

OPINION OF ADVOCATE GENERAL
ALBER

delivered on 23 April 2002¹

I — Introduction

1. This reference for a preliminary ruling concerns firstly the determination of the place of origin for scallops which are caught in the territorial waters of Jersey by a fishing vessel registered in France. Secondly it asks whether a national rule which prohibits the landing of scallops during certain months of the year is compatible with the principle of freedom of movement for goods.

lation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code² (hereafter: the Customs Code), which provides:

‘(1) Goods originating in a country shall be those wholly obtained or produced in that country.

II — Legal framework

(2) The expression “goods wholly obtained in a country” means:

(1) *Community law provisions*

...

(a) origin of goods

2. In Community law the origin of goods is determined by Article 23 of Council Regu-

(e) products of hunting or fishing carried on therein;

¹ — Original language: German.

² — OJ 1992 L 302 p. 1.

(f) products of sea-fishing and other products taken from the sea outside a country's territorial sea by vessels registered or recorded in the country concerned and flying the flag of that country;

...

(3) For the purposes of paragraph 2 the expression "country" covers that country's territorial sea.'

(b) Fisheries

3. A comprehensive Community-law system for the management of fishery resources has existed since the 1980s. It was created by the adoption of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources³ (hereafter: Regulation No 170/83). Regulation No 170/83 was later replaced by Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture⁴ (hereafter: Regulation No 3760/92).

4. On the basis of Regulation No 170/83 and subsequently on the basis of Regulation No 3760/92 the Council has laid down limits on the total permitted catch of certain fishery resources and has granted quotas to the individual Member States. For scallops however no total permitted catches were fixed.

5. Regulation No 170/83 was supplemented by Council Regulation (EEC) No 171/83 of 25 January 1983 laying down certain technical measures for the conservation of fishery resources⁵ (hereafter: Regulation No 171/83). This regulation has been replaced by Council Regulation (EEC) No 3094/86 of 7 October 1986 laying down certain technical measures for the conservation of fishery resources,⁶ by Council Regulation (EC) No 894/97 of 29 April 1997 laying down certain technical measures for the conservation of fishery resources⁷ and most recently by Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms⁸ (hereafter: Regulation No 850/98). As can be deduced from the first recital of Regulation No 171/83 and its Article 20(2) technical

³ — OJ 1983 L 24, p. 14.

⁴ — OJ 1986 L 288, p. 1.

⁵ — OJ 1997 L 132, p. 1.

⁶ — OJ 1998 L 125, p. 1, as amended by Council Regulation (EC) No 1298/2000 of 8 June 2000 amending for the fifth time Regulation (EC) No 850/98, OJ 2000 L 148, p. 1.

³ — OJ 1983 L 24, p. 1.

⁴ — OJ 1992 L 389, p. 1.

measures include amongst other things temporal restrictions on fishing.

(ii) going beyond the minimum requirements laid down in the said legislation;

6. Article 46 of Regulation No 850/98 provides:

‘(1) Member States may take measures for the conservation and management of stocks:

provided that such measures apply solely to the fishermen of the Member State concerned, are compatible with Community law, and are in conformity with the common fisheries policy.

(a) in the case of strictly local stocks which are of interest solely to the fishermen of the Member State concerned; or

(2) The Commission shall be informed, in time for it to present its observations, of any plans to introduce or amend national technical measures. If the Commission so requests within one month of such notification, the Member State concerned shall suspend the entry into force of the measures planned until three months have elapsed from the date of the said notification, so that the Commission can decide within that period whether the measures in question comply with the provisions of paragraph 1.

(b) in the form of conditions or detailed arrangements designed to limit catches by technical measures:

(i) supplementing those laid down in the Community legislation on fisheries;

Where the Commission finds, by a decision which it shall communicate to all Member States, that a planned measure does not comply with the provisions of paragraph 1, the Member State concerned may not bring it into force without making the necessary amendments thereto.

or

The Member State concerned shall immediately inform the other Member States and the Commission of the measures adopted, having made any amendments which may be necessary.

(3) Member States shall provide the Commission, on request, with all particulars necessary to assess whether their national technical measures comply with the provisions of paragraph 1.'

