No fresh consultation of the Commission is required in the case of the re-enactment, without substantive amendment, of a national measure for the conservation of fishery resources, which was previously adopted in conformity with the procedural and substantive conditions laid down by Community law.

	Mertens de Wilmars	Koopmans	Bahlmann
Galmot	Pescatore	Mackenzie Stuart	O'Keeffe
Bosco	Due	Everling	Kakouris

Delivered in open court in Luxembourg on 14 February 1984.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 15 DECEMBER 1983

My Lords,

The masters of two German fishing vessels, the *Hannover* and the *Kiel* were found fishing for herring off the west coast of Scotland on 10 July 1981. They were arrested and prosecuted for an offence under the West Coast Herring (Prohibition of Fishing) Order 1981, which was made under the Sea Fish (Conservation) Act 1967 (as amended) and which prohibited fishing in the area where the vessels were found. On 13 July 1981, after trial, the masters were convicted and admonished, their catch being confiscated. They appealed to the High Court of Justiciary on the ground that the Order infringed Community law. That court has referred to the Court of Justice under Article 177 of the EEC

Treaty the question "where, after 1 January 1979, a Member State notifies the Commission of a re-enactment, without substantive amendment, of a national conservation measure which was itself made and maintained in conformity with Community law, does the measure so re-enacted remain made and maintained in conformity with Community law in the absence of express Commission approval?"

The question arises in this way. On 16 June 1978, following a recommendation by the International Council for the Exploration of the Sea, in the light of then depleted herring stocks, the Commission proposed that in a zone including the area in question (and known as ICES Division VI (a)) no herring fishing should be allowed as from 1 July 1978. The United Kingdom Government, following the practice agreed in the Hague Resolution of 3 November 1976, notified the Commission on 3 July 1978 of an Order which it proposed to make, with effect from 6 July 1978, forbidding the fishing of herring in the relevant area. After querying the omission of one area from the scope of the Order, which was satisfactorily explained, the Commission approved the Order ("the 1978 Order") on 22 December 1978.

By a judgment given on 15 April 1981, the High Court in London held that the 1978 Order was invalid to the extent that it included certain waters adjacent to Northern Ireland (since they were excluded from the 1967 Act referred to and included in the Fisheries Act (Northern Ireland) 1966 (as amended) but was otherwise valid. *(Dunkley* v *Evans* [1981] 1WLR 1522.) The Northern Ireland waters comprise 0.8% of the total area covered by the 1978 Order.

Separate orders were then made to cover the waters respectively included in each of the statutes referred to, the order made under the 1967 Act, under which the prosecution in this case was brought ("the 1981 Order") being made on 6 April 1981, to come into operation on 1 May 1981. The two orders together dealt with the whole area covered by the 1978 Order, but only that area, and apart from dividing the area, were in no material way different from it. The two new orders were notified to the Commission by letter of 4 May 1981 with the explanation that "it has been necessary to correct a minor technical error" in the 1978 Order. On 1 July 1982, the United Kingdom Government, in reply to a question from the Commission dated 27 May, explained the reasons why these two orders had been made following the High Court's decision.

The principal point of law taken on behalf of the two defendants was that the Commission should have been asked to approve the 1981 Order before it was made. It was not asked in advance.

On 1 January 1979, after the 1978 Order had been made, the six-year transitional period provided for in Article 102 of the Act of Accession expired. The Court has held in Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045 that thereupon the Community had exclusive powers in respect of fishery conservation

matters, and that conservation measures in existence at that time should not be altered by Member States, save in a limited way as required by biological or technical developments, and not in any event so as to change the policy. The Commission was to be consulted about, and its approval sought of, conservation measures by Member States. In fact, the Council maintained the national conservation measures which were in force on 31 December 1978 by decisions relating to the years 1979 and 1980. On 27 March 1981, though no final agreement had by then been reached by the Council as to what should happen in 1981, the Council noted that certain steps were to be taken by Member States. In the English version, this minute reads "would take conservation measures similar to those which had been taken in previous years". The German text is capable of a different meaning. The sense may be rather that of taking measures appropriate to the need to avoid disturbance rather than measures corresponding to those taken in previous years; on the other hand, the French text is "des mesures de conservation analogues à celles qu'ils avaient déjà prises durant les années précédentes".

