

OPINION OF MR ADVOCATE GENERAL REISCHL  
DELIVERED ON 19 JANUARY 1978<sup>1</sup>

*Mr President,  
Members of the Court,*

The Court has already on several occasions in the past year concerned itself with the case on which I am giving my opinion today, on the basis of an application under Article 83 of the Rules of Procedure of this Court. I may therefore restrict myself, so far as describing the facts is concerned, to a few observations.

On 30 October 1976 the Council held a meeting in The Hague. At that meeting various resolutions relating to the fisheries' questions were adopted which were formally approved on 3 November 1976.

The most important of these was the decision that, as from 1 January 1977, the Member States would, by joint action, extend their fishing zones to 200 miles off their North Sea and North Atlantic coasts. Ireland, the defendant in these proceedings, did this by an order of 22 December 1976.

At the meeting in The Hague Community measures for the conservation of fish stocks were also discussed. A statement of the Commission, which was approved by the Council and forms Annex VI to the Hague Resolutions, relates thereto, and I would like to quote the complete text thereof because of its importance for the present case. That statement provides that:

'Pending the implementation of the Community measures at present in preparation relating to the conservation of resources, the Member States will not take any unilateral measures in respect of the conservation of resources.

However, if no agreement is reached for 1977 within the international

fisheries Commissions and if subsequently no autonomous Community measures could be adopted immediately, the Member States could then adopt, as an interim measure and in a form which avoids discrimination, appropriate measures to ensure the protection of resources situated in the fishing zones off their coasts.

Before adopting such measures, the Member State concerned will seek the approval of the Commission, which must be consulted at all stages of the procedures.

Any such measures shall not prejudice the guidelines to be adopted for the implementation of Community provisions on the conservation of resources.'

So far as common efforts for the adoption of interim conservation measures were concerned, it is necessary to mention proposals for regulations submitted by the Commission on 3 December 1976 (Document No 3 annexed to the application), 14 January 1977 (Document No 5) and 11 March 1977 (Document No 13). None of these moves was however successful; during this period solely several limited regulations containing conservation measures were adopted, such as Regulation No 194/77 of 28 January 1977 (OJ L 25 of 29. 1. 1977, p. 46), Regulation No 350/77 of 18 February 1977 (OJ L 48 of 19. 2. 1977, p. 28) and Regulation No 373/77 of 24 February 1977 (OJ L 53 of 25. 2. 1977, p. 1).

This state of affairs prompted the Irish Minister of Foreign Affairs to announce to the Commission on 14 February 1977 the intention of the Irish Government to adopt unilateral conservation measures, the essential features of which were

<sup>1</sup> - Translated from the German.

indicated. These measures were adopted on 16 February 1977 and were, first, the Sea Fisheries (Conservation and Rational Exploitation) Order 1977, which contained a prohibition, applicable to all fishing vessels, on remaining and fishing in a specific area of the sea defined according to degrees of latitude and longitude, and, secondly, the Sea Fisheries (Conservation and Rational Exploitation) No 2 Order 1977, according to which the above-mentioned prohibition was not applicable to vessels not exceeding 33 metres in length or having an engine power not exceeding 1 100 brake horsepower. These regulations, which were adopted by the Irish Ministers for Fisheries and which I shall henceforth call 'the Irish measures' for short, were originally to come into force on 1 March 1977. This was not however the case for the time being, mainly because of pressure applied by the Commission which *inter alia* held a meeting on this question on 21 February with representatives of the Irish Government and representatives of the other Member States. On the contrary, the measures were put into force only on 10 April 1977 after a Council meeting at the end of March 1977 had failed to reach agreement on common conservation measures. At the same time the Irish Government, and I shall return to this again, invited the other Member States to submit to it for approval fishing plans which were to take the place of the above-mentioned measures where appropriate.

The Commission, which had already described the Irish measures as incompatible with Community law in the meeting at the end of March 1977, just as moreover the majority of the Member States had declared themselves to be against the measures at the meeting on 21 February 1977, thereupon decided to initiate the procedure under Article 169 of the EEC Treaty for a declaration that Ireland

had failed to fulfil its obligations under the Treaty. This was done by letter of 2 May 1977 in which the Irish Government was informed that the measures were discriminatory, that they were not genuine conservation measures and that in addition their effects on the common organization of the market in fishery products were not, as was necessary, kept to the minimum. Following a reply by the Irish Government on 6 May 1977 which was in the Commission's view unsatisfactory, the Commission delivered a formal opinion as provided for in Article 169. On 13 May 1977, when the period laid down therein for the suspension of the Irish measures (10 May 1977) had expired without this being done, the Commission brought the matter before the Court of Justice, which must now decide whether the Irish Government has or has not been in breach of provisions of Community law.

Before I examine this question I should like however to recall once more that when the procedure was initiated an application for the adoption of interim measures was also lodged under Article 83 of the Rules of Procedure of the Court of Justice. This resulted, after the oral procedure on 21 May 1977, in an order issued on 22 May deferring a decision on the application for the time being in order to give the parties an opportunity to reach agreement on alternative solutions. Reports were to be submitted thereon within a specific period which was extended several times. Following this and the re-opening of the oral procedure on 11 July 1977, the Court issued a second order on 13 July 1977 in which Ireland was ordered to suspend the application of the measures in question with regard to vessels from other Member States by 18 July 1977 at the latest. It was moreover added that Ireland could, with the consent of the Commission, adopt other conservation measures which were in accordance with the provisions of

Community law and compatible with the objectives of the common fisheries policy. In fact, as the Court was assured, the measures thereupon ceased to be applied as from 18 July 1977 and fishing activity was able to continue in the area concerned since no other measures were adopted.