7. Regulations Nos 171/83, 3094/86, 894/97 contained provisions which corresponded to those of the present Article 46.

(2) Provisions of national law

8. By means of Ministerial Order No 794 P3 of 19 March 1980 (hereafter: 'the Ministerial Order') France prohibited between 15 May and 30 September the catching (Article 1) and landing (Article 3) of scallops within its coastal region between the Belgian and Spanish frontiers.

III — Facts and the questions referred

9. Ms Pansard, Mr Bourret and Mr Kermarec caught scallops in the waters of Jersey from a fishing vessel flying the French flag. Their fishing permit was issued by the Jersey authorities. They landed along the French coast the scallops they had caught. From 24 May to 2 June 2001 they landed them in Saint Cast le Guildo and on 30 July 2001 in Saint-Suliac. Criminal proceedings were brought against them in the Tribunal de Grande Instance de Dinan for breach of the Ministerial Order.

10. In the proceedings before the national court the defendants have raised the question as to whether French law is compatible with Community law. They take the view that the scallops which have been landed are imported products and that the Ministerial Order is in breach of Article 28 EC.

11. The court before which the proceedings in the present case are pending has therefore referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Can scallops caught in the circumstances described be regarded as imported products, notwithstanding the French legislation which applies to fish catches the law of the flag of the fishing vessel?

- (2) Is the validity of the Order of 19 March 1980, which prohibits the landing of scallops during their close season, affected by the provisions of the Treaty of Maastricht, which prohibit measures having an equivalent effect to quantitative restrictions on imports?

tered in France and sailed under the French flag is decisive in determining the origin of the scallops. In the oral proceedings the French Government expanded its argument and contended that Article 23(2)(f) of the Customs Code is to be interpreted in such a way that the phrases 'outside a country's territorial sea' and 'registered... in the country concerned' refer to one and the same country. In its view this provision cannot be understood as a delimitation of the territorial jurisdictions of the respective Member States as this would be in contradiction to the internal market.

IV — Arguments of the parties

(1) *The French Government*

12. As regards the first question the French Government takes the view that the scallops which were landed are of French origin and therefore cannot be regarded as products imported into France.

13. It argues that in Community law Article 23 of the Customs Code is determinative of the origin of goods. According to paragraph 2(f) of this provision goods originating in a country are such products of sea-fishing and other products taken from the sea outside a country's territorial sea by vessels registered or recorded in the country concerned and flying the flag of that country. The scallops were caught outside French territorial sea, that is to say in the sovereign waters of Jersey. Therefore the fact that the ship was regis-

14. The French Government argues that its position is supported by the Court's case-law on Article 4(2)(f) of Council Regulation (EEC) No 802/68 of 27 June 1968 on the common definition of the concept of the origin of goods.⁹ Whilst this regulation was repealed by the Customs Code, the relevant provisions of the latter determining the origin of goods are almost word for word identical with those of the regulation.

⁹ — OJ, English Special Edition 1968 (I), p. 165.

Therefore the case-law on Article 4 of Regulation No 802/68 can be applied in interpreting Article 23 of the Customs Code.¹⁰

15. According to that case-law the origin of fish is determined on the basis of the flag or place of registration of the vessel which catches them.¹¹ This applies wherever the fish are caught.¹²

17. According to settled case-law a national provision falls within the scope of Article 28 EC to the extent that it regulates a situation relating to the import of goods in intra-Community trade. In the view of the French Government this is not the case here, since — as it already pointed out with regard to the first question — the scallops which have been landed are not imported goods, but goods of French origin.

(2) *The Netherlands Government*

16. As regards the second question the French Government points out that according to settled case-law the Court lacks the competence in a reference for a preliminary ruling to determine the compatibility of a national provision with Community law. The second question referred therefore must be reformulated to ask whether the interpretation of Article 28 EC precludes a Member State from adopting a provision which prevents the landing of scallops during their close season.

