

In Case 804/79

COMMISSION OF THE EUROPEAN [UNION], represented by its Legal Advisers, Donald W. Allen and John Temple Lang, acting as Agents, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

applicant,

supported by

FRENCH REPUBLIC, represented by Gilbert Guillaume, Director of Legal Affairs at the Ministry of Foreign Affairs, acting as Agent, and for the

purposes of the written procedure by Philippe Moreau-Defarges, Adviser at the Directorate for Legal Affairs at the Ministry for Foreign Affairs, acting as Joint Agent, with an address for service in Luxembourg at the Embassy of the French Republic,

and

IRELAND, represented by Louis J. Dockery, Chief State Solicitor, acting as Agent, assisted, for the purposes of the oral procedure, by James Lynch, Assistant Chief State Solicitor, and by Declan N. C. Budd, Barrister, with an address for service in Luxembourg at the Irish Embassy,

interveners,

v

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND,
represented by R. D. Munrow, Assistant Treasury Solicitor, acting as Agent,
assisted by Lord Mackay of Clashfern, QC, and Peter G. Langdon-Davies,
Barrister of the Inner Temple, with an address for service in Luxembourg at the
Embassy of the United Kingdom,

defendant,

APPLICATION for a declaration that, by adopting and applying in 1979 certain
national measures relating to sea fisheries, the United Kingdom has failed to fulfil
its obligations under the [Treaty on the Functioning of the European Union],

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, Lord Mackenzie
Stuart and T. Koopmans (Presidents of Chambers), A. O'Keeffe, G. Bosco, A.
Touffait, O. Due and U. Everling, Judges,

Advocate General: G. Reischl

Registrar: A. Van Houtte

gives the following

JUDGMENT

Decision

- 1 By application lodged at the Court Registry on 13 November 1979 the Commission of the European [Union] brought an action under [Article 258 TFEU] for a declaration that, by applying in the matter of sea fisheries unilateral measures comprising on the one hand five statutory instruments relating to the mesh of nets and the minimum landing size for certain species and on the other hand, a licensing system for fishing in the Irish Sea and the waters round the Isle of Man, the United Kingdom has failed to fulfil its obligations under the Treaty.
- 2 The measures belonging to the first group comprise the following statutory instruments, which were brought into force on 1 July 1979:
 - The Fishing Nets (North-East Atlantic) (Variation) Order 1979, SI No 744;
 - The Immature Sea Fish Order 1979, SI No 741;
 - The Immature Nephrops Order 1979, SI No 742;
 - The Nephrops Tails (Restrictions on Landing) Order 1979, SI No 743;
 - The Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979, SI No 235.
- 3 The provisions applied in the Irish Sea and the waters round the Isle of Man are based on two orders:

— The Herring (Irish Sea) Licensing Order 1977, SI No 1388; and

— The Herring (Isle of Man) Licensing Order 1977, SI No 1389.

It should be noted that these are the same measures as have already been the subject of the Court judgment of 10 July 1980 (Case 32/79 *Commission v United Kingdom*).

History of the dispute

- 4 It is common ground that at the beginning of 1979 the Council, to which the Commission, in pursuance of Article 102 of the Act of Accession, had proposed the adoption of a series of measures for the conservation of fishery resources in the waters under the jurisdiction of the Member States, failed to adopt the necessary provisions. In the circumstances the Council adopted interim measures which, applied for limited periods, were extended from time to time. These Decisions, the wording of which is similar, are dated 19 December 1978 (not published), 9 April 1979, (79/383 (Official Journal L 93, p. 40)) and 25 June 1979, (79/590 (Official Journal L 161, p. 46)). The latter decision, which was applicable at the time of the bringing into force of the five statutory instruments of the first group, is worded as follows:

"Council Decision of 25 June 1979

under the Treaties, concerning fishery activities in waters under the sovereignty or jurisdiction of Member States, taken on a temporary basis pending the adoption of permanent [Union] measures.

The Council intends to reach an agreement as early as possible in 1979 on [Union] measures for the conservation and management of fishery resources and related matters. Pending its decision in the matter and in view both of Article 102 of the Act of Accession and of the need to protect the biological resources and to maintain suitable relations with third countries in fisheries

matters, the Council, on 19 December 1978 and 9 April 1979, adopted interim measures which were in force from 1 January to 31 March 1979 and from 1 April to 30 June 1979 respectively. Following on from these measures, the Council has decided on the following interim measures which will apply from 1 July 1979 until the Council has reached a definitive agreement or until 31 October 1979, whichever is the earlier.