In addition, I should like to mention that an Irish court has also asked the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty on the problem of the permissibility of the Irish measures. This request, which forms the subject-matter of Case 88/77, is of course dealt with in a separate opinion. Nevertheless I consider it correct and appropriate to examine in the present case arguments from that other case which have been put forward by other parties, for it seems to me to be unjustifiable to reach a decision concerning the alleged failure to fulfil obligations under the Treaty without considering all aspects which are of interest to the case.

1. Council Regulation No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (OJ L 20 of 28. 1. 1976, p. 19) is essential with regard to the allegations which the Commission has made against Ireland on account of the above-mentioned measures. Article 1 thereof — I shall not at present deal with the whole of its contents — speaks of laying down common rules for fishing in maritime waters and the co-ordination of structural policies of Member States for the fishing industry.

Article 2 provides that rules applied by each Member State in respect of fishing in the maritime waters coming under its sovereignty or within its jurisdiction must not lead to differences in treatment of other Member States and that the Member States must ensure equal conditions of access to and use of the fishing grounds situated in the waters referred to in Article 2 (1) for all

fishing vessels flying the flag of a Member State and registered in Community territory. In addition, Article 4 provides that:

‘Where there is a risk of over-fishing of certain stocks in the maritime waters referred to in Article 2, of one or other Member State, the Council, acting in accordance with the procedure provided for in Article 43 (2) of the Treaty on a proposal from the Commission, may adopt the necessary conservation measures.

In particular, these measures may include restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear.’

The Irish Government principally replies that these provisions; and in particular Article 2, apply only to waters which were under the sovereignty of the Member States at the date on which the regulation was adopted. It claims that the wording of Article 2 (2) indicates this, stating that:

‘The maritime waters referred to in this article shall be those which are so described by the laws in force in each Member State.’

At the relevant date there were however no 200-mile zones but, as far as Ireland was concerned, only a 12-mile zone. Since on the other hand it is an established fact that the Irish conservation measures were to be applied first and foremost outside that area, they could not be compared with Regulation No 101/76 as long as it had not been made clear by an amendment of the legal situation that the provisions laid down in Regulation No 101/76 were to apply also to the extended sovereign waters.

This issue could *per se* be left aside if the only question involved were whether the Irish measures infringe the principle of equal treatment. In this respect it would in fact be possible to reach an

appraisal even regardless of Regulation No 101/76, and I shall have to return to this point again, since, as we have seen, Annex VI to the Hague Resolutions also contains a prohibition on discrimination as does Article 7 of the EEC Treaty, which even in the view of the Irish Government applies to all the Irish sovereign waters. I should like however to examine the question which has been raised nevertheless, since Regulation No 101/76 in the view of the Commission is also that the definition contained in Article 2 (3) is meant to be determining only with regard to the prohibition on discrimination but not with regard to the other principles contained in the regulation.

I consider that the surprising argument put forward by the Irish Government is incorrect for the following reasons.

In the first place I have the impression that it is in fact easier to deduce from Regulation No 101/76 the contrary of the Irish viewpoint. The wording of Article 2 (3) which has been quoted is so general that, in accordance with the principle that the territorial scope of the Common Market is determined by the territories of the Member States at the time — and I do not wish to put forward any considerations of public international law — it may be immediately understood as meaning that the national provisions which were in force at the date on which the regulation was adopted are not the decisive factor but the national provisions applicable at the time in question. If any other finding were reached, this would lead, in view of the fact that the definition contained in Article 2 (3) applies to the whole regulation, to the completely unacceptable result that if the sovereign waters were extended without express amendment of the regulation a common structural policy would only be possible with regard to a small proportion of the Community waters, in other words to an extent which in the nature of the case would not permit of useful measures.

It also seems to me to be important to refer to Article 102 of the Act Concerning the Conditions of Accession and the Adjustments to the Treaties which provides that:

‘From the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea.’

There is no doubt that this article provides for Community jurisdiction over all the sovereign waters as they stand at the time, so that the idea that there might be sovereign waters outside the jurisdiction of the Community, in respect of which it would be possible to adopt without further ado purely national measures relating to fishing and the protection of the fish stocks, seems incompatible therewith.

In addition, I consider that the deductions which may be made from the above-mentioned Hague Resolutions as a whole with regard to the problem which is of interest in this case are of particular importance. First, it is essential that they speak of the creation of a 200-mile fishing zone in the Community and that the limits of the fishing zones were extended by means of concerted action, in other words, the extension of the jurisdiction originated in an act of the Community. It was accordingly provided that the fishing rights of third countries in these zones were to be governed by agreements entered into by the Community containing reciprocal obligations and that the Commission would be instructed to conduct negotiations. Annex VII accordingly also speaks of ‘ressources communes’ (Community resources) and Community-wide measures with regard to the internal fisheries system and in relation to all the sovereign waters; in other words it is assumed that the

provisions on Community policy apply to all the sovereign waters. In addition, it is clear that Annex VI, which was quoted above and speaks of common conservation measures at present in preparation and according to which unilateral measures are only permissible under certain conditions, also relates to all the sovereign waters, which can only mean that there is an assumption of Community sovereignty and an acceptance that Article 4 of Regulation No 101/76 is valid.