18. In the oral proceedings the Netherlands Government supported the interpretation of the Customs Code advanced by the French Government. It, too, takes the view that according to Article 23(2)(f) of Regulation No 2913/92 the origin of the goods is to be determined on the basis of the flag State. This interpretation can not only be supported by the literal wording of the provision but also by the consistent practice observed with regard to the administration of fishing quotas, which are also based on the flag State. Finally the Netherlands Government points to the UN Law of the Sea Convention whose provisions on natural resources are similarly centred on the flag State of the vessel which raises those resources.

10 — Regulation No 802/68 provided in Article 4:
'(1) Goods wholly obtained or produced in one country shall be considered as originating in that country.

(2) The expression "goods wholly obtained or produced in one country" means:

...
(f) products of sea-fishing and other products taken from the sea by vessels registered or recorded in that country and flying its flag;
...

11 — Case 100/84 *Commission v United Kingdom* [1985] ECR 1169, paragraph 18.

12 — Case C-280/89 *Commission v Ireland* [1992] ECR I-6185, paragraph 14.

19. A significant problem of identifying the fish caught, especially where the fish have been caught in more than one location in its view points against making reference to the location where the catch took place. This problem can be avoided if the origin of the fish is determined not according to the location of the catch but according to the flag State of the vessel.

(3) *The Commission*

20. As regards the first question the Commission takes the view that the scallops are British and therefore imported products. It argues that the criteria for determining the origin of fish catches are laid down in Article 23(2)(e) and (f) of the Customs Code. Where fish are caught within a country — this also includes the country's territorial sea as provided by Article 23(3) of the Customs Code — then their origin is within that country. Where however fish are caught outside the territorial sea, then their origin is determined according to the flag or place of registration of the vessel which catches them.

21. In the present case the scallops were caught in the territorial sea of Jersey and therefore within a country. According to the Commission, they are therefore of British origin and must be treated as imported products on their landing in France.

22. In the oral proceedings it additionally emphasised that Article 23(3) of the Customs Code, in defining 'country' for the purposes of Article 23(2), includes a country's territorial sea. In its view this provision must be read in the light of the distinction made between the Exclusive Economic Zone and the territorial sea in the UN Law of the Sea Convention.

23. As regards the second question the Commission argues that recourse to Article 30 EC must be excluded because Community law measures are already in place. Whilst no specific measures have been taken with regard to the management of scallops stocks, nevertheless within the field of fisheries Community-law harmonisation has occurred to a sufficient extent. In particular, Article 46(1) of Regulation No 850/98 lays down exhaustively the areas in which Member States retain competence to take measures for the conservation and management of stocks.

24. In any event, it argues, the principle of freedom of movement of goods precludes a national measure which — as the Ministerial Order does in the present case — prohibits for certain months the landing of scallops which have their origin in another Member State. Such a prohibition must be seen as a measure having an equivalent effect to a quantitative restriction on imports within the meaning of Article 28 EC.

25. The possibility of justification under Article 30 EC is in its view excluded. It is true that the provision contained within the Ministerial Order aims to protect natural resources. This purpose is not to be regarded as an overriding requirement as defined in the case-law of the Court, but is rather to be classified under the ground of justification 'the protection of life of animals' as provided by Article 30 EC. In the result, however, the measure cannot be regarded as justified as it is in breach of the principle of proportionality. The objective of the prohibition could be as effectively achieved by measures which are less of a hindrance to intra-Community trade.

Commission of the Ministerial Order. Therefore ever since the Community provisions came into force the Ministerial Order has suffered from a formal defect, which renders it inapplicable.

27. Finally, the Commission argues that the Order is in breach of Article 10 of Regulation No 3760/92.¹⁷ According to this article, the Member States are only accorded the competence to take measures for the conservation and management of resources in waters under their sovereignty or jurisdiction. In so far as the Order relates to scallops which are caught in the territorial sea of other Member States, France has therefore exceeded its competence.

26. Furthermore, according to the Commission, the Ministerial Order is in itself inapplicable because of a formal defect. Whilst it was made before the Community provisions on the conservation and management of fishery resources came into force, Member States were nevertheless placed under a duty by Article 20(2) and (3) of Regulation No 171/83¹³ to notify the Commission of any existing national measures. Subsequently those provisions have been replaced by other provisions, all of which however have contained the same duty to notify. The Commission refers to Article 14 of Regulation No 3094/86,¹⁴ Article 17 of Regulation No 894/97¹⁵ and Article 46 of Regulation No 850/98.¹⁶ France however has never notified the

V — Appraisal

(1) *The first question*

28. The first question concerns the determination of the origin of the scallops: Are they French scallops or those of the island of Jersey?

