules based on other criteria may in fact

conceal discrimination on the basis of nationality. Such would be the case in particular if the application of certain criteria of differentiation were to result, in all cases or in the vast majority of cases, in foreigners alone being affected without any objective justification.

In the present case the use of length of the boat and engine brake horse-power by the Irish Government as the criteria by which entry to Irish waters was to be determined, when coupled with the fact that only two Irish vessels could possibly be excluded on such criteria, amounts to factual discrimination on the basis of nationality.

Even if there were no national discrimination in the Irish measures, they would be contrary to the second subparagraph of Article 2 (1) of Regulation No 101/76 which provides for equal conditions of access to and use of the fishing grounds for all the vessels of the Member States. That provision is concerned with other kinds of discrimination than those based on nationality.

The reply to the first question should therefore be in the affirmative.

(c) In so far as the orders of 16 February 1977 are contrary to Community law they cease to have effect in Irish law. Any conviction in Irish courts based on them would be invalid.

The *Government of the French Republic* emphasizes the fact that the fishing policy is a Community one. That is clear from Article 38 (1) of the EEC Treaty, in relation to which the Community laid down, first by means of Regulations Nos 2141/70 and 2142/70 and subsequently by Regulations Nos 100/76 and 101/76, a common organization of the market and a common structural policy for the fishing industry.

(a) The Community character of the rules concerning fishing in particular emerges most clearly from Article 102 of the Act of Accession, Annex I to the Hague Resolutions and the case-law of the Court in the *Kramer* case. A twofold conclusion may be derived from those provisions: first, the power to establish permanent rules for fishing is held by the Community itself. In the terms of the consistent case-law of the Court of Justice the powers of the Community exclude the concurrent powers of the Member States. Secondly, the general rules of the Common Market are applicable to the fishing industry, in particular, Article 7 of the EEC Treaty prohibiting any discrimination on grounds of nationality, which was reaffirmed with regard to fishing in the second subparagraph of Article 2 (1) of Regulation No 101/76. The principle of equality of treatment entails an obligation to take account of the practical effects of a measure and its non-discriminatory appearance is not sufficient to justify it.

As regards the regulation of the fishing industry that finding does not preclude account being taken of the need to preserve species and to conserve the resources of the sea, on condition that it does not have the effect of favouring fishermen of one Member State to the detriment of those of other Member States.

(b) In view of the present situation of Community law, determined in particular by the Statement on Annex VI to the Hague Resolutions, the validity of the Irish measures must be examined essentially having regard to, first, their non-discriminatory nature and whether they are adequate for the objective in question and, secondly, their effect on the establishment of the future common policy for the fishing industry.

The Statement on Annex VI to the Hague Resolutions provides that the conservation measures which Member States may adopt by way of derogation

for 1977 must not be discriminatory. The practical consequences of the Irish measures are that, whilst they have the appearance of giving formal equality of treatment, their effects are discriminatory. Numerous fishermen who are nationals of other countries of the Community and have traditionally fished in the waters subject to the measures in question have boats in excess of the dimensions and the power specified in those orders. On the other hand, the large majority of Irish boats fall within the category of boats which are permitted to carry on fishing. The evidence clearly suggests that those measures are in fact of a discriminatory nature. Moreover, in its order of 22 May 1977 in Case 61/77 the Court of Justice admitted that a strong presumption existed to that effect.

Rules relating to the conservation of fish resources usually lay down measures which do not constitute merely a prohibition on fishing. Therefore it is at least arguable whether the measures in question are adequate for the objective they serve, namely the conservation of resources.

At present the Community rules relating to the fishing industry form the subject of important negotiations within the Community. Already a number of provisional measures both internal and concerning the relations of the Community with third countries have been adopted. The permanent Community rules relating to fishing must be adopted in conformity with the general rules of Community law.