Finally it is not only of interest that in the judgment of the Court in Joined Cases 3, 4 and 6/76 (*Cornelis Kramer and Others*, Judgment of 14 July 1976, [1976] ECR 1279), to which I shall return again, it is stated that it follows from the very nature of the case that the rule-making authority of the Community *ratione materiae* also extends — in so far as the Member States have similar authority under public international law — to fishing on the high seas. For the purpose of refuting the argument put forward by the Irish Government it is also possible to refer to regulations which were issued subsequently, in particular Regulation No 350/77 (OJ L 48 of 19. 2. 1977, p. 28) and Regulation No 1412/77 (OJ L 160 of 30. 6. 1977, p. 5), as also to a number of other regulations quoted by the Commission containing similar provisions. For an analysis of them, I would refer in detail to the statements made by the Commission. I should only like to point out that the conservation measures which they laid down relate to the whole 200-mile zone and that the scheme of their provisions makes it clear that the Community legislature assumes a rule-making power in the fisheries sector which covers the national sovereign waters. This can only mean, in particular if Articles 1 and 4 of Regulation No 1412/77 are considered together, confirmation of the assumption that Regulation No 101/76 refers without express amendment to the extended sovereign waters.

I cannot understand how it is possible nevertheless to put forward the argument that the Community rules contained in the above-mentioned regulation did not extend to the area in which the Irish measures were to apply.

2. Secondly, it is necessary to examine the question whether at the time in question it was at all possible to adopt national measures for conservation of the fish stocks or whether only the Community institutions had powers in this areas. This is an argument which was put forward by the defendants in the procedure which gave rise to the request for a preliminary ruling in Case 88/77. It is necessary in any case only to apply it to the waters beyond the 12-mile zone; it is in other words necessary in this connexion, as in general in the present case, to disregard the coastal waters as defined in Articles 100 and 101 of the Act Concerning the Conditions of Accession since it was declared that in respect thereof derogations from the common policy and in particular special fishing restrictions were permissible.

Those who support the argument that national measures are not permissible rely above all upon the above-mentioned Article 102 of the Act Concerning the Conditions of Accession and upon Article 4 (1) of Regulation No 101/76, which is also quoted above. In addition they do not permit references to the judgment in the Kramer Case (Joined Cases 3, 4 and 6/76) on the ground that at that time the situation was different. They take the view so far as the reference to the Hague Resolutions is concerned — which of course speak of unilateral measures — that the purpose of those resolutions was not to amend Regulation No 101/76 and that they could not in addition have done so. Above all, they claim that the Council in fact decided transitional measures for the conservation of the fish stocks at the

beginning of 1977 and thus exercised its powers.

So far as these submissions are concerned, it is certainly impossible to deny that Community jurisdiction exists in the field of measures for the conservation of the fish stocks and that in this connexion Article 4 of Regulation No 101/76 is of central importance. It is necessary however to bear in mind that a similar provision was already contained in Article 5 of Regulation No 2141/70 (OJ, English Special Edition 1970 (III), p. 703) and that in the *Kramer* case however no objections were made to national conservation measures. The fundamental reason for this was that the Community institutions had not until then exercised the power to adopt Community rules. It was expressly emphasized that the Member States at that time had the power to act because the Community had not yet fully exercised its functions. The same situation obviously existed at the beginning of April 1977 too, for it must be borne in mind that the Community measures which had actually been adopted until then were not comprehensive but only applied to parts of the sector. In this connexion I should like to refer to the relevant regulations.

It is impossible however to contest that the facts in the *Kramer* case were actually different in some respects from those in the present case. In particular national measures were adopted at that time within the framework of the *implementation* of undertakings affecting the Netherlands within the context of the North-East Atlantic Fisheries Convention of 24 January 1959. Rules were therefore involved which were binding on all the States concerned and all the Member States except Italy and Luxembourg were parties to the Convention in addition to seven non-Member countries. I am however not certain on the one hand whether this factor is decisive and on the other it may be said that reference

must not be made exclusively to the *Kramer* case for the purpose of justifying the argument that national conservation measures are permissible. I need only recall Annex VI to the Hague Resolutions which has already been quoted at the beginning and in which it is clearly stated that national measures are permissible under certain conditions. It is also impossible to raise the objection that these resolutions were not intended to amend and could not have amended Regulation No 101/76. Nor is this in fact their purpose; on the contrary, they were only intended to make it clear, as did also the judgment in the *Kramer* case, that in fact, as long as the Community has not exercised its powers, national measures may be adopted if necessary.

Finally reference may also be made in this connexion to the recitals of the preamble to Regulation No 350/77 of 18 February 1977 laying down certain interim measures for the conservation and management of fishery resources. The recitals of the preamble thereto expressly state as follows:

‘Whereas pending the establishment of a Community regime for the conservation and management of resources, and notwithstanding the provisions of the present regulation, Member States may, in accordance with the procedure and conditions set out in Annex VI to the Council Resolution of 3 November 1976, adopt, in a form which avoids discrimination, appropriate further measures to ensure the protection of resources situated in the fishing zones off their coasts.’

Since, however, as I have already said, only partial rules existed in April 1977 and a comprehensive policy was merely being discussed but was not yet achieved it is in fact impossible to contest that at that time national conservation measures were in principle still permissible.

3. The crucial condition with regard to conservation measures, as I have already mentioned, is naturally that they are *necessary*, in other words that in a certain area the fish stocks have already been considerably reduced or that there is an immediate danger of over-fishing and without restrictions and measures of protection regeneration and thus future supplies are endangered.

It is possible to receive the impression from certain submissions made by the Commission and other circumstances which came to light during the procedure that it is necessary to answer this question in the negative so far as the Irish measures are concerned.