¹³ — Cited above, footnote 5.

¹⁴ — Cited above, footnote 6.

¹⁵ — Cited above, footnote 7.

¹⁶ — Cited above, footnote 8.

¹⁷ — Cited above, footnote 4.

29. Firstly it must be made clear that in principle Jersey enjoys a special status under Article 299(6)(c) EC. Nevertheless, according to Article 1 of Protocol No 3 on the Channel Islands and the Isle of Man (Documents concerning the accession to the European Communities of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland),¹⁸ the Community rules on customs matters and quantitative restrictions are to apply to the Channel Islands under the same conditions as they apply to the United Kingdom. Therefore, with respect to Jersey, the provisions applicable for determining the origin of goods are the generally applicable provisions of Community law, that is to say the Customs Code.

30. According to Article 23(1) of the Customs Code goods originating in a country are to be those wholly obtained or produced in that country. Article 23(2)(e) of the Customs Code provides that products of fishing are wholly obtained in a country when carried out therein. Article 23(3) of the Customs Code defines 'country' as including that country's territorial sea. Outside the territorial sea of a country the origin of products of sea-fishing and other products taken from the sea is determined according to Article 23(2)(f) of the Customs Code on the basis of the country of registration and the flag flown by the vessel making the catch.

31. The French Government argues on the basis of the case-law interpreting Article 4 of Regulation No 802/68 that the scallops are French, since they were caught by a ship flying the French flag. However, the reference to this case-law cannot amount to a convincing argument. In both of the judgments to which France refers the flag flown by the vessel making the catch is determinative.¹⁹ However, Article 4 of Regulation No 802/68 has been replaced by Article 23 of Regulation No 2913/92. These provisions differ in one significant respect. Whereas the previous provision determined the origin of fish, irrespective of the place where they were caught, solely by reference to the flag of the vessel making the catch, in the text of Article 23 of Regulation No 2913/92 currently in force the location of the catch is decisive. The article distinguishes between those catches which occur within and those outside the territorial sea of a country, without the flag of the vessel making the catch making any difference.

32. This interpretation which follows from the wording of paragraph 2 and its logical interconnection with paragraph 3 of the provision is further supported by the spirit and purpose of the legislation. Article 23 is to be found in the Customs Code, a legislative instrument, the spirit and purpose of which is to raise income for the Community in the form of customs duties. The argument put forward by the French and Netherlands Governments, according to which the flag State is decisive, leads however to the result that fish which are caught in the territorial waters of other

18 — OJ 1972 L 73, p. 164.

19 — *Commission v United Kingdom*, paragraphs 18 to 21, and *Commission v Ireland*, paragraph 14.

States could be 'imported' free of customs duties into the Member State under whose flag the vessels are sailing — and thereby into the Community — since they would by reason of the catch being made by a vessel registered in the Community become goods moving freely in the Community. Thus scallops which, for example, were caught in the territorial sea of Argentina — assuming for the purposes of argument that scallops are to be found there — by a vessel registered in France and issued with a fishing permit by the Argentine authorities would be treated as French scallops. This would be contrary to the spirit of the Customs Code, which is designed to raise income.

33. The interpretation I have put forward here in conclusion is furthermore in accordance with the overall system of the provision of Community law concerning the management of fishery resources. Regulations No 170/83 and No 171/83, to which will I return when considering the second question, created a comprehensive Community-law system for the management of fishery resources. According to Article 20 of Regulation No 171/83, to which today the above cited Article 46 of Regulation No 850/98 corresponds, it is open to Member States to take measures for the conservation and management of stocks, where these measures concern strictly local stocks which are of interest solely to the fishermen of the Member State concerned, or where the measures apply solely to vessels sailing under the flag of the Member State concerned or apply solely to persons resident in the Member State concerned. In other words, Member States may adopt legislation for the stocks which are within their sovereign jurisdiction, that is within their territorial waters, or for the vessels and persons who are within their