In substance the Irish measures prejudge the result of the future negotiations on Community rules and thus run the risk of compromising the achievement of an agreement within the Community. Moreover they may have the effect of causing those Member States which believe that their interests have been prejudiced to adopt comparable unilateral measures. The Court accepted that reasoning in its order of 22 May 1977.

If in practice unilateral measures have the effect of prohibiting the fishing vessels of a Member State from carrying out their traditional fishing activities it is evident that the functioning of the common organization of the market is directly jeopardized.

The *Government of the Kingdom of the Netherlands* considers that a comparison must be made between the circumstances giving rise to the present dispute and those which gave rise to the judgment of 14 July 1976 in the *Kramer* case.

(a) One difference is that the *Kramer* case concerned not a unilateral, national restriction of catches but one agreed on internationally. A second difference is to be found in the fact that since 1975 the Community institutions and the Member States have set out to formulate a Community policy for the conservation of fish stocks and that in the circumstances which have thus changed any national measure restricting catches may render considerably more difficult the creation and development of a common policy. The danger increases as the date approaches by which the Council must have determined measures to conserve the biological resources of the sea under Article 102 of the Act of Accession. A third difference relates to the fact that a national provision such as that adopted by Ireland cannot reasonably be regarded as serving to safeguard the resources of the sea. Contrary to Article 4 of Regulation No 101/76 and to the practice of international fishery organizations it contains no definition of species of fish, areas, fishing seasons, methods of fishing or fishing gear. Biological considerations based on factual calculations of the risks of overfishing, relating to certain areas and certain species, cannot reasonably constitute grounds for such a provision.

(b) The undeniable need for an adequate protection of fish stocks in the areas in question cannot justify the adoption of any type of measure restricting catches. Even if the national power still exists in that sphere in addition to the power of the Community it must, in any event, be understood as being limited to what is strictly necessary to achieve the common objective of the safeguarding of fish stocks. On the one hand restrictions on catches imposed on the fishing industry must be strictly necessary for the achievement of the common objective; on the other, the effects of the national measure on the functioning of the common organization of the market must be kept to a minimum. A system of rules regulating catches such as that at issue in the present case appears not to comply with those conditions. Various alternative measures are probably more appropriate for the protection of fish stocks, without excluding certain fishing boats on the basis of arbitrary criteria. Furthermore, the Irish measures are detrimental to a rational development of the fishing industry in that particularly the more modern trawlers are excluded. The modernization of the Netherlands fleet was rather related to its being designed for selective fishing of high quality fish intended for human consumption. It has also made possible an increase in the productivity of labour. That development, which is also set out as an aim in Articles 1 and 9 of Regulation No 101/76, would be thwarted by national measures such as those adopted by Ireland.

(c) The provision contained in the Irish measures also conflicts with a fundamental principle of the Community fishing policy. The equal rights of all fishing vessels from the Community in respect to access to and use of the fishing grounds as guaranteed by Article 2 of Regulation No 101/76 are prejudiced. The formally objective nature of the exclusion of boats above a certain length or engine power does not affect that conclusion. From the text of Article 2 (1) it is evident that it is the substantive effects of the national provision which are to be assessed and not its form alone.

(d) By reason of the one-sided nature of the restriction of catches, the method of restricting catches which is not justified on the grounds of protecting fish stocks and the discriminatory effect of the measures, both individually and in conjunction with each other, Community law bars measures such as those adopted by Ireland.

After recalling the special situation in Ireland as regards sea fishing and the principles of Community law applicable in the fisheries sector, which were laid down in particular by Council Regulations Nos 100/76 and 101/76, Articles 100 to 103 of the Act of Accession, the Hague Resolutions of October/November 1976 and the case-law of the Court, the *Commission* maintains that national measures are compatible with Community law only if they comply with three tests: they do not lead to differences in treatment of fishing boats of other Member States and do provide equal conditions of access; they are, objectively considered, real conservation measures; they are so-designed as to keep their effect on the functioning of the common Community fisheries policy to the minimum. Moreover, the Member States are not free to adopt any measures, even measures having a legitimate objective, which interfere more than is necessary with the operation of Community policies.