1. Member States shall conduct their fishery in such a way that the catches of their vessels during the interim period shall take into account TACs submitted by the Commission to the Council in their communications of 23 November 1978 and 16 February 1979 and the part of the TACs made available to third countries under agreements or arrangements made with them by the [Union]. The catches taken in the interim period will be offset against the allocations eventually decided upon by the Council for 1979.
2. As regards technical measures for the conservation and surveillance of fishery resources, Member States shall apply the same measures as they applied on 3 November 1976, and other measures taken in accordance with the procedures and criteria of Annex VI to the Council resolution of 3 November 1976."
- 5 By a letter of 21 March 1979 the Government of the United Kingdom informed the Commission of its intention to bring into force on 1 June 1979 a series of measures for the conservation of fishery resources concerning the mesh of nets, minimum landing sizes and by-catches and sought the approval of the Commission in this matter in accordance with Annex VI to the Hague Resolution (the text of which, hereinafter referred to as "the Hague Resolution", which was not published in the Official Journal, was quoted in the Court's judgment of 16 February 1978 (Case 61/77 *Commission v Ireland* [1978] ECR 417, at paragraph 37). Subsequently the Government informed the Commission that the proposed measures would not come into force until 1 July.
- 6 The Commission reserved its position until it had obtained the complete text of the proposed measures and the Government of the United Kingdom sent to it on 19 June 1979 five draft statutory instruments and on 29 June 1979 a

sixth replacing one of the first five. In the correspondence exchanged on this subject with the Government of the United Kingdom the Commission repeatedly stressed that the proposed measures could not come into force without having received its approval in view of the fact that the subject-matter was within the powers of the [Union].

- 7 The measures in question were brought into force on 1 July 1979.
- 8 On 6 July 1979 the Commission sent to the Government of the United Kingdom a letter notifying it that it was taking action under [Article 258 TFEU]. The Commission received the Government's observations by a letter dated 31 July 1979 and delivered its reasoned opinion on the abovementioned statutory instruments on 3 August 1979 and on the dispute concerning fishing in the Irish Sea and the waters round the Isle of Man on 2 October 1979.
- 9 The parties do not dispute the fact that the statutory instruments brought into force on 1 July 1979 by the United Kingdom are genuine conservation measures and that they correspond, at least in principle, to the measures proposed at the same time by the Commission to the Council as regards the whole of the sea areas in question. The criticisms made by the Commission are based on the consideration that measures of this type cannot be effectively adopted except for the whole of the [Union], that the Council would have been in a position to adopt them in the form intended by the Treaty if the United Kingdom had not itself blocked the decision-making process in the Council and that by unilaterally adopting the measures in question the United Kingdom has encroached upon the powers which belong in their entirety, as from 1 January 1979, to the [Union]. According to the Commission, in the circumstances the disputed measures could therefore be adopted only with its authorization.
- 10 It is only in the alternative that the Commission has considered the substance of the various measures adopted in order to show that, even though they are genuine measures of conservation, their adoption has breached the principle of the equality of treatment of all [Union] fishermen, either as regards the time at which they came into force or as regards the detailed methods of

their application.

- 11 The Government of the French Republic and the Government of Ireland have expressed their support for the Commission's case.
- 12 The French Government recalls that fisheries and more precisely the conservation of marine species are covered by the powers expressly transferred to the [Union] and stresses that on 31 December 1978 all national powers in the matter of conservation measures disappeared totally and irreversibly. A fundamental distinction must therefore be made, in accordance with the existing case-law of the Court, between the period which expired on 31 December 1978 and the ensuing period. Henceforth the power to adopt measures for the protection of the biological resources of the sea comes within the competence of the [Union] alone and more precisely of the Council. The Council cannot, without disregarding the provisions of Article 102, restore to the Member States a power which they have definitively lost. Having regard to these legal facts, the decisions adopted by the Council must be understood as decisions "crystallizing" and fixing the conservation measures as they existed at the expiration of the transitional period and not as decisions delegating or transferring power.
- 13 The Government of Ireland, whilst supporting the Commission's action, does not however accept the French Government's position with regard to the question of powers. It takes the view that the situation is governed by the successive decisions of the Council, as referred to above, but it would not wish to exclude the possibility that the Council might, even after the expiration of the period laid down in Article 102 of the Act of Accession, adopt rules, procedures and criteria for action by individual Member States instead of action by the Council itself if circumstances make urgent conservation measures necessary.
- 14 The Government of the United Kingdom claims that as long as the Council has not exercised the powers conferred upon it by Article 102 of the Act of Accession, even after the expiration of the period laid down in that article, the Member States retain residual powers and duties until the [Union] has fully exercised its powers. It does not dispute that the measures adopted in

these circumstances by the Member States must be compatible with all relevant provisions of [Union] law; in this case the real question therefore is whether the measures are in conflict with the [Union] legislation in force and whether, in adopting them, the United Kingdom has disregarded any one of its obligations in pursuance of [Union] law.