In this connexion I am thinking of the reference made by the Commission to the considerable decrease in catches by third countries on account of the measures adopted by the Community after 1 January 1977. Although in the area in question over 400 000 tonnes were fished by vessels from third countries in 1976, in 1977 this is said to have been only approximately 130 000 tonnes. In particular a comparison of the quotas for specific species of fish to which Soviet vessels in Zone VII, which is of interest in this case, were entitled on the one hand in 1975 and on the other in 1977 is impressive, as is a contrast with the total catches made by the Community in the above-mentioned zone in 1975, bearing in mind in this connexion that a reduction in the quotas also involves a decrease in *ancillary* catches. Moreover, I am thinking of the Community measures for the restriction and prohibition of herring fishing which likewise resulted in a considerable improvement. In addition, it is necessary to recall the fact that following the order of the Court of Justice the application of the Irish measures was suspended as from 18 July 1977 and that no other measures, such as the laying down of fishing plans and such-like, were adopted in their place.

It became clear upon closer examination nevertheless that the need for national conservation measures in *April* 1977 cannot be simply denied on that ground.

It is necessary of course to disregard measures which were subsequently adopted by the Council, for example Regulations Nos. 1672/77 (OJ L 186 of 26. 7. 1977, p. 27), 1709/77 (OJ L 189 of 29. 7. 1977, p. 8) and 1779/77 (OJ L 196 of 3. 8. 1977, p. 4) which were adopted at the end of July or the beginning of August 1977, because the decisive factor is the date of the application of the Irish measures and perhaps the law-suits which were foreseeable in this connexion.

With regard to the restrictions on certain catches by third countries, which were, incidentally, subject to a time-limit, it is moreover of importance that such Community measures already existed at the beginning of 1977, such as for example Regulation No 194/77 of 28 January 1977 and Regulation No 373/77 of 24 February 1977. This did not prevent the Commission from making proposals for conservation measures in March 1977. In those proposals it was acknowledged that certain stocks in the Irish waters were over-fished and that measures relating to important species of fish in Zones VI and VII were particularly urgent. They therefore provided for a reduction of 41% in the catches for 1977. In view of this the Commission did not indeed contest the need for conservation measures *per se*, and again did not do so during the oral procedure, but merely stressed that the situation was less dramatic than portrayed by the Irish Government because of the reduction in catches by third countries.

Finally, it is impossible to conclude from the conduct of Ireland following the order made by the Court of Justice on 13 July 1977 that the Irish measures were unnecessary from the outset. In this connexion Community measures

which had been adopted in the meantime or were imminent and the fact that the Irish measures had been effective for a considerable period of time may have been of importance, and it may therefore have seemed less urgent to adopt drastic unilateral measures. In addition, it was not explained during the procedure why the fishing plans originally sought by Ireland did not materialize. Without such an explanation however it is impossible to repudiate the assumption that practical reasons prevented their being put into effect, because for example the information received was inadequate and the necessary system of control, which could only function in collaboration with other Member States, could not be achieved.

For all these reasons I tend not to criticize the Irish measures on the ground that there was in principle no need for them. Of course the further question, which it will be necessary to examine again later, is whether the measures were necessary in the comprehensive form chosen, so far as the area and species of fish affected were concerned, or whether it must be said of them that they went further than was necessary.

4. In examining the case further, I must therefore consider the form and effects of the Irish measures. Different points of view, some of which, once more, stem from Case 88/77, are relevant in this respect.

Thus the question was raised whether the restriction on fishing should not be regarded as a measure having an effect equivalent to a quantitative restriction on imports within the meaning of Article 30 of the EEC Treaty and whether it is therefore not permissible. Doubts were voiced as to whether the Irish orders in question were genuine conservation measures. In addition, it was claimed that the measures infringed the prohibition on discrimination in

various respects. Moreover, the criticism was made that their effects on the common organization of the market were not restricted to what was absolutely necessary and that they were capable of jeopardizing the negotiations with third countries which the Commission must conduct pursuant to the Hague Resolutions.

(a) The first of these points should present the fewest problems, at any rate if I restrict myself to fundamental observations.

In this connexion it was submitted that Council Regulation No. 100/76 of 19 January 1976 on the common organization of the market in fishery products (OJ L 20 of 28. 1. 1976, p. 1) also contains provisions relating to production and that Article 18 (2) thereof prohibits the application of quantitative restrictions. According to the comprehensive definition of such restrictions developed in decided cases and in particular according to the judgment in Case 170/73 (*Officier van Justitie v Haaster*, judgment of 30 October 1974, [1974] ECR 1123) it is clear that it also covers restrictions on production. It is impossible in the present case to justify such restrictions, in this case a restriction on fishing, on the basis of Article 36 of the Treaty, because the measures went too far. In fact an appropriate quota system would have been sufficient; it would also have been possible to envisage applying the procedure under Annex VI to the Hague Resolutions, which provides for co-operation with the Commission.

In my view it is sufficient with regard to this criticism to refer to the abovementioned judgment in the *Kramer* case. That judgment emphasized that a limitation of fishing activities is imposed with a view to conserving the resources of the sea. It was further stated that even if for a short time this leads to a reduction in the quantities that the States concerned are able to



exchange between themselves this must however not be regarded as prohibited within the meaning of the Treaty because these measures were necessary to ensure in the long term a steady, optimum yield from fishing. On the other hand, the reference to a possible quota system seems just as unproductive as the reference to the procedure under Annex VI to the Hague Resolutions, which amounts to the same thing. It is very easy to say this because the present case is solely concerned with purely unilateral measures which are not involved in that connexion. In addition, it is necessary to bear in mind that Ireland immediately sought a different solution by inviting the other Member States to submit fishing plans. I therefore consider — of course this is merely a provisional judgment — that it is impossible to call in question, on the ground that they are measures having an effect equivalent to quantitative restrictions on imports which are prohibited by the Treaty, the fact that the Irish measures are in principle permissible. This does not however say whether the measures went beyond what was necessary and could for that reason be classified in the above-mentioned way. It will be necessary to examine this aspect later in connexion with other considerations.