The Irish measures do not satisfy those conditions.

(a) Article 2 (1) of Regulation No 101/76 prohibits 'differences in treatment of other Member States', not merely express or open discrimination

on the grounds of nationality. It also requires 'equal access to and use of the fishing grounds', which is another obligation of substance.

A number of tests may be used in order to judge the actual effects of the Irish measures.

The first test to be applied is to establish the proportion of boats of the various Member States in relation to the total number of their sea fishing boats which are prohibited from fishing within the zone in question. That information is contained in the following table:

Member State	Total powered coastal and deep-sea fishing vessels	of which over 33 m registered length and 1 100 b.h.p.	%
Ireland	1 100	2	0.18
France	3 905	160	4
Netherlands	544	94	17.2
United Kingdom	2 520	276	10.6

That table clearly establishes the discriminatory nature of the measures in dispute.

The second test is whether the prohibition, which applies in a large area of the open Atlantic, most of it substantially nearer to Ireland than to ports in other Member States, has a different effect with regard to boats based in other Member States.

Since smaller boats are less able in practice regularly to travel long distances in bad weather to fish, or to stay at sea for long periods, it seems clear that the Irish measures have a discriminatory effect though not a readily quantifiable one.

The third test is the extent to which boats from other Member States which are over the Irish size limits have until now fished regularly in the zone to which the orders relate. The available information is set out in the following table:

Member State	Total fishing vessels normally operating in waters affected by the Irish measures	of which over 33 m registered length and 1 100 b.h.p.	%
Ireland	1 100	1	0.19
France	407	101	24.8
Netherlands	57	57	100
United Kingdom	26	—	—

Here the discriminatory effect is even more obvious.

The fourth test is what proportions of the total catches of the various national fishing fleets are affected by the Irish measures. It appears that the catches of the Irish fishing fleet are substantially unaffected, since only one or two Irish boats are over the size limits and at least one of these does not fish at all in the

area concerned. On the other hand, many Dutch and French boats are prohibited by the Irish measures from fishing in areas where they obtained a very substantial proportion of their total catches.

Judged by all four tests, the Irish measures are contrary to the principles of equal access and no difference in treatment.

Even supposing a restriction on size and engine power had been the only type of effective action possible and even if such a restriction should be regarded objectively as a conservation measure, nevertheless the limits chosen were unnecessarily discriminatory in their effects.

The answer to the argument that almost any measure is likely to have a different effect on the fishing fleets of the different Member States is that national measures must be so designed as to avoid having a substantially different effect on the different fleets, unless the different effects are strictly necessary for biological conservation reasons. There is no biological justification for the discriminatory effect of the Irish measures.

(b) The Irish measures prohibit all fishing by large fishing boats, for any species, even species not in need of conservation, over a very large area of sea, throughout the year, for an unlimited period. They do nothing to limit the total number of fish caught, or the total number of boats fishing, or the total time spent fishing, or the mesh size, equipment or techniques used. They are unselective. They do not limit either the total catch or the total fishing effort in the areas to which they relate. Nor do they prevent fishing in spawning grounds or nurseries, nor do they protect vulnerable areas from fishing by harmful methods.

No doubt, because of their discriminatory effects, the Irish measures should be able to reduce the total catch in the zone in question in the short term. Nevertheless, they cannot be regarded objectively as conservation measures in the true sense of the term.

The Irish authorities have not produced any estimate of the reduction in the catches which should result from the measures in dispute. The scientific evidence available suggests that measures as far-reaching in their effects as the Irish measures can neither be regarded as necessary for the stocks of all species in the Irish seas, nor as appropriate.

Certain recommendations of the North East Atlantic Fisheries Commission and in the Commission's proposals dated 20 December 1976 and 14 January 1977 certainly also included limitations on boat size. However, they were intended only to protect certain limited areas where there are particularly vulnerable ecosystems. It would be unnecessary and entirely inappropriate to adopt such limitations for a large area of open ocean.