On 5 May 1981, the ICES Herring Working Group, in the light of the current stock position, recommended to the ICES Advisory Committee on Fishery Management (ACFM) that a total allowable catch of 62 500 tonnes should be permitted in area ICES VI(a). The Commission adopted this suggestion in a proposal to the Council made on 12 June. Thereafter, on 29 June the two masters were licensed by the Government of the Federal Republic of Germany to fish in that area. On 3 July, the ACFM recommended that the figure be increased to 65 000 tonnes and that figure was in turn recommended by the Commission to the Council on 24 July. On 27 July, the Council met but was unable to reach agreement, and on 28 July the Commission issued a formal declaration (to be found in Official Journal 1981, C 224 p. 1) calling on Member States to carry out the Commission's "existing proposals", which the Commission considered "in the present situation as being legally binding upon the Member States and which the Commission intended to do all in its power to enforce". The next day, the Commission, having cited the proposals made to the Council, told the United Kingdom Government that it could not approve the 1981 Orders "as they are not now justified by the requirements of conservation". Nor could analogous provisions to those in the 1978 Order "continue to have the approval of the Commission as they (stood)". The United Kingdom Government was asked not to apply those measures, to repeal them as necessary and to replace them with measures compatible with the new proposals. The 1981 Order was in fact revoked with effect from 11 August, the Northern Ireland Order three days later.

The prosecution in the case, supported by the United Kingdom Government and the Commission, contends that on 10 and 13 July the 1981 Order was valid. All that had happened is that the 1978 Order had been re-enacted following an error, and no substantive changes were made. The position was just the same, so far as the relevant waters were concerned, as if the partially valid 1978

Order had been left untidily in existence, or amended so as to delete the Northern Ireland waters. The 1978 Order had been approved and its complete equivalent did not need the Commission's approval since no change was made.

The Government of the Federal Republic contends that all measures, whether involving changes of substance or not, require the approval of the Commission; if they do not get it prior to enactment, they are automatically invalid. At the least they must be submitted prior to adoption. Moreover, in the present case, it was well known even prior to the April/May meeting of the ICES Working Group that herring spawn stocks far exceeded the minimum of 200 000 tonnes which justified the reintroduction of fishing. That knowledge and in particular the proposals made on 5 May produced such a substantial difference that the 1981 Order could not lawfully re-enact the 1978 Order. The logic of the argument compelled the German Government to say that the 1978 Order should have been replaced in any event at the latest once these proposals of the ICES Herring Working Group were made. It goes further and contends that the 1978 Order was defective because it was not limited in time, since review of the position should take place on an annual basis. Above all, once the Commission made its proposals on 12 June, the 1981 Order ceased to be valid so that on 10 July no offence was committed. This latter point is not covered by the express terms of the question referred, apparently by deliberate decision of the national court. It is, however, convenient to deal with it briefly to test the strength of the argument as to the position at the time the 1981 Order was made.

I can see nothing in the Treaty, in Council Regulation (EEC) No 101/76 of 19 January 1976, laying down a common structural policy for the fishing industry (Official Journal L 20, 28. 1. 1976, p. 19) or in the Court's judgments in Case 804/79 or Case 269/80 *R.* v *Tymen* [1981] ECR 3079, which require that approved national measures have to be limited in time or fixed on an annual basis. It is sufficient that as and when Community policy changes they should be replaced or amended. Nor does it seem to me to be the law that when the facts change, here that herring stocks had increased, national measures cease to be valid and cannot lawfully be re-enacted. A recommendation of the ICES Herring Working Group to the ACFM, and the latter's recommendations to the Commission are no doubt of great importance in the formulation of Community policy, but those bodies are not composed exclusively of the Member States and they are not organs of the Commission. Their reports did not accordingly invalidate the 1978 Order or mean that the situation had so changed that, subject to the procedural argument, the 1981 Order could not re-enact it. It seems to me that the High Court of Justiciary was right to pose its question on the basis that the 1978 Order was not only lawfully made, but also lawfully "maintained". The contrary result would lead to uncertainty and diversification

and seems wrong in principle, since it pre-supposes that national provisions become invalid without the intervention of any Community institution.