- 15 The Government of the United Kingdom takes the view that at the time when it introduced the five statutory instruments at issue there was no [Union] legislation in force on the same matter just as there was no [Union] legislation affecting herring fishing in the Irish Sea and the waters round the Isle of Man. The Government feels that it has satisfied the obligations resulting from the Council's decisions and the Hague Resolution in view of the fact that it consulted the Commission at all stages of the preparation of the disputed measures and sought its approval. On the other hand it does not agree that that Resolution and the decisions extending its application may be interpreted as requiring the prior authorization of the Commission for any action by the Member States.
- 16 Having regard to the uncertainties characterizing the legal situation in the field in question it is appropriate in the first place to establish what the state of [Union] law was as regards conservation measures at the relevant period. Once the bases of the legal situation have been established it will then be necessary to consider separately on the one hand the question of the compatibility with [Union] law of the adoption of the five statutory instruments disputed by the Commission and on the other the fisheries situation in the Irish Sea and the waters round the Isle of Man, which raises special legal problems.

The state of the law at the time in question

- 17 The Court has had occasion to recall in former judgments and most recently in its judgment of 10 July 1980, to which reference has already been made, the elements of [Union] law which are applicable in this matter. The situation described in those judgments has in the meantime undergone a substantial change by reason of the fact that since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act

of Accession, power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the [Union].

- 18 Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures, with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of [Union] law. As the Commission has rightly pointed out, the resources to which the fishermen of the Member States have an equal right of access must henceforth be subject to the rules of [Union] law.
- 19 It is in the light of this position of principle that the legal situation must be assessed. It is characterized by the fact that, in a matter in which the powers are in the hands of the [Union], the Council has not adopted, within the required periods, the conservation measures referred to by Article 102 of the Act of Accession.
- 20 On this subject it is appropriate to stress, first of all, that the transfer to the [Union] of powers in this matter being total and definitive, such a failure to act could not in any case restore to the Member States the power and freedom to act unilaterally in this field.
- 21 It follows, as has been stated by the French Government, that in the absence of provisions adopted by the Council in accordance with the forms and procedures prescribed by the Treaty, the conservation measures as they existed at the end of the period referred to in Article 102 of the Act of Accession are maintained in the state in which they were at the time of the expiration of the transitional period laid down by that provision.
- 22 However, it is not possible to extend that idea to the point of making it entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant biological and technological facts in this sphere. Such amendments

would be of a limited scope only and could not involve a new conservation policy on the part of a Member State, since the power to lay down such a policy belongs henceforth to the [Union] institutions.

- 23 Having regard to the situation created by the inaction of the Council, the conditions in which such measures may be adopted must be defined by means of all the available elements of law, even though fragmentary, and by having regard, for the remainder, to the structural principles on which the [Union] is founded. These principles require the [Union] to retain in all circumstances its capacity to comply with its responsibilities, subject to the observance of the essential balances intended by the Treaty.
- 24 In this respect it should be recorded first of all that at the time of the events giving rise to the dispute, the Commission had presented the proposals required by Article 102 of the Act of Accession so that the Council had before it a draft relating to the whole of the conservation measures to be adopted. Although it is true that the Council did not follow those proposals, it did at least lay down certain guide-lines, expressed in the decisions referred to above and, in particular, in that of 25 June 1979, which was applicable at the time of the events in question.
- 25 These decisions, which were essentially of an interim nature, adopt the Commission's proposals as regards total allowable catches (TACs) as a limit to the aggregate of fishing activities during the period in question. They moreover consolidate the technical measures for conservation and control of fishery resources in force at the relevant time. They thus reflect, on the one hand, the Council's intention to reinforce the authority of the Commission's proposals and, on the other hand, its intention to prevent the conservation measures in force from being amended by the Member States without any acknowledged need.
- 26 As regards any amendments which may be necessary to the existing conservation measures, the decisions which have been mentioned refer to the "procedures and criteria" of the Hague Resolution. It may be recalled that that Resolution excludes in principle unilateral measures by the Member States and that in the absence of [Union] measures it admits only of

measures adopted to ensure the protection of resources and in a form which avoids discrimination. Furthermore it emphasizes that such measures shall not prejudice the guide-lines to be adopted for [Union] policy on the conservation of resources.