A measure which results in reduced catches in one area of the Community seas is not necessarily a sound conservation measure from the Community point of view. If might, for example, cause increased fishing pressure on other areas of Community seas. From the viewpoint of a rational, scientifically based Community conservation policy, the boundaries between the seas under the sovereignty or within the jurisdiction of one Member State are without significance and any scientifically based policy should deal with the entire stock or management area.

The Irish measures relate to a zone defined only by reference to lines of latitude and longitude which, in themselves, are without biological or ecological significance. The zone in question does not correspond to the sea area within which any particular fish stocks are found.

No doubt large boats catch more fish than small boats. However, it is unjustifiable in terms of conservation to prohibit large boats entirely while allowing unlimited and uncontrollable catches of all species of fish throughout the year by unlimited numbers of small boats.

The Irish measures are arbitrary and have serious repercussions, both geographically and on the operation of the Community. They prevent a large number of fishing boats registered in the Community from fishing in a very large sea area in which they have traditionally fished.

The Irish measures cannot be regarded objectively as conservation measures and they are therefore not consistent with the system established by Regulations Nos 100/76 and 101/76, even if they were compatible with Article 2 of Regulation No 101/76.

(c) Annex VI to the Hague Resolutions, whatever its exact legal effect, does not lay down rules of substance or of procedure which are substantially different from the relevant rules of Community law. It is undeniable that, taken together, the resolutions gave an important mandate to the Commission to negotiate arrangements on fisheries with third countries in areas within 200 miles of Member States' baselines. Ireland agreed to that mandate. Without disregarding Article 5 of the EEC Treaty, Annex VI could not authorize national measures incompatible with Community law.

The Community is now actively involved with a number of third countries in fisheries negotiations which may involve some degree of reciprocity. Measures such as the Irish measures violate Community law, since they seriously interfere with those negotiations.

No Member State may withdraw from the Commission the powers to negotiate with third countries conferred upon it by the Council, even as regards seas under its jurisdiction. Furthermore, when it conferred the negotiating mandate on the Commission, the Council was not unaware that the internal fisheries regime was not entirely established and that it would be brought about concurrently with the external regime. The Council thus accepted the disadvantages which might result during the negotiations with third countries from the existence of certain national conservation measures. However, the adoption of unilateral measures affecting a large number of boats over a large sea area, in particular when adopted by a Member State having sovereignty or jurisdiction over a large proportion of Community seas, calls in question the credibility of the Community in negotiations with third countries. The Irish measures have extraordinarily disruptive effects on the implementation of the Community's external fisheries policy.

Supposing the Irish measures are regarded as compatible with Community law, other Member States would be free to adopt unilaterally similar measures which might extend to the entire sea area under national sovereignty or jurisdiction. It would be impossible for the Community to conduct serious negotiations with third countries if each maritime Member State adopted, or was likely to adopt, or was known to be free to adopt at any time, measures of the kind adopted by the Irish Government. The Community could only give assurances to third countries on condition that each Member State was legally obliged to obey them.

The Irish measures exerted an adverse influence in particular on the negotiations with the USSR, which contested the effectiveness of control by the Community of the Community

fisheries, with Canada and the USA, which have seriously questioned whether the Community has power to enter into international agreements on fisheries or to ensure that they are carried out if made, with Norway, which claimed that the measures upset the balance of the arrangements agreed with the Community and entitled Norway to renegotiate them, and with certain other third countries which have threatened retaliation.

The fact that in its negotiations with third countries the Community has always reserved the right to regulate its internal regime in accordance with its own needs in no way permits individual Member States, acting unilaterally without the agreement of the Commission, to adopt measures as important and as serious in their effects as the Irish measures.

(d) Article 2 of Regulation No 101/76 is directly applicable by virtue of Article 189 of the EEC Treaty. Individuals and companies have rights under it which are enforceable before national courts. A conviction of a national of a Member State in accordance with a national law which was contrary to Article 2 of Regulation No 101/76 would be contrary to Community law.

