OPINION OF ADVOCATE GENERAL TESAURO
delivered on 23 January 1992 *

Mr President,
Members of the Court,

1. The questions submitted by the national court relate to the interpretation of Article 7 of the Treaty and Articles 2 and 3 of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry. [1]

The questions were raised in criminal proceedings brought against two masters of British fishing vessels — K. G. Wood and J. Cowie — for infringement of one of the conditions laid down in the fishing licence, namely the failure to report by radio the fact of crossing from one ICES area to another.

2. The United Kingdom legislation provides that fishing licences issued for species subject to quotas may have attached to them certain conditions, failure to comply with which constitutes an offence. In particular, as from March 1989, licences granted to British fishing vessels have included the obligation to contact the relevant ministry by radio when they cross the line of longitude 4° west which separates ICES area IV (North Sea) from ICES area VI (West of Scotland).

That condition was imposed in order to monitor due compliance with the system of Community fishing quotas and to ensure that catches taken in either of the two areas were not set against the quota allocated to the other area.

As regards the persons to whom the condition in question applies, it is to be noted that only vessels registered in the United Kingdom are in possession of fishing licences issued by the United Kingdom authorities. It follows that, since the obligation to report any crossing from ICES area IV to ICES area VI derives from one of the conditions laid down in the fishing licence, that obligation affects only United Kingdom fishing vessels, whilst the fishing vessels of other Member States, which do not hold United Kingdom licences are not required to make any such report, even though they may be fishing for the same species subject to quota limits in the same areas.

3. In the main proceedings, the accused contend that the condition at issue is unlawful in two respects.

First, the obligation to make reports involves discrimination based on nationality, in so far as it affects only United Kingdom fishing vessels. That obligation therefore breaches both Article 7 of the Treaty and Article 2 of Regulation No 101/76, the first paragraph of which specifically provides:

* Original language: Italian.
1 — OJ 1984 L 20, p.19.

'1. 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.

Member States shall ensure in particular equal conditions of access to and use of the fishing grounds situated in the waters referred to in the preceding subparagraph for all fishing vessels flying the flag of a Member State and registered in Community territory.'

Secondly, the accused state that, pursuant to Article 3 of the same regulation, the Member States are required to notify other Member States and the Commission of any alterations they intend to make to the national fishery rules. However, the inclusion of the contested condition in fishing licences in March 1989 was not notified by the United Kingdom in accordance with Article 3. The requirement is therefore unlawful and cannot be relied on against any offenders, in so far as it was introduced in breach of the procedural requirements of the Community legislation.

4. It was because of those objections that the national court decided to stay the proceedings and refer two questions to the Court of Justice for a preliminary ruling.

The first question concerns the allegedly discriminatory nature of the condition at issue, having regard to Article 7 of the Treaty and Article 2 of Regulation No 101/76.

The second question, on the other hand, relates to the procedural rule in Article 3 of Regulation No 101/76. The Court wishes to know whether, pursuant to that provision, the United Kingdom authorities were required to give notice of their intention to incorporate the contested condition in fishing licences.

5. In that regard, it should also be noted that, after the date of the offence with which the accused are charged in the main proceedings, the United Kingdom notified the contested measures to the Commission and the Commission, in response, stated that it had no objections thereto.

In view of those developments, the national court decided to refer an additional question to the Court, essentially to establish whether failure to comply with the obligation of notification laid down in Article 3 of Regulation No 101/76 renders the measure in question invalid and whether, if that is the case, such invalidity may be rectified *ex post facto* by subsequent notification at a belated stage.

6. As I have said, therefore, the first question concerns the allegedly discriminatory nature of the reporting obligation incorporated in the fishing licences. In order to establish whether the alleged discrimination exists, it is appropriate to describe the basic outline of the Community rules governing fishing.

It should be observed that Regulation No 170/83, [2] which supplemented Regulation

2 — Council Regulation (EEC) No 170/83 of 25 January 1983 (OJ 1983 L 24, p. 1).

No 101/76, established a Community system for the conservation and management of fishery resources, which imposes a limitation on fishing activity. Article 3 of that regulation provides for a total allowable catch (TAC) available to the Community to be fixed each year for each stock or group of stocks where it becomes necessary to limit the catch in the case of a species or group of related species.

Pursuant to Article 4(1) of that regulation, the volume of the catches available to the Community is then to be distributed between the Member States, on the basis of national quotas, in a manner which assures each Member State relative stability of fishing activities for each of the stocks considered.

As part of this system of distribution of fishery resources on a national basis, Article 5(2) of Regulation No 170/83 provides that it is for the Member States to determine, in accordance with the applicable Community provisions, the detailed rules for utilization of the quotas allocated to them.

Thus, under the Community system, the Member States are empowered, in managing their national quotas, to regulate the exercise of fishing activities in the waters under their jurisdiction by vessels flying their flag (see the judgment in Case 223/86 *Pesca Valentia* [1988] ECR 83).