sovereign jurisdiction. The French Government has tried to justify the legality of the 1980 Ministerial Order with the argument that it applies only to French stocks, French vessels and French persons and so regulates a wholly internal situation outside the scope of Article 28 EC. If Article 23 of the Customs Code were to be interpreted along the lines put forward by the French and Netherlands Governments, this would however lead to the situation that the French Government could regulate the catch of scallops by French fishermen outside its jurisdiction, namely in the territorial waters of Jersey. However, by virtue of Article 46 of Regulation No 850/98, cited above, only Jersey has the power to regulate the management of scallop stocks in its jurisdiction, that is including the territorial sea of Jersey. For this reason too Article 23 of the Custom Code can therefore only be understood to the effect that it is the location of the catch and not the flag State which is decisive.

34. In the proceedings before the national court in the present case the scallops were caught in the territorial waters of the island of Jersey. According to the Customs Code, in particular Article 23 thereof, scallops caught in the territorial waters of Jersey are of British origin. As a result, they are to be regarded as products imported into France.

35. As an interim conclusion I accordingly propose that the answer to the first question is that scallops caught in the territorial

waters of Jersey by a French registered vessel under a fishing permit issued by the Jersey authorities are of British origin and are therefore to be regarded in France as imported products.

(b) Existence of a measure having equivalent effect to a quantitative restriction on imports

(2) *The second question*

(a) Interpretation of the question referred

36. With regard to the second the question, it must firstly be pointed out as a matter of clarification that the Court of Justice according to its own settled case-law does not have jurisdiction in a reference made under Article 234 EC to give a ruling on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court with points on the interpretation of Community law, so as to enable that court to determine whether such compatibility exists in order to decide the case before it.²⁰ The second question therefore falls to be reformulated to the effect that it seeks information on whether Article 28 EC is to be so interpreted that it precludes the application of national legislation which prohibits the landing of scallops originating in another Member State during certain months of the year.

37. Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between the Member States. According to settled case-law, a measure of equivalent effect to a quantitative restriction is any measure capable of hindering directly or indirectly, actually or potentially, intra-Community trade.²¹

38. The Ministerial Order in question prohibits the catch of scallops in French territorial waters and their landing along the French Atlantic coast during the period 15 May to 30 September. The prohibition on landing is a general one, which does not differentiate according to the origin of the scallops.

39. In so far as the Ministerial Order regulates the *catch* of scallops, it can according to the principle of territoriality only affect the catch of scallops in French territorial waters. In this respect the facts do not reveal any cross-border aspect.

20 — Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 23, and Joined Cases C-37/96 and C-38/96 *Sodiprem and Others* [1998] ECR I-2039, paragraph 22.

21 — Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5; Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, paragraph 11.

40. With regard to the *landing* of scallops, however, it must be noted that the Ministerial Order in question does not differentiate between scallops of French origin and those which are not of French origin. The Ministerial Order in question also applies to scallops caught within the territorial waters of Jersey, that is to say, scallops of British origin. In this respect the Ministerial Order regulates a cross-border situation.

41. According to the case-law of the Court prohibitions on the landing of fish originating in other Member States constitute barriers, incompatible with Article 28 EC, to the free movement of goods.²² Consequently the French ministerial order in question here, to the extent that it contains a general prohibition on landing, constitutes a measure which is capable of hindering intra-Community trade. To this extent it is incompatible with Article 28 EC.

(c) Justification of the measure

42. The question thus arises as to whether the measure is justified under Article 30 EC. The prohibition on landing applies during the close season for fishing for scallops in French territorial waters between 15 May and 30 September. Accordingly it falls to be considered whether it is justified as a measure for the

protection of the stocks of scallops, and thus, in the terminology of Article 30 EC, for the protection of the health and life of animals.

43. The protection of the life of animals has been recognised in principle as an overriding requirement, by which an objective which is in the general interest is pursued. In this respect protection of scallop stocks is in principle capable of justifying restrictions of the free movement of goods.

44. In the present case it must however be observed that according to settled case-law recourse to Article 30 EC and the fundamental requirements recognised therein is no longer possible where a Community harmonisation measure exists, adopted to attain the specific objective intended to be attained by recourse to Article 30 EC.²³ In other words, a justification based on the protection of scallop stocks is excluded if there are Community measures which assure those stocks.