(e) The following answers should be given to the questions referred to the Court:

1. Community law, in particular Article 2 of Regulation No 101/76, precludes Member States from taking measures which lead in practice to differences in treatment of the fishing fleets of Member States and which do not give the fishing fleets of Member States equal conditions of access to and use of fishing grounds in all maritime waters coming under the sovereignty or within the jurisdiction of the Member State in question. A national measure is contrary to the principles of equal treatment and equal conditions of access if without biological justification, it has an effect which is substantially greater, in nature or extent, on the fishing fleets of other interested Member States than on the fishing fleet of the Member State adopting the measures.
2. Community law also precludes Member States from adopting fisheries measures which are not, objectively considered, conservation measures appropriate and effective in relation to the needs of the stocks in question. A national measure is not a conservation measure merely because it has the effect of reducing catches of fish. A non-selective measure the only effect of which is totally to prohibit all fishing of all species of fish by boats over a certain size throughout the year and for an unlimited time in a large area which does not correspond to any known fish stocks, and which does not limit the total number of fish caught, or the total number of boats fishing, or mesh size, or the total fishing effort, is not a conservation measure.
3. A national fisheries measure which is not a conservation measure or which goes beyond which is necessary for conservation and which hinders the Community or Community institutions in carrying out tasks entrusted to them in accordance with Community law or policy, or which hinders the common action of the Community within the context of international negotiations, is contrary to Community law. A national measure has these effects if it is so extensive in its application (whether to the area of sea, the number of boats, the number of species or the length of time to which it applies or otherwise) that it would, if valid, in practice create serious difficulties for the Community in carrying out its tasks or negotiations.

III — Oral procedure

At the hearing on 14 December 1977 the Irish Minister for Fisheries, the complainant in the main action, represented by Liam J. Lysaght, Chief State Solicitor, acting as Agent, assisted by Niall Fennelly, Barrister-at-Law, C. A. Schonenberg and the other defendants in the main action, represented by Rory Conway, Solicitor, the Government of the Kingdom of the Netherlands, represented by G. W. Maas Geesteranus, Legal Adviser at the Ministery for Foreign Affairs, and the Commission of the European Communities, represented by its Legal Adviser, John Temple Lang, submitted oral observations and their replies to the questions raised by the Court.

The Advocate General delivered his opinion at the hearing on 19 January 1978.

Decision

1 By order of 7 July 1977, received at the Court of Justice on 12 July, the District Court for the District Court Area of Cork City (Ireland) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions concerning the interpretation of Article 7 of the Treaty, Articles 100 to 103 of the Act of Accession and Articles 2 and 4 of Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (OJ L 20, p. 19), the answers to which will enable it to assess the compatibility with Community law of two orders made by the Irish Minister for Fisheries on 16 February 1977 in relation to sea fishing (Sea Fisheries (Conservation and Rational Exploitation) Orders 1977).

2 The combined effect of the two orders was to prohibit fishing within a maritime area situated within the exclusive fishery limits of the Irish State which lie south of the parallel 56° 30' North latitude, east of the meridian of 12° West longitude and north of the parallel of 50° 30' North latitude by all fishing boats exceeding 33 metres in registered length and whose engine power exceeds 1 100 brake horse-power.

3 The file shows that on 29 April 1977 ten trawlers registered in the Netherlands, all of which exceeded the registered dimension and brake horse-power authorized by the Irish orders, fished within the area reserved by those orders.

4 One of the Dutch trawlers, the Master of which was C. A. Schonenberg, was boarded by a boarding party from an Irish Naval Sea Fisheries Protection vessel and brought to Cork Harbour, where it was followed by the nine other trawlers in the same group.

5 The Masters of the ten Netherlands trawlers in question are at present being prosecuted before the Cork District Court for having violated the orders of 16 February 1977.