(b) It is further necessary to examine whether measures which only lead to a ban on vessels of a certain size and engine-power are genuine conservation measures. The Commission in particular contests this.

On the other hand the Irish government relies upon the fact that even under earlier Irish orders (the Sea Fisheries Act 1952, Sea Fisheries (Amendment) Act 1959 and the Licensing of Sea Fishing Vessels Regulations 1960) vessels of a certain size required a licence and were banned from certain areas. In addition, it claims that even in the case of the measures which it was

necessary to appraise in the *Kramer* case, measures which were recommended by an international commission, the size of the vessel was of importance and that no objection was raised thereto. Finally, it refers to the fact that in the Commission's proposals for conservation measures of December 1976 and January 1977 such considerations were also of importance and it points out that criteria of this nature may also be found in Community Regulations No 194/77 (OJ L 46 of 29. 1. 1977, p. 25) and No 746/77 (OJ L 90 of 8. 4. 1977, p. 8) on the fishing rights of third countries.

Other parties to the proceedings, in particular the Commission counter this argument by stating that they are not appropriate conservation measures because it is to be expected that the banned vessels would seek other waters and give rise there to the danger of over-fishing. They refer to the fact that examples of conservation measures are set out in Article 4 of Regulation No 101/76 and that that article speaks of restrictions relating to the catching of certain species, to areas, to fishing seasons, to methods of fishing and to fishing gear. In fact, genuine conservation measures, and reference may be made in this connexion to what is customary in international conventions and organizations, are adapted to the particular biological features of specific areas and it is impossible to speak of such in relation to the Irish Sea; in addition they provide for different treatment according to species of fish and size of fish. Their aim is in particular to lay down a total maximum quantity which may be fished and its distribution among the various interested parties. In this connexion the number of vessels permitted access and the length of catches is laid down. Often the method of fishing is taken as the basis and provisions relating to equipment, for example the size of nets and so forth, are adopted, in particular

for the conservation of spawning grounds and young fish stocks. The reference to earlier Irish measures is therefore untenable because those measures only applied to coastal waters and in addition contained a strong element of social policy. The same applies to the proposals of the Commission which were put forward and which referred only to the 12-mile zone. In this connexion, it is necessary moreover to take into consideration, that is, regardless of criteria relating to social and regional policy, the fact that their aim was the protection of particularly vulnerable areas (for example spawning grounds) and that for that reason they also laid down provisions relating to prohibited equipment. In the same way it is impossible to refer to regulations relating to the fishing rights of third countries. It is in fact important in this respect that it is not pure conservation measures which are involved and that, with the exception of the rules applicable to the Spanish fleet, which were aimed at the vessels which had been used until then, they had in mind not only other sizes of vessels but also a quota system and, in connexion therewith, a restriction on the number of larger vessels. Finally, it is also necessary to consider that the Irish measures in question did not provide for any restriction on the number of small vessels which were permitted. The large vessels which were excluded could therefore have immediately been replaced by small vessels and in addition it is necessary to bear in mind in this connexion that smaller vessels, according to the method of fishing and the use of the fish caught, could in certain circumstances constitute a greater danger for the fish stocks than large vessels.

It is possible to state first of all with regard to this difference of opinion that the argument put forward against the Irish measures to the effect that they had unfavourable effects on other

waters and increased the danger of over-fishing there is very unconvincing. Naturally, a comprehensive system covering all waters would be the most appropriate. However, the Hague Resolutions made provision for unilateral national measures precisely in case such a comprehensive system did not materialize in due course. Since any national measure involves a restrictive effect it is impossible to contest its permissibility by indicating that it represents a danger to other areas of the sea to which the banned vessels would move.

In addition, I grant — this however tells against the Irish measures — that in their ideal form conservation measures must certainly take the form described by the Commission. In the same way, it seems to me that the statements made by the Commission with regard to the references of the Irish Government to earlier Irish measures, to the measures which it was necessary to appraise in the *Kramer* case and to the proposals submitted by the Commission in the spring of last year are convincing. In fact it certainly makes a fundamental difference whether measures refer only to coastal waters with particularly vulnerable fish stocks or to a very large area of the sea, quite apart from the fact that in the case of the proposals put forward by the Commission, fundamental reasons based on regional and social policy were involved which unilateral national measures should not automatically have.

In addition the Irish measures provided for no restrictions on small vessels, which must in the long term have deprived them of all conservation effects. In this connexion it is moreover of interest that the Netherlands Government declared that it was possible to replace in a relatively short time the larger vessels which had been banned by smaller ones which, on the basis of the composition of the French fleet, should also have been possible

with regard to the latter. In the same way, it is of interest that, according to the statements made by the defendant in the procedure which led to the reference to this court for a preliminary ruling in Case 88/77, smaller vessels could, if they applied certain fishing techniques and if the catches were used in a certain way (processing into fish meal), endanger the fish stocks to a greater extent than large vessels which fish only for human consumption and process the catches right on board.