- 27 Before adopting such measures the Member State concerned is required to seek the approval of the Commission, which must be consulted at all stages of the procedure. It should be noted that these requirements, which were originally defined during the transitional period laid down by Article 102 of the Act of Accession, must be considered henceforth in a new setting, characterized by the exclusive powers of the [Union] on this subject and by the full effect of the relevant rules of [Union] law, without prejudice to the transitional provisions of Articles 100, 101 and 103 of the Act of Accession, the application of which is however not at issue in this case.
- 28 According to [the second and third paragraphs of Article 4(3) TEU] Member States are required to take all appropriate measures to facilitate the achievement of the [Union]'s task and to abstain from any measure which might jeopardize the attainment of the objectives of the Treaty. This provision imposes on Member States special duties of action and abstention in a situation in which the Commission, in order to meet urgent needs of conservation, has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted [Union] action.
- 29 Furthermore it should be remembered that in pursuance of [Article 18 TFEU], [Union] fishermen must have, subject to the exceptions mentioned above, equal access to the fish stocks coming within the jurisdiction of the Member States. The Council alone has the power to determine the detailed conditions of such access in accordance with the procedures laid down by [Article 43(2) and (3) TFEU] and Article 102 of the Act of Accession. This legal situation cannot be modified by measures adopted unilaterally by the Member States.
- 30 As this is a field reserved to the powers of the [Union], within which Member States may henceforth act only as trustees of the common interest,

a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which [the first paragraph of Article 17 TEU], in conjunction, in this case, with the Decision of 25 June 1979 and the parallel decisions, gives to the Commission.

- 31 Thus, in a situation characterized by the inaction of the Council and by the maintenance, in principle, of the conservation measures in force at the expiration of the period laid down in Article 102 of the Act of Accession, the Decision of 25 June 1979 and the parallel decisions, as well as the requirements inherent in the safeguard by the [Union] of the common interest and the integrity of its own powers, imposed upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections, reservations or conditions which might be formulated by the Commission.
- 32 It may be noted that this process of cooperation between Member States and the Commission has been confirmed by a practice which has been widely followed inasmuch as the Commission has given its views on a large number of national conservation measures notified to it by the various Member States concerned and has put forward, where appropriate, reservations or conditions (cf. for the period in question, the Communications published in Official Journals C 154 of 1978, p. 5, C 119 of 1979, p. 5, C 133 and C 237 of 1980, p. 2 in each case).
- 33 It is in the light of the state of law as thus defined that the two groups of measures which are the subject of the dispute must be considered.

The statutory instruments contested by the Commission

- 34 The Government of the United Kingdom claims that the five statutory

instruments contested by the Commission were the subject of prior consultation on its part in accordance with the decisions of the Council and the procedure laid down by the Hague Resolution. There can be no question of its having brought them into force before obtaining the Commission's view, the more so as it may be seen from the information supplied by the Commission itself that the majority of the measures adopted by the Member States at the time in question had been notified only after they entered into force and that the cases of prior approval were exceptional.

- 35 In this respect it must be stated that the consultation carried out by the Government of the United Kingdom was unsatisfactory and cannot be considered as being in accordance with the requirements of the Council decisions. Although it is true that the Commission was informed on 21 March 1979 of the Government's intentions it was only on 19 June that it was able to acquaint itself with the text of the proposed measures. Having regard to the technical complexity of the matter it is clear that this way of handling the matter did not allow the Commission to weigh up all the implications of the provisions proposed and to exercise properly the duty of supervision devolving upon it in pursuance of [the first paragraph of Article 17 TEU].
- 36 It may be noted that the Commission put forward its reservations at the very beginning of the consultation procedure and that it renewed them expressly on 22 and 27 June after taking note of the wording of the measures and making known its intention not to approve them until a more thorough examination had made it possible to find an area of agreement. The Government of the United Kingdom did not take any action in consequence of those observations and the measures were brought into force on 1 July 1979 with the result that the Commission immediately initiated the procedure under [Article 258 TFEU] by a letter of 6 July 1979.
- 37 The United Kingdom Government's argument to the effect that in other cases the Commission gave retroactive approval to measures already brought into force by the Member States cannot affect this view of the position. In fact it is established that in all the cases referred to the measures in question were in the end approved, where necessary after acceptance by the State concerned of the conditions laid down by the Commission. Although the procedure adopted in this matter by certain Member States

may appear unsatisfactory from the point of view of the duty to cooperate laid down in [the second and third paragraphs of Article 4(3) TEU], the cases referred to are not comparable with the disputed measures of the United Kingdom, in respect of which the Commission made known its reservations from the beginning of the consultation procedure and against which it formally maintained its objections.