In particular, for the purpose of regulating the activity of fishing vessels flying their flag, Member States may, in order to ensure that the TAC system operates properly, introduce a system of fishing licences, which also impose on the fisherman concerned the obligation to comply with certain conditions.

Such a system of national licences, widely used and partly regulated at Community level (see Council Regulation No 3483/88 of 7 November 1988 [3]), has been upheld by the Court of Justice, which, in its judgment in Case 9/89 (*Spain* v *Council* [1990] ECR 1383), stated that 'a licensing system introduced by the Member State of registration represents ... one of the methods available to Member States to ensure compliance with catch limitations imposed under the Community ... system' for the conservation of fishery resources.

7. The conditions which may be incorporated in fishing licences without any doubt include control measures, such as the reporting obligation to which the present dispute relates. Such measures form an integral part of the licensing system, in so far as they ensure that it is effective and enforce observance of the quotas allocated.

The incorporation of such monitoring conditions in the licences is, moreover, entirely compatible with Regulation No 2241/87. [4] That regulation, which establishes certain control measures for fishing activities, does not rule out (see Article 15) national moni-

3 — OJ 1988 L 306, p. 2.

4 — Council Regulation (EEC) No 2241/87 of 23 July 1987 (OJ 1987 L 207, p. 1).

toring measures which go beyond the scope of the minimum requirements laid down in the regulation. And it is significant that, in the present proceedings, the parties agree that the reporting obligation at issue is properly described as a monitoring measure within the meaning of Article 15 of Regulation No 2241/87.

8. It goes without saying that national control measures that are incorporated in fishing licences in order to ensure the proper management of national quotas apply only to national fishing vessels.

As the Court pointed out in its judgments in Case 3/87 *Agegate* [1989] ECR 4459 and Case 216/87 *Jaderow* [1989] ECR 4509, the Community legislature attaches the national quotas to the fishing vessels flying the flag of, or registered in, a Member State, only those vessels being entitled to fish against its quotas.

It is therefore natural, and in harmony with the logic underlying the system, that each Member State, within the scope of the powers conferred on it by the relevant Community legislation, should introduce, for the management of its quotas, control measures which take the form of specific conditions included in the fishing licences and which, consequently, apply only to national fishing vessels.

9. Admittedly, since the Member States, within the limits of the discretion granted to them, may adopt differing measures it may also happen that the vessels of different Member States are required to fulfil different obligations and that some obligations may prove to be more rigorous than others.

However, such a difference of situations certainly does not constitute discrimination prohibited by Community law. Indeed, the Court has consistently held that the principle of equal treatment laid down in Article 7 of the Treaty does not apply to possible disparities of treatment and distortions affecting persons and undertakings subject to Community law *as a result of divergences between the laws of the various Member States* (see the judgments in Case 14/68 *Wilhelm* [1969] ECR 1, Case 185 to 204/78 *Van Dam* [1979] ECR 2345, and *Pesca Valentia*, supra).

It should also be observed that possible differences between national control measures likewise do not seem capable of giving rise to distortion of the conditions applicable to the exercise of fishing activities. Such measures are in fact additional to the Community monitoring system provided for in Regulation No 2241/87 and subsequent provisions supplementing it. Whilst it is true, therefore, that certain Member States may adopt (national) control measures which are stricter than those laid down by other Member States, it is also true that all the Member States are in any event required to apply the Community monitoring system within their own territories and in the sea areas subject to their jurisdiction.

The existence of this system of common rules to ensure observance of the limits on fishing activity (see the second recital in the preamble to Regulation No 2241/87) means

that all fishermen are subject to the same nucleus of minimum rules and, as a result, the risk that, in this specific respect, there will be significant differences in the conditions applicable to fishing is very small.

In view of the foregoing considerations, I am of the opinion that no discrimination incompatible with Community law can be identified in the present case.

10. The other questions submitted by the national court relate to three points:

(a) whether the contested control measure should be notified in advance to the Commission and the other Member States, pursuant to Article 3 of Regulation No 101/76;

(b) if so, whether failure to notify renders the measure in question invalid and inapplicable;

(c) and, finally, whether such invalidity can be rectified *ex post facto* by notification after the measure has entered into force.

11. With regard to point (a), it should be noted that the parties agree that the measure in question falls to be classified as a national control measure within the meaning of Article 15 of Regulation No 2241/87.

The second paragraph of Article 15 is a provision specifically concerning notification of the measures in question. It provides that they must be notified to the Commission in accordance with Article 2(2) of Regulation No 101/76. On the other hand, Article 15 contains no reference to Article 3 of Regulation No 101/76.

Whilst Article 2 provides for notification (to the Commission and the Member States) of the national measures *already in existence* upon entry into force of the regulation, Article 3 specifically governs the case where, after the entry into force of the regulation, the Member States wish to introduce *new measures* and, for such cases, it states that the Member States are to notify the measures *before* they are adopted.