45. As I have already stated in outlining the legal framework of this case, the management of fishery resources has been regulated by Community law since the 1980s, initially by means of Regulation No 170/83,

22 — Case C-169/89 *Van den Burg* [1990] ECR I-2143, paragraph 8; Case C-350/97 *Monsees* [1999] ECR I-2921, paragraph 24; Case C-5194 *Hedley Lomas* [1996] ECR I-2553.

23 — *Commission v Ireland*, cited in footnote 12, paragraph 14.

subsequently replaced by Regulation No 3760/92. As the Commission itself concedes, there have not yet been any specific Community measures relating to the management of scallop stocks. Neither has an overall limit been set on the quantities which may be caught nor have any other measures been adopted to protect the stocks of scallops. In this respect the present case therefore differs from the case of *van den Burg* referred to by the Commission in the oral proceedings, in which the directive in question provided exhaustive substantive regulation with regard to the conservation of wild birds.²⁴ Therefore in this case recourse to Article 30 EC appears at first sight not to be excluded.

46. The Commission nevertheless seeks to prevent recourse to Article 30 by means of the argument that a comprehensive system for the management of fishery resources already exists. It argues that France only has the power to act within the framework created by Community law, in particular by Article 46 of Regulation No 850/98 and the regulations preceding it. In its view the Ministerial Order does not satisfy these requirements, since it has not been notified to the Commission. Since the adoption of Regulation No 171/83, however, the Member States have been under a duty to communicate to the Commission those national measures which they consider necessary for the management of fishery resources. On the basis of the judgments in

*Enichem Base*²⁵ and *CIA Security International*²⁶ the Commission takes the view that the Ministerial Order is inapplicable, since it has not been notified.

47. Contemporaneously with the adoption of Regulation No 170/83 the Community legislature adopted Regulation No 171/83 laying down certain technical measures for the conservation of fishery resources. Temporary restrictions on the catches of fish are included among the technical measures within the meaning of this regulation. This can be deduced from the first recital in the preamble to the regulation and from Title IV of the regulation entitled 'prohibition of fishing for certain species within certain areas and periods.' According to Article 20(2) of the regulation national technical measures are to be communicated to the Commission in accordance with Article 2(2) of Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry.²⁷ Currently this duty to notify applies by virtue of Article 46 of Regulation No 850/98.

48. The Ministerial Order provides for a temporary prohibition on landing in conjunction with a temporary prohibition on catches. It is therefore a technical measure within the meaning of Regulation No 850/98. As such it is subject to the duty to notify arising out of Article 46 of

24 — *Van den Burg*, paragraph 9.

25 — Case 380/87 *Enichem Base and Others* [1989] ECR 2491, paragraph 2.

26 — Case C-194/94 [1996] ECR I-2201, paragraphs 48 and 49.

27 — OJ 1976 L 20, p. 19.

the regulation. It is not in dispute that the Commission was nevertheless not notified of the existence of the Ministerial Order. The question thus arises as to the consequences of this breach of the duty to notify, and in particular whether this breach leads to the inapplicability of the Ministerial Order vis-à-vis individuals.

49. In its judgment in *Enichem Base*, referred to by the Commission, the Court did not however find that a breach of the duty to notify contained in Article 3(2) of Council Directive 75/442/EEC of 15 July 1975 on waste²⁸ led to the inapplicability of the national measure which had not been notified. It based this conclusion on the fact that the directive did not lay down any procedure for Community monitoring of the draft rules which were to be notified nor did it make implementation of the planned rules conditional upon agreement by the Commission or its failure to object. The duty to provide information was intended merely to enable the Commission to verify whether Community harmonising legislation was called for and whether the draft rules submitted to it were compatible with Community law, and, if necessary, to take the appropriate measures. It added that neither the wording nor the purpose of the provision provided any support for the view that failure to observe the obligation to give prior notice to the Commission in itself renders unlawful the national rules adopted.²⁹