On the other hand it must in turn be acknowledged that in appraising the case the fact that national measures had to be adopted quickly and that the Irish control facilities are limited is also of importance. In addition it cannot be denied that the Irish measures certainly involved in the short term a restriction on catches and thus contributed to the conservation of the fish stocks. The replacement of larger vessels by small ones did in fact require a certain period of time quite apart from the fact that smaller vessels from other Member States were restricted in their powers of action in view of the distance and the weather conditions in the relevant area of the sea. The Irish Government had however according to its statements merely intended transitional measures which were to be replaced by fishing plans or even Community measures.

Thus, after examining all the criteria which are of importance in this connexion, I can do no more than express doubts as to whether the contested measures should really be considered as genuine conservation measures. A reliable judgment would in my opinion be possible only after consultation of an expert. Of course I do not consider that it is necessary to go into the examination more deeply in this way. I rather prefer to turn to another aspect of the examination in respect of which it seems to be easier to reach a clear judgment.

(c) I come therefore to the criticism, which should indeed form the focal point of the proceedings, that the Irish measures infringed the prohibition on discrimination. This criticism is based on Annex VI to the Hague Resolutions which states that the Member States shall adopt appropriate measures in a form which avoids discrimination. In addition the abovementioned Article 2 of Regulation No 101/76 provides that differences in treatment of other Member States are prohibited and that 'equal conditions of access to and use of the fishing grounds' must be granted to the fishing vessels of the Member States in the waters coming under the sovereignty of the Member States.

In this connexion the Commission indicated that the criterion of the size of the vessel and engine-power chosen in the Irish measures results in very different effects on the fishing fleets of the Member States, in particular if one takes as the basis the ships which formerly traditionally fished in the waters in question and were banned as a result of the Irish measures. Thus differences arise from a comparison of the situation of other Member States concerned with the situation of the Irish fleet and, on the other hand, from a comparison between the remaining Member States. In addition, the defendant in the proceedings which led to the reference to this Court for a preliminary ruling in Case 88/77 claimed that it is possible to speak of discrimination also in relation to the large vessels which were banned and the smaller vessels which were permitted access.

In this connexion the Irish Government defends itself, if I ignore the argument which has already been examined according to which Regulation No 101/76 only applies to the 200-mile zone, by indicating above all that in fact no differentiation was made on the basis of nationality but that criteria were applied which were, rather, objective

and a ... in the same way to all those ... The different effects which ... arose are irrelevant for the ... of the prohibition on discrimination. So far as the effects on the ... fleet are concerned, it is ... necessary to take into consideration the fact that they have not been ... for long in the Irish waters. In ... it is a decisive factor, and the ... to the fact that virtually no effects ... be recorded with regard to the ... fleet, that in this respect a ... situation existed, since because of the structure of the Irish fleet only ... waters come into consideration ... regard to that fleet and that those ... are therefore vital. Therefore ... are reasonable grounds in favour of the preservation of the Irish fishing industry according to the relevant case-law which states that this is merely the establishment of the necessary equilibrium. In this connexion it is in addition possible to refer to the statements made by the Community institutions which have repeatedly accepted preferential treatment for the Irish fishing industry. Thus the Council confirmed in the Hague Resolutions the need for the continued and progressive development of the Irish fishing industry in view of the particular problems of Ireland and the Commission likewise admitted in its proposals of March 1977 that the volume of Irish catches within the context of Community conservation measures could increase by approximately 20% by comparison with 1976.

I should like to point out at the beginning with regard to this very important issue in the proceedings that the above-mentioned Article 2 of Regulation No 101/76, rather than Annex VI to the Hague Resolutions, is of central importance as a legal criterion. In order to avoid misunderstandings I should like however to add that I am convinced that Annex VI to the Hague Resolutions was in no way intended to

qualify the criterion but was merely meant to restate in a shortened form the concept already contained in Article 2 of Regulation No 101/76.

In the same way it is necessary in my view to stress at the outset the factors already developed in the case-law of this Court with regard to the principle of the prohibition on discrimination or of equal treatment. We must above all adhere to these principles; on the other hand, the reference to the case-law of the European Court of Human Rights made by the Irish Government in the oral procedure is only of limited interest chiefly because of the different wording used in the Convention for the Protection of Human Rights and Fundamental Freedoms. Thus it was stated in the judgment in Case 13/63 (*Government of the Italian Republic v Commission of the EEC*, judgment of 17 July 1963 [1963] ECR 165) that similar situations should, in accordance with the prohibition on discrimination, not be treated differently and that the decisive factor is whether it is possible to speak of discrimination *in substance*. In the judgment in Case 152/73 (*Sotgiu v Deutsche Bundespost*, judgment of 12 February 1974 [1974] ECR 153) it was emphasized that not only overt and express discrimination is involved but also covert forms of discrimination and that the ascertainable effects and not technical legal trappings are decisive. In addition, the judgment in Case 153/73 (*Holtz & Willemsen GmbH v Council and Commission of the European Communities*, judgment of 2 July 1974, [1974] ECR 675) speaks of the need for criteria of an objective nature which ensure a proportionate distribution of advantages and disadvantages.

If the Irish measures are considered against this background it is first of all impossible to avoid the finding that the criteria chosen involved virtually no effects for the Irish fleet which until that time was active in the area in question, since only two vessels are

prohibited from fishing; they have however only been in service since 1975 and one of them, which is not in dispute, has normally never fished in the area in question. On the other hand, the situation with regard to France is that of 407 vessels which normally go fishing in the Irish waters 101, in other words approximately 25%, are banned. With regard to the Netherlands it is established that a considerable proportion of the Netherlands fleet had fished for years in the Irish waters and can therefore definitely claim 'long-standing rights' which must be taken into consideration in the present case. Of the 42 Netherlands vessels which, according to the information supplied by the Netherlands Government, were equipped for fishing in the Irish waters, 35 were banned from fishing on account of the criteria laid down in the Irish measures although the Netherlands fleet, which traditionally operated in the area in question, had in any case diminished by a third since 1975. It is therefore certainly impossible to deny that the Irish measures have considerably different effect on the various Member States.