The logic of Article 3 is clear. It is intended to allow the Commission (and likewise the other Member States) to check whether the national measures are in conformity with Community law and, if necessary, to take action before such measures have come into force. In other words, Article 3 envisages a system of *prior verification* which, in harmony with the principle of cooperation between the Member States and the Community, is designed to ensure that the Commission is not faced with a *fait accompli*, in other words with unilateral initiatives already in operation whose disrupting consequences may have already come about and have become irreversible.

That said, the question which arises with regard to Article 15 of Regulation No 2241/87 is as follows: does the fact that Article 15 provides that national control meas-

ures must be notified in accordance with Article 2(2) of Regulation No 101/76, without referring also to Article 3 of that regulation, mean that, as far as that specific category of measures is concerned, the Community legislature did not wish to require *prior* notification, thus making it possible, by way of derogation from the general terms of Article 3 of Regulation No 101/76, for the Member States to inform the Commission of the measures adopted in that field even *after* their entry into force?

12. The United Kingdom contends that that question must be answered in the affirmative. In its opinion, by not referring expressly to Article 3 of Regulation No 101/76, Article 15 of Regulation No 2241/87 in fact intended to exclude its application.

It seems to me, however, that that view ultimately contradicts the logic on which the provisions in question are based. According to that view, the Member States would be allowed to notify measures after they had been put into operation, thus greatly reducing the effectiveness of Community control over national measures adopted under Article 15 of Regulation No 2241/87.

There is no reason for the Community control of measures adopted by the Member States under Regulation No 2241/87 to be so limited in its depth and, moreover, substantially different from what is envisaged, in general terms, by Regulation No 101/76.

The national measures introduced on the basis of Regulation No 2241/87 are only a version of the measures introduced under Regulation No 101/76: in both cases, Community control pursues exactly the same objectives and there is no reason for such control not to be carried out in accordance with the same procedures.

In order to ensure that the system is consistent and that Article 15 is fully effective, it is necessary, in my opinion, to go beyond the text of that provision — which, without doubt, is subject to lacunae. It should be read in conjunction not only with Article 2 but also with Article 3 of Regulation No 101/76. This means that the Member States are required to notify the measures that they intend to adopt *in advance*.

This view is supported by the fact that Articles 2 and 3 are provisions which are clearly complementary and inseparable, one relating to existing measures and the other to new measures. It would therefore seem illogical to take the view that Article 15 was intended to refer to only one of those provisions — what is more, the least important one as regards the proper functioning of the Community monitoring system.

13. Such coordination between the two regulations comes up against only one limitation. Article 15 appears to be wholly irreconcilable with Articles 2 and 3 as regards the requirement of notification only to the Commission and not to the Member States. The result is that the control measures introduced under Article 15 do not necessarily have to be brought to the attention of the other Member States.

14. That having been said, I must add, with regard to point (b), that both Article 15 of Regulation No 2241/87 and Article 3 of Regulation No 101/76 merely impose an obligation of notification on the Member States. But those provisions do not impose an express *standstill* obligation on Member States (like that provided for in Article 93(3) of the Treaty, for example) or provide that the Commission is to intervene, in the exercise of specific decision-making powers, either to authorize the measure in question or to suspend its operation or to declare it unlawful (as required by Article 93 of the Treaty and by Community regulations including, in particular, in the sector with which we are concerned here, Regulation No 3094/86 [5] referred to by the Commission in its observations).

In those circumstances and having regard to the case-law of the Court (judgments in Case 174/84 *Bulk Oil* [1986] ECR 559, paragraph 62, and in Case 380/87 *Enichem Base* [1989] ECR 2491, paragraphs 20 to 23), it is my view that a failure to comply with the obligation as to notification, although theoretically capable of constituting an infringement amenable to proceedings under Article 169, cannot in itself be relied on by the persons concerned to support their contention that measures not notified in due time are not applicable to them. The measures in question must be regarded as legally valid and applicable to the persons to whom they are addressed.

The negative answer given to point (b) makes it unnecessary to consider point (c).

15. In the light of the foregoing observations, I propose that the following answer be given to the national court:

(1) Article 7 of the Treaty and Article 2 of Regulation No 101/76 do not prohibit a Member State from incorporating in a fishing licence issued to national fishing vessels a condition requiring reporting by radio of the crossing of the line of longitude 4° west which separates ICES area IV from ICES area VI.

(2) A Member State wishing to apply a condition such as that described in paragraph 1 above must notify it to the Commission in accordance with Article 3 of Regulation No 101/76. However, the absence of notification does not render the measures adopted invalid and inapplicable.

5 — Council Regulation (EEC) No 3094/86 of 7 October 1986 (OJ 1986 L 288, page 1).