50. In contrast to this, in *CIA Security International*, also referred to by the Commission in its argument, the Court held that the failure to comply with the duty to notify in accordance with Articles 8 and 9 of Council Directive 83/189 of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations³⁰ entailed the inapplicability of the relevant national provisions. It founded this conclusion on the consideration that the obligation to notify was an important means for achieving preventive Community control and served to achieve the aim of protecting the free movement of goods. It held that the effectiveness of Community control would be that much greater if breach of the obligation to notify were regarded as constituting a substantial procedural defect which could render the technical rules in question inapplicable to individuals.³¹ In contrast to Directive 75/442, the Court held, Directive 83/189 did not only pursue the aim of informing the Commission, but also the more general aim of eliminating or restricting obstacles to trade, informing other States of technical provisions envisaged by a State, giving the Commission and the other Member States the necessary time to react and to propose an amendment enabling restrictions on the free movement of goods arising from the envisaged measure to be lessened, and of affording the Commission the necessary time to propose a harmonising directive. Moreover, Articles 8 and 9 of Directive 83/189 made the date of entry into force of the measure subject to the Commission's

28 — OJ 1975 L 194, p. 39.

29 — *Enichem Base*, paragraphs 20 to 22.

30 — OJ 1983 L 109, p. 8.

31 — *CIA Security International*, paragraph 48.

agreement or lack of opposition.³² In the subsequent paragraphs of its judgment, the Court discussed whether there were any reasons specific to Directive 83/189 which would speak against the presumption of inapplicability in the case of non-notification of measures. In particular it discussed the objection that this could lead to a legislative vacuum in the national legal system. However it rejected this conclusion by pointing to the existence of the urgent-case procedure laid down in Article 9(3) of Directive 83/189.³³

51. In the light of this case-law the notification procedure laid down in Article 46 of Regulation No 850/98 must be examined more closely. Firstly, it may be observed that just as in the case of Articles 8 and 9 of Directive 83/189, Article 46(2) of Regulation 850/98 also renders the date of entry into force of a national measure notified subject to the Commission's agreement or lack of opposition. Moreover, however, entry into force is in any event dependent on the Commission's agreement. For, according to the third subparagraph of Article 46(2), where the Commission has found that a measure does not comply with the provisions of Article 46(1) the Member State may not bring it into force unless it makes the necessary amendments. This possibility for the Commission to intervene goes far beyond the mere informing of the Commission. The national measures notified are subject to the Commission's review as to their legality. This points to the conclusion that a national measure which has not been notified in accordance with

Article 46 of Regulation No 850/98 is in principle inapplicable vis-à-vis individuals.

52. There are no obvious reasons associated with Regulation No 850/98 itself which point against the presumption of inapplicability in the case of a national measure which has not been notified. In particular, Article 45(2) of the regulation permits a Member State in urgent cases to take where necessary non-discriminatory conservation measures. These measures can be put into force immediately and reduced time-limits apply for the Commission to raise any objections. In this respect too the legal position appears to be comparable with that which applies under Directive 83/189, where the Court had pointed to the urgent-case procedure under Article 9(3).

53. My interim conclusion is therefore that a national provision concerning a technical measure relating to fish catches which has not been notified in accordance with Article 46 of Regulation No 850/98 is inapplicable to individuals.

54. Nevertheless it must be noted that as regards the management specifically of scallop stocks no substantive Community law measures have been taken. It is only out of a *formal* failure to comply with Community law that the inapplicability of the national measure in this case arises. Examination of the substantive or *material* compatibility of the Ministerial Order can

32 — *CIA Security International*, paragraph 50.

33 — *CIA Security International*, paragraphs 51-53.

only be undertaken on the basis of Articles 28 and 30 EC. The question therefore arises as to whether reliance on Article 30 EC purely on account of a breach of the duty to notify under Article 46 of Regulation No 850/98 should be precluded.

55. In the result, it seems justified to preclude reliance on Article 30 EC outside the framework of Regulation No 850/98. By means of Regulations Nos 170/83 and 171/83 Community law comprehensively regulated the management of fishery resources. Even where no individual measures are taken with regard to a particular fish resource under Regulation No 170/83, or now Regulation No 3760/92, the provisions concerning technical measures must nevertheless still be observed.

