



## Reports of Cases

JUDGMENT OF THE GENERAL COURT (Third Chamber)

21 November 2012\*

(Fisheries — Measures for the conservation of living aquatic resources — Article 105 of Regulation (EC) No 1224/2009 — Deductions from quotas allocated for a given year on account of overfishing in previous years — Temporal application — Legal certainty — Interpretation guaranteeing compliance with primary law — Principle that penalties must have a proper legal basis — Non-retroactivity)

In Case T-76/11,

**Kingdom of Spain**, represented by N. Díaz Abad, abogado del Estado,

applicant,

v

**European Commission**, represented by F. Jimeno Fernández and D. Nardi, acting as Agents,

defendant,

ACTION for annulment of Commission Regulation (EU) No 1004/2010 of 8 November 2010 of operating deductions from certain fishing quotas for 2010 on account of overfishing in the previous year (OJ 2010 L 291, p. 31),

THE GENERAL COURT (Third Chamber),

composed of O. Czúcz (Rapporteur), President, I. Labucka and D. Gratsias, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 April 2012,

gives the following

### Judgment

- 1 By the present action, the Kingdom of Spain seeks annulment of Commission Regulation (EU) No 1004/2010 of 8 November 2010 of operating deductions from certain fishing quotas for 2010 on account of overfishing in the previous year (OJ 2010 L 291, p. 31) ('the contested regulation').

\* Language of the case: Spanish.

**Legal context**

2 Article 23 of Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261, p. 1) reads as follows:

‘1. When it has been established by the Commission that a Member State has overfished its quota, allocation or share of a stock or a group of stocks available to it, the Commission shall operate deductions from the annual quota, allocation or share of the Member State which has overfished. These deductions shall be decided in accordance with the procedure laid down in Article 36.

2. The Council shall adopt rules by qualified majority, on a proposal from the Commission, for deduction in accordance with the objectives and management strategies set out in Article 8 of Regulation (EEC) No 3760/92 and take into account, as a matter of priority, the following parameters:

- the degree of overfishing,
- any cases of overfishing of the same stock in the previous year,
- the biological status of the resources concerned.’

3 Article 5 of Council Regulation (EC) No 847/96 of 6 May 1996 introducing additional conditions for year-to-year management of TACs and quotas (OJ 1996 L 115, p. 3) provides:

‘1. Except for the stocks referred to in paragraph 2, all landings in excess of the respective permitted landings shall be deducted from the quotas of the same stock in the following year.

2. For the stocks referred to in the third indent of Article 2, overfishing of permitted landings shall lead to deduction from the corresponding quota in the following year according to the following table:

Extent of the overfishing relative to the permitted landings	Deduction
The first 10%	Overfishing x 1.00
The next 10% up to 20% in total	Overfishing x 1.10
The next 20% up to 40% in total	Overfishing x 1.20
Any further overfishing greater than 40%	Overfishing x 1.40

However, a deduction equal to the overfishing × 1.00 shall apply in all cases of overfishing relative to permitted landings equal to, or less than, 100 tonnes.

An additional 3% of the quantity fished in excess of permitted landings shall be deducted for each successive year in which permitted landings are overfished by more than 10%.’

4 Article 23(4) of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358, p. 59), reads as follows:

‘When the Commission has established that a Member State has exceeded the fishing opportunities which have been allocated to it, the Commission shall operate deductions from future fishing opportunities of that Member State.’

5 Article 105 of Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 (OJ 2009 L 343, p. 1), provides as follows:

‘1. When the Commission has established that a Member State has exceeded the quotas which have been allocated to it, the Commission shall operate deductions from future quotas of that Member State.

2. In the case of an overfishing of a quota, allocation or share of a stock or a group of stocks available to a Member State in a given year the Commission shall operate deductions in the following year or years from the annual quota, allocation or share of the Member State which has overfished by applying a multiplying factor according to the following table:

Extent of overfishing relative to the permitted landings	Multiplying factor
Up to 5%	Overfishing x 1.0
Over 5% up to 10%	Overfishing x 1.1
Over 10% up to 20%	Overfishing x 1.2
Over 20% up to 40%	Overfishing x 1.4
Over 40% up to 50%	Overfishing x 1.8
Any further overfishing greater than 50%	Overfishing x 2.0

However, a deduction equal to the overfishing x 1.00 shall apply in all cases of overfishing relative to permitted landing equal to, or less than, 100 tonnes.

3. In addition to the multiplying factors referred to in paragraph 2, a multiplying factor of 1.5 shall apply if:

- (a) a Member State has repeatedly overfished its quota, allocation or share of the stock or group of stocks over the previous two years and these overfishings have been the subject of deductions as referred to in paragraph 2;
- (b) the available scientific, technical and economic advice and in particular the reports drawn up by STECF have established that overfishing constitutes a serious threat to the conservation of the stock concerned; or
- (c) the stock is subject to a multiannual plan.