6 As the compatibility of those orders with Community law was contested in the course of those proceedings the District Court referred three questions to the Court of Justice for a preliminary ruling.

7 The first question, which concerns the interpretation of Article 7 of the EEC Treaty and of Article 2 of Regulation No 101/76, in conjunction with Articles 100 and 101 of the Act of Accession, seeks to enable the national court to assess the compatibility of the Irish orders of 16 February 1977 with the principle of equality of treatment guaranteed by the aforementioned provisions to all fishing boats flying the flag of one of the Member States and registered within the territory of the Community.

8 The second question, which relates to the interpretation of Articles 102 and 103 of the Act of Accession and Article 4 of Regulation No 101/76, asks whether, at the period in question, the Member States were still entitled to adopt conservation measures in the maritime waters under their jurisdiction or whether the power to do so was reserved to the Council.

9 Finally, by the third question the District Court asks whether it is possible to convict in criminal proceedings if, as a result of the reply to either of the first two questions, it finds that the orders of 16 February 1977 are incompatible with certain provisions of Community law.

10 The orders made by the Irish Minister for Fisheries on 16 February 1977 have resulted in an application by the Commission under Article 169 of the EEC Treaty for a declaration that Ireland has failed to fulfil one of its obligations under the Treaty; this application forms the subject of Case 61/77.

11 In fact, the questions of law considered within the context of Case 61/77 are identical to those which are raised by the questions referred by the District Court.

12 By judgment given this day the Court has found that by bringing into force the orders made by the Irish Minister for Fisheries on 16 February 1977 Ireland failed to fulfil its obligations under the Treaty.

13 It is therefore sufficient to refer to the judgment given in Case 61/77, the text of which is annexed to the present judgment.

14 Having regard to the grounds set out in that judgment it is appropriate to reply first to the second question that in the absence of the adoption by the Community of adequate conservation measures under Article 102 of the Act of Accession and Article 4 of Regulation No 101/76, the Member States were, at the period in question, entitled to adopt interim measures as regards the waters under their jurisdiction, provided that such measures are in accordance with the requirements of Community law.

15 The reply to the first question must be that Article 7 of the EEC Treaty, Article 2 of Regulation No 101/76 and, in so far as they have a bearing on the problem, Articles 100 and 101 of the Act of Accession preclude a Member State from adopting measures such as are set out in the Sea Fisheries (Conservation and Rational Exploitation) Order 1977 and the Sea Fisheries (Conservation and Rational Exploitation) (No 2) Order 1977.

16 Finally, as the Court has already held in its judgment of 21 March 1972 in Case 82/71, *Pubblico Ministero della Repubblica Italiana* v *Società Agricola Industria Latte (SAIL)* ([1972] I ECR 119), where criminal proceeding are brought by virtue of a national legislative measure which is held to be contrary to Community law, a conviction in those proceedings is also incompatible with that law.

Costs

17 The costs incurred by the Government of the Kingdom of the Netherlands, the Government of the French Republic and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

18 As these proceeding are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the District Court for the District Court Area of Cork City, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the District Court for the District Court Area of Cork City by order of 7 July 1977, hereby rules:

1. **In the absence of the adoption by the Community of adequate conservation measures under Article 102 of the Act of Accession and Article 4 of Regulation No 101/76, the Member States were, at the period in question, entitled to adopt interim measures as regards the maritime waters coming within their jurisdiction, provided that such measures are in accordance with the requirements of Community law;**

2. **Article 7 of the EEC Treaty, Article 2 of Regulation No 101/76 and, in so far as they have a bearing on the problem, Articles 100 and 101 of the Act of Accession, preclude a Member State from adopting measures such as are set out in the Sea Fisheries (Conservation and Rational Exploitation) Order 1977 and the Sea Fisheries (Conservation and Rational Exploitation) (No 2) Order 1977;**

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

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 16 February 1978.

A. Van Houtte
Registrar

H. Kutscher
President