56. As is evident from Article 46 of Regulation No 850/98, the Member States are given the express power, in circumstances where there are no Community rules, to adopt rules relating to their territorial sea and their fishermen. Nevertheless those rules must be compatible with Community law, and thus also with the principle the free movement of goods. Furthermore, they must be notified to the Commission, so that, if need be, it can block national provisions which are contrary to Community law. Thus even though no substantive measures have been taken with regard to scallops, France is nevertheless bound to observe the general provisions relating to the adoption of national technical meas-

ures. Community law is in this respect exhaustive.

57. Since in the present case the rule in Article 46 of Regulation No 850/98 was not observed, the Ministerial Order must therefore remain unapplied vis-à-vis individuals. Justification of the Ministerial Order as protecting the life of animals within the meaning of Article 30 EC is therefore precluded.

58. I therefore propose that the answer to the second question referred should be that Article 28 EC is to be interpreted as meaning that it precludes the application of a national provision which prohibits the landing of scallops during their close season of 15 May to 30 September irrespective of their origin and which, furthermore, contrary to the provisions of Community law, was not notified to the Commission prior to being brought into force.

(d) Proportionality

59. Only secondarily, and in the event that the Court does not follow the line of reasoning set out above and permits recourse to Article 30 EC, is it necessary to discuss whether the justification of protecting the life of animals must in this case be excluded because the Ministerial Order is disproportionate. It is settled

case-law that in areas where there are no Community rules obstacles to intra-Community trade resulting from disparities between the national provisions must be accepted in so far as such provisions are applicable to domestic and imported products without distinction and are necessary in order to satisfy overriding requirements. However, in order to be permissible, such provisions must be proportionate to the objective pursued and that objective must not be capable of being achieved by measures which are less restrictive of intra-Community trade.³⁴

60. By means of the prohibition on landing fishermen are prevented from catching scallops during the prescribed close season. The prohibition on landing scallops is therefore appropriate for the protection of the life and stocks of scallops.

61. A provision goes beyond what is necessary if the objective pursued can be achieved as effectively by provisions which are less restrictive of intra-Community trade. The prohibition on landing affects not only scallops caught in the French territorial sea but also those caught in the territorial sea of other States. Compared to this measure, a less restrictive provision

would prohibit only the landing of scallops of French origin. This would be sufficient to enforce the prohibition on catching scallops in French territorial waters, without thereby restricting intra-Community trade.

62. It is questionable though whether a limited prohibition relating only to the landing of scallops of French origin is equally suited to protect the life of animals and scallops stocks. This may be doubted since when scallops are landed it is in principle not possible to identify their origin, that is to say, whether or not they are domestic or imported goods.

63. That argument can be countered with the observation that this uncertainty can be met by carrying out stricter controls in the territorial sea. The difficulties which such controls of catches bring with them ought not to be any greater or of a different nature for scallops than for other types of fish, whose catches are limited by quotas the observance of which must be ensured through appropriate controls. Moreover difficulties encountered in the administrative application of a measure do not in principle provide justification for measures which hinder the free movement of goods.³⁵

34 — Case C-3/99 *Ruwet* [2000] ECR I-8749, paragraph 50; Case C-313/94 *Graffione* [1996] ECR I-6039, paragraph 17.

35 — Case 124/85 *Commission v Greece* [1986] ECR 3935, paragraph 12; Case C-128/89 *Commission v Italy* [1990] ECR I-3239, paragraph 22.

64. Therefore it is to be concluded that the Ministerial Order is also contrary to Community law in so far as it hinders the free movement of goods beyond the extent necessary for the protection of scallops in French territorial waters.

VI — Conclusion

65. In the light of the foregoing I propose that the answers to be given to the questions referred should be as follows:

- (1) Scallops caught in the territorial waters of Jersey under a fishing permit issued by the Jersey authorities by a vessel registered in France and sailing under the French flag are to be regarded in France as imported products.
- (2) Article 28 EC precludes the application of a national provision which prohibits the landing of scallops during their close season of 15 May to 30 September irrespective of their origin and which furthermore, contrary to the provisions of Community law, was not notified to the Commission before it was brought into force.