4. In the case of an overfishing of a quota, allocation or share of a stock or a group of stocks available to a Member State in earlier years, the Commission, after consultation of the Member State concerned, may deduct quotas in accordance with the procedure referred to in Article 119 from future quotas of that Member State to take account of the level of overfishing.

5. If a deduction according to paragraphs 1 and 2 cannot be operated on the quota, allocation or share of a stock or group of stocks that was overfished as such because that quota, allocation or share of a stock or group of stocks is not or not sufficiently available to the Member State concerned, the

Commission, after consultation of the Member State concerned, may deduct in the following year or years quotas for other stocks or groups of stocks available to that Member State in the same geographical area, or with the same commercial value in accordance with paragraph 1.

6. Detailed rules for the application of this Article, and in particular for determining the quantities concerned, may be adopted in accordance with the procedure referred to in Article 119.'

- 6 Pursuant to Article 124 thereof, Regulation No 1224/2009 is applicable as from 1 January 2010.

### **Background to the dispute**

- 7 The contested regulation is part of a series of implementing regulations from the European Commission by which it made deductions to fishing quotas allocated for a given year on account of previous overfishing. Those regulations may be divided into four groups.
- 8 In 2002 and 2003, the Commission adopted Regulation (EC) No 2000/2002 of 8 November 2002 adapting certain fish quotas for 2002 pursuant to Regulation No 847/96 (OJ 2002 L 308, p. 13) and Regulation (EC) No 728/2003 of 25 April 2003 adapting certain fish quotas for 2003 pursuant to Regulation No 847/96 (OJ 2003 L 105, p. 3). In those regulations, which are based on Regulations Nos 2847/93 and 847/96, it made deductions on the quotas allocated for a given year on account of overfishing the previous year.
- 9 In the period 2004 to 2008, the Commission adopted Regulation (EC) No 762/2004 of 23 April 2004 adapting certain fish quotas for 2004 pursuant to Regulation No 847/96 (OJ 2004 L 120, p. 8), Regulation (EC) No 776/2005 of 19 May 2005 adapting certain fish quotas for 2005 pursuant to Regulation No 847/96 (OJ 2005 L 130, p. 7), Regulation (EC) No 742/2006 of 17 May 2006 adapting certain fish quotas for 2006 pursuant to Regulation No 847/96 (OJ 2006 L 130, p. 7), Regulation (EC) No 609/2007 of 1 June 2007 adapting certain fish quotas for 2007 pursuant to Regulation No 847/96 (OJ 2007 L 141, p. 33) and Regulation (EC) No 541/2008 of 16 June 2008 adapting certain fish quotas for 2008 pursuant to Regulation No 847/96 (OJ 2008 L 157, p. 23). In those regulations, which are based on Regulations Nos 2371/2002 and 847/96, the Commission made deductions on the quotas allocated for a given year on account of overfishing the previous year. It is apparent from the annexes to those regulations that, in certain cases, the Commission was not able to make deductions proportionately to the overfishing because those deductions would have exceeded the quotas allocated for the year in question. In those cases, the Commission merely reduced the respective quotas for the year in question to zero, without bringing the remainder over to the following year.
- 10 As the number of cases in which the Commission was unable to make deductions proportionately to the overfishing for the previous year had increased, it changed its approach in Commission Regulation (EC) No 649/2009 of 23 July 2009 adapting certain fish quotas for 2009 in the context of the year-to-year management of fishing quotas (OJ 2009 L 192, p. 14). Like the regulations adopted between 2004 and 2008, that regulation is based on Regulations Nos 2371/2002 and 847/96. In recital 9 in the preamble to Regulation No 649/2009, the Commission stated that it was appropriate that the full amount of the deductions applied on account of overfishing in 2008 be deducted from the quotas and that the deductions which could not be applied in 2009 should be deducted from the quotas allocated for 2010 and, so far as necessary, for subsequent years. It also noted the difference between, on the one hand, the amount of the deductions applied on account of overfishing in 2008 and, on the other, the amount of the quotas allocated for 2009, in a column entitled 'Outstanding balance' in the table reproduced in Annex II to that regulation.
- 11 Lastly, in 2010, the Commission adopted the contested regulation, which was published in the *Official Journal of the European Union* on 9 November 2010. That regulation is based on Article 105(1) of Regulation No 1224/2009.

12 Recitals 5 and 8 in the preamble thereto read as follows:

‘(5) [Regulation No 649/2009] has operated deductions from fishing quotas for 2009 on account of overfishing of quotas in 2008. However, for certain Member States the deductions to be applied were higher than their respective 2009 quota and could therefore not be operated entirely in that year. To ensure that also in such cases the full amount be deducted, the remaining quantities should be taken into account when establishing deductions from 2010 quotas.