On the other hand it is impossible to argue that the negative effects on the French and Netherlands fleet could have been reduced by employing smaller vessels. It is in fact not known to what extent at all it is possible to make use in other waters of approximately 3 700 smaller vessels belonging to the French fleet and approximately 460 smaller vessels belonging to the Netherlands fleet, disregarding the fleet in the IJsselmeer. In addition, it is at any rate certain — only thus was there any reason at all for the Irish measure — that immediate re-organization of the fishing fleet and thus instant adjustment was impossible. In addition, the fact that the powers of action of smaller vessels in far distant waters in which there are often stormy seas are so hampered that it is impossible to expect catches which

could be achieved by larger vessels also tells against such an adjustment.

Moreover it is in my opinion impossible to refer, for the purposes of justifying the above-mentioned different effects, to the special situation of the Irish fishing industry with regard to which it is established on the one hand that Irish vessels, in contrast to large Netherlands and French vessels, could not move to other fishing areas and in respect of which it is, secondly, acknowledged that it requires development. In this connexion various factors come into consideration in order to show that the reasons put forward by the Irish Government may not be regarded as factual considerations within the meaning of the requirement of equal treatment. We are not clear whether in fact it is possible for the banned French and Netherlands vessels to compensate for the losses in other waters and whether this involves considerably higher expenditure. Thus doubts may rightly be raised as to whether it is at all justifiable in this connexion to take into consideration all the circumstances relating to the branch of industry concerned. On the basis of Article 2 of Regulation No 101/76 the focal point of the examination is equal access to the Irish waters, which must be ensured, and from this point of view the comparison with the situation which existed before the introduction of the Irish measures certainly suggests itself as the decisive one. Moreover, in so far as Ireland refers to the fact that on various occasions Community institutions spoke of the necessary development of the Irish fishing industry it is not only essential that this does not necessarily cover higher catch quotas — as the Commission stressed, State aid could for example come into consideration — but it is in particular important that these were merely declarations of intent with regard to the internal regime which was yet to be established which were intended to explain the elements of a

*common* policy which may also be characterized by other factors. However, what is possible within the context of a Community measure from the viewpoint of social and regional policy or the grant of aid may certainly not be introduced by the Member States alone within the context of unilateral national measures.

It is accordingly impossible to doubt that the Irish measures led to discrimination against the French and Netherlands fishing fleets in relation to the Irish fishing fleet and in addition to this it is possible also to detect a difference in treatment if the examination is limited to the other Member States, with the exception of Ireland. This can be said with regard to the comparison between France and the Netherlands if one bears in mind the figures which were set out above in relation to the ban on vessels which traditionally fished in the Irish waters and if one considers that France, because of the distance and the number of small vessels which its fleet contains, should be in a better position to change over to the small vessels which are permitted access. In addition this may be stated with regard to the comparison of both these States with Great Britain since according to the statements of the Commission in the application the British fleet, which has up to now fished in the waters in question, has not been at all affected by the Irish measures.

Finally, it is also impossible to counter the criticism which may be substantiated in this way that the prohibition on discrimination has been infringed — in my opinion the question whether it is necessary to accept that there has been discrimination against larger vessels in relation to smaller vessels may be disregarded — by stating that any effective conservation measure involves different effects and that it was impossible to envisage other unilateral measures in view of the control facilities which Ireland had at its disposal.

I am not convinced that all conservation measures — the same may not apply to a complete fishing ban — necessarily have different effects. In any case, with regard to the Irish measures, which cover a very large area of the sea, there are considerable doubts as to the accuracy of this argument which have not been removed and in my opinion it has not been shown that other measures which were not discriminatory or were less discriminatory were totally inconceivable. Thus the Commission referred for example to the possibility of restricting fishing bans to certain periods of time or areas. Moreover, it would have been possible to consider an appreciable restriction in Irish catches or a standstill order relating to the catches made in 1976, with which Ireland had declared itself to be in agreement in March 1977, quite apart from the fact that it has not been clearly shown that the immediate replacement of the measures which had been adopted by fishing plans failed because of the attitude of other Member States in the negotiations with Ireland.

For this reason it is necessary to acknowledge at the end of this section that the Commission correctly accuses the Irish Government of the infringement of a fundamental principle contained in Regulation No 101/76 and that for this very reason the finding that there has been an infringement of Community law is justified.

(d) After this it is in fact superfluous to examine the remaining problems raised in the proceedings. I would however like to deal with them at least cursorily, in other words to touch briefly on the question of the principle that national conservation measures must be restricted to what is absolutely necessary and in particular on the requirement that it is necessary to ensure that the effects on the common policy and the functioning of a common organization of the market must be kept

to the minimum. In addition it is necessary to deal briefly with the allegation that the negotiations which the Commission must conduct with third countries were jeopardized.

(aa) With regard to the first point the Commission relies upon the case-law of the Court of Justice in which the principle of proportionality has repeatedly been stressed. According to that case-law, for example the judgment in Case 155/73 (*Sacchi*, judgment of 30 April 1974, [1974] ECR 409), the principle that drastic measures are only permissible to the extent to which they are absolutely necessary applies and it is necessary to take into consideration according to the judgment in Case 104/75 (*De Peijper*, judgment of 20 May 1978, [1976] ECR 613) the fact that protective measures must restrict themselves to what is necessary and must only contain those rules which must be considered as the least restrictive. In particular the abovementioned judgment in the *Kramer* case is of interest in the present case which stressed that national measures must not jeopardize the objectives or the functioning of the Community system and in particular that the implementation of fishing restrictions must be arranged in such a way as to keep the effects on the functioning of the common organization of the market to a minimum.