Nor does it seem to me that the terms of the Council Minute of 27 March, whichever version is accepted, change the position so far as the validity of the 1978 Order was concerned. If fishing was to be permitted, in my view it had to be permitted on a clearer basis than a mere note of Member States' intentions. The Commission's proposals of 12 June and its amended proposals of 24 July were clearer. There was, however, not least in view of the history of attempts to reach agreement, no certainty that they would be adopted, and indeed on 12 June the Commission reserved the right to change the proposals, as it in fact did. These proposals were subsequent to the making of the 1981 Order; they could not have made it invalid at the time it was made, and since they remained as proposals subject to further amendment, they could not in my view render the Order invalid, once they were made, so as to exclude a prosecution for a breach of the Order in respect of the events of 10 July. If this is correct, the suggestion that the Order was invalid before the Commission's proposals of 12 June is even weaker.

I assume for present purposes that the Commission's declaration of 27 July and its letter of 28 July produce the necessary certainty and clarity, but the United Kingdom Government complied with them. They cannot affect the validity of the Order as of 10 July 1981.

The German Government also relies on the minutes of a Council meeting on 15, 16 and 17 December 1980 noting that Member States in carrying out their fishing would take account of the total allowable catches ("TAC") for 1981 submitted by the Commission on 18 November and 16 December 1980. Those proposals were, however, for a negative TAC and the minute cannot be read as imposing an obligation on Member States to comply with whatever proposals the Commission subsequently made.

There were thus, in my view, no substantive grounds which invalidated the 1978 Order so as to prevent its re-enactment in 1981, or so as to make the latter invalid by 13 July 1981. The position would, as I see it, have been different if the Commission's declaration had been made prior to the making of the 1981 Order.

So far as the procedural argument is concerned, it is obviously desirable that measures should be submitted to the Commission in advance as otherwise the risk is taken that substantive changes may have been made inadvertently. It may also be necessary in law, as the Commission contends, for amendments which extend the period of a measure which is limited in time, to be submitted in advance. Where, however, a measure which is not limited in time is re-enacted, or is re-enacted during its life and for no longer than the period prescribed, without any change of substance being made, it does not seem to me that it is invalidated because it is not submitted to the Commission for prior authorization. It produced no change in law and

nothing in the Court's judgments seems to me to require that it should be so submitted as a prerequisite of validity, even though as a matter of administrative efficiency it is right that it should be notified. There was in substance nothing for the Commission to assess or supervise; in no way can it be said that it breached the Government's duties "as a trustee of the common interest" or that it showed a lack of collaboration with the Commission.

Finally, it is submitted by the Federal Republic that if the measure was valid, the Court should rule that a person who commits what would otherwise be an offence as a result of an unavoidable mistake cannot be convicted of an offence in relation to that act. This point does not seem to me to be raised on the present reference, and is, in my view, in any event a matter for the High Court of Justiciary to deal with under national law in the first place if the point is taken.

I conclude that the question referred should be answered on the following lines: "Where after 1 January 1979 a Member State notifies the Commission of a re-enactment, without substantive amendment, of a national fishery conservation measure which was itself made and maintained in conformity with Community law, that re-enacted measure is made in conformity with Community law even though made without express Commission approval, and remains in conformity with Community law in the absence of a decision by the Council or the Commission requiring that measure to be repealed or amended in order to conform with the conservation policy of the Community".

In so far as the Procurator Fiscal has incurred separate costs of the reference, these fall to be dealt with by the High Court in the main proceedings. The Commission and the Governments of the United Kingdom and the Federal Republic of Germany should, in my view, bear their own costs.