- 38 It therefore appears that the United Kingdom has failed to fulfil its obligations under the Treaty both by having prevented the Commission, by the consultation procedure adopted, from giving adequate consideration to the proposed measures and by having brought them into force in spite of the Commission's objections.

The measures applicable to the Irish Sea and the waters round the Isle of Man

- 39 The Government of Ireland, which attaches special importance to this aspect of the dispute, has asked the Court to clarify the legal situation as regards the application of the relevant rules of [Union] law in the territorial waters around the Isle of Man.
- 40 As the Court has already declared in its judgment of 10 July 1980, it is not necessary in this connexion to consider the constitutional position of the Isle of Man or the relationship of that territory to the [Union] as it is clear from the very wording of the order in question, namely the Herring (Isle of Man) Licensing Order, SI No 1389, that that measure was adopted under the legislation of the United Kingdom by the British Government so that the United Kingdom must take full responsibility for that measure *vis-a-vis* the [Union].
- 41 It is sufficient to state that the legal bases of the fishery regime disputed by the Commission remained in 1979 the same as those which the Court had to consider in its judgment of 10 July 1980 for the years 1977 and 1978. Even though it appears from the file that the regime seems to have been slightly

liberalized in favour of Irish fishermen, the Court can only maintain the assessment which it made in the judgment referred to, to the effect that the system of fishing licences applied in the Irish Sea and the waters round the Isle of Man did not form the subject-matter of any consultation or consequently of any authorization on the part of the Commission, that the detailed rules for its implementation were reserved wholly to the discretion of the United Kingdom authorities without its being possible for the [Union] authorities, the other Member States and those concerned to be legally certain how the system would actually be applied.

- 42 This system, as such, has infringed one of the fundamental rules in this matter, referred to above, in the sense that it has prevented the fishermen of other Member States and particularly those of Ireland from having access to fishery zones which ought to be open to them on an equal footing with the fishermen of the United Kingdom.
- 43 It is therefore necessary to repeat for the year 1979 the finding already laid down by the judgment of 10 July 1980 of a failure by the United Kingdom to fulfil its obligations. Moreover the fact must be recorded that the system applied in the maritime zone referred to calls in question one of the essential principles in this matter.

Costs

- 44 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs. As the defendant has failed in its submissions it must be ordered to pay the costs, including those of the interveners.

On those grounds,

THE COURT

hereby:

1. Declares that the United Kingdom has failed to fulfil its obligations under the [Treaty on the Functioning of the European Union]:

(a) by having brought into force on 1 July 1979 without appropriate prior consultation and in spite of the Commission's objections, the following statutory instruments:

— **The Fishing Nets (North-East Atlantic) (Variation) Order 1979, SI No 744;**

— **The Immature Sea Fish Order 1979, SI No 741;**

— **The Immature Nephrops Order 1979, SI No 742;**

— **The Nephrops Tails (Restrictions on Landing) Order 1979, SI No 743;**

— **The Sea Fish (Minimum Size) (Amendment) Order (Northern Ireland) 1979, SI No 235;**

(b) by having maintained in force in the Irish Sea and the waters round the Isle of Man in pursuance of the Herring (Irish Sea) Licensing Order 1977, SI No 1388, and the Herring (Isle of Man) Licensing Order 1977, SI No 1389, a system of fishing licences which had not been the subject of appropriate consultation with or an authorization from the Commission, the detailed rules for the implementation of which were reserved wholly to the discretion of the United Kingdom authorities, without its being possible for the [Union] authorities, the other Member States and those concerned

to be legally certain how the system would actually be applied and which, as a result, had the effect of preventing fishermen from other Member States from having access to fishery zones which ought to be open to them on an equal footing with the fishermen of the United Kingdom;

2. Orders the United Kingdom to pay the costs including those of the interveners.

Mertens de Wilmars Bosco	Pescatore Touffait	Mackenzie Stuart Due	Koopmans Everling	O'Keeffe
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Delivered in open court in Luxembourg on 5 May 1981.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President