In fact there are many indications in favour of the assumption that that principle was not taken into sufficient consideration when the Irish measures were adopted.

In this connexion I would like to leave open the question whether it may correctly be said, and it is impossible to repudiate it completely, that the Irish measures constituted an obstacle to the common policy which must now be elaborated and that they are capable of prejudicing the result of the negotiations on an internal régime and

thus of making agreement more difficult.

In my opinion it is sufficient to state the following considerations:

— It seems to have been shown that the measures which were adopted went far beyond what was necessary both from the geographical and the biological point of view. They relate to a very large area, in fact to 25% of the Irish waters, and thus to almost all the zone in this area which is abundant in fish. Moreover, they apply without distinction to all species of fish. The Irish Government was not however able to show, by putting forward biological reasons, that such an extensive danger of over-fishing exists, and in particular it did not refute the statement of the Commission, which has been substantiated, that the Irish waters are not a uniform ecological area and that not all the species of fish which are found there equally merit conservation. It is possible at least to refer correctly in this connexion to the above-mentioned sharp decrease in the catches made by third countries which resulted in a considerable improvement. For this reason the Commission with good reason raised the question whether less extensive measures would have sufficed, for example the above-mentioned standstill order based upon the year 1976.

— In addition reference was correctly made, in so far as the form which the Irish measures took is concerned, to the objectives relating to structural policy contained in Regulation No 101/76 — rational use of the biological resources of the sea, increase in productivity, reorganization of fleets for the purpose of technical development, and so forth. They are doubtless of particular importance to a sector which is undergoing a recession and has to

suffer considerable economic difficulties. However, measures which ban large modern vessels from fishing and which result in the conversion of the fleets to smaller and less modern vessels counteract these objectives.

It may accordingly be said at least that considerable additional doubts as to the compatibility of the Irish measures with the principles laid down in Community law have thus become apparent. However, as the facts stand it is impossible to go further into these aspects. This is however also not imperative because the accusation of discrimination is sufficient to aid the success of the application lodged by the Commission for a declaration that Ireland has failed to fulfil its obligations.

(bb) The following may be stated with regard to the negative effects of the Irish measures on the negotiations with third countries on fishing questions.

The Commission claims, and in this respect it relies upon the judgment in the *Kramer* case and upon Opinion 1/76, that the Member States are under a duty to act in common with regard to external affairs and that the Community has jurisdiction with regard to the conclusion of agreements in the area of the organization of the market in fishery products. Accordingly, the Commission was instructed at The Hague to conduct negotiations and such negotiations were begun with the objective of concluding reciprocal agreements. It must therefore be regarded as prohibited for individual Member States to withdraw unilaterally the mandate given to the Commission and for that reason it is also impossible to tolerate the jeopardizing of the negotiations through actions taken by individual Member States. This is however to be expected, in other words that the Community's position will be

upset by measures such as the Irish measures, and the Commission gives several examples of this.

The Irish Government replied to this that it is itself taking part in the negotiations and that it is unaware of any difficulties which are attributable to its measures. This fact must also be taken into account in negotiations with third countries as long as national conservation measures are possible. In addition, it must be remembered that at present only the elaboration of outline agreements is involved and not the fixing of quotas, fishing zones and so forth, and that these details are in any case dependent upon the establishment of the internal regime the elaboration of which has not yet been agreed upon.

It is necessary to observe with regard to this difference of opinion on the one hand that the examples which the Commission put forward with regard to the detrimental effect on the negotiations with third countries do not seem very impressive. I recall that in this connexion it was said that some third countries wanted to conclude agreements only with the individual Member States, and that certain third countries doubted the capacity of the Community to conclude agreements in this field and to ensure implementation of them; I also recall that reference was made to the threat of reprisals for the purpose of restoring equilibrium in existing agreements and that for example Norway declared that the Irish measures, which were applied to several Norwegian vessels, could result in demands for fresh negotiations on agreements which had been concluded. To this extent it is moreover of interest that Ireland declared, without being contradicted, that the ban on Norwegian vessels was based on an error and that this has in the meantime been resolved. In addition it is necessary to bear in mind that it was in fact possible to reach agreement on fishing restrictions with certain third countries.



On the other hand, however, it should be remembered that the form of unilateral national measures, which had in fact to be taken into consideration in negotiations with third countries, must be such they may be acknowledged to be conservation measures and that they are restricted to what is absolutely necessary. If this requirement is not complied with the danger actually arises that the Community position in negotiations with third countries will be unduly jeopardized. As we have seen, there are however strong doubts as to whether the Irish measures complied therewith.

For this reason at least it is possible that objections must also be made to the measures from the point of view of 'not jeopardizing negotiations with third countries'. At this point I shall merely make this suggestion. Once again, it seems impossible to go into the matter further on the basis of the information which it is possible for us to obtain; it is also unnecessary since, as I have shown, the accusation of discrimination is sufficient to enable the Commission's application to be granted.

5. Finally, it is necessary to summarize by saying that the Commission's application is well founded and that, accordingly, it is necessary to declare that Ireland has failed to fulfil its obligations under Community law by adopting both orders of 16 February 1977 and applying them as from 10 April 1977. If this is the result of the case Ireland must, in accordance with the request made in the application, be ordered in addition to bear the costs of the proceedings.