...

(8) However, since deductions to be operated apply to overfishing that was completed in 2009 and thus at a time when [Regulation No 1224/2009] was not yet applicable, legal predictability concerns make it opportune to operate deductions that are not more stringent than those which would have resulted from the application of the rules in force at that time, namely the rules set out in Article 5(2) of [Regulation No 847/96] introducing additional conditions for year-to-year management of TACs and quotas.’

13 Article 1(1) of the contested regulation provides:

‘The fishing quotas fixed in Regulations (EC) No 1226/2009, (EC) No 1287/2009, (EC) No 1359/2008 and (EU) No 53/2010 are reduced as shown in the Annex.’

14 The annex to the contested regulation contains a column entitled ‘Remaining deductions from 2009 (R.649/09)’, in which some of the amounts indicated in the column entitled ‘Outstanding balance’ in the Annex to Regulation No 649/2009 are reproduced.

15 Moreover, like Regulation No 649/2009, the annex to the contested regulation also contains a column entitled ‘Outstanding balance’, which indicates the deductions the Commission was unable to make because the deductions amounted to more than the quotas allocated for 2010.

### **Procedure and forms of order sought**

16 By application lodged on 2 February 2010 at the Registry of the General Court, the Kingdom of Spain brought an action for annulment of the contested regulation pursuant to Article 263 TFEU.

17 Upon hearing the report of the Judge-Rapporteur, the General Court (Third Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the General Court, to request the Commission to reply to certain questions. The Commission complied with that request within the period prescribed.

18 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 23 April 2012.

19 The Kingdom of Spain claims that the Court should:

- annul the contested regulation;
- order the Commission to pay the costs.

20 The Commission contends that the Court should:

- dismiss the action as unfounded;

— order the applicant to pay the costs.

## Law

- 21 By the contested regulation, the Commission made deductions from certain fishing quotas for the Member States for 2010. It based that regulation on Article 105 of Regulation No 1224/2009, which is applicable as from 1 January 2010. That provision provides that when the Commission has established that a Member State has exceeded the quotas which have been allocated to it for a given year, the Commission is to operate deductions from future quotas of that Member State. It thus allows the Commission to make deductions from the quotas allocated not only for the year following the overfishing, but also from those allocated for subsequent years. Consequently, in a regulation making deductions from quotas allocated for a given year, the Commission may make deductions not only on account of overfishing which was completed during the preceding year, but also on account of overfishing in earlier years, in so far as the corresponding deductions have not already been made.
- 22 The Kingdom of Spain's action for annulment is based on four pleas in law. By the first plea, it argues that Article 105 of Regulation No 1224/2009, on which the Commission based the contested regulation, was not applicable *ratione temporis*. By the second and third pleas, the Kingdom of Spain criticises the Commission for having infringed the principle that penalties must have a proper legal basis, the principle of legal certainty and the principle that less favourable penalty provisions must not be applied retroactively by making deductions from the 2010 quotas on account of overfishing not only for 2009 but also for 2008, whereas the legislation preceding Article 105 of Regulation No 1224/2009 allowed for deductions to be made only in respect of overfishing for 2009. By the fourth plea, the Kingdom of Spain argues that it cannot be left to the Commission to choose the applicable legislation by reference to the time when it decides to begin examining conduct.

### *The first plea: inapplicability ratione temporis of Article 105 of Regulation No 1224/2009*

- 23 The Kingdom of Spain criticises the Commission for having based the contested regulation on Article 105 of Regulation No 1224/2009. The contested regulation makes deductions from certain quotas on account of overfishing which was completed before 2010. Consequently, it cannot be based on Article 105 of Regulation No 1224/2009, which is applicable as from 1 January 2010.
- 24 In that context, it should be borne in mind, as a preliminary point, that Regulation No 1224/2009 does not contain specific rules on the temporal application of Article 105 thereof.
- 25 It is therefore appropriate to apply the general rules on the temporal application of rules, which draw a distinction between procedural rules, on the one hand, and substantive rules, on the other (Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9; Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux v Commission* [1993] ECR I-3873, paragraph 22; and Case C-293/04 *Beemsterboer Coldstore Services* [2006] ECR I-2263, paragraphs 19 to 21). Article 105 of Regulation No 1224/2009 determines the scheme of quota deductions and is therefore a substantive rule.
- 26 It is settled case-law in respect of substantive rules that, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must in principle be interpreted as applying only to situations existing subsequently to their entry into force. However, in so far as it clearly follows from their terms, objectives or general scheme that they cover situations existing prior to their entry into force, they may also be applied to such situations (see, to that effect, Case C-34/92 *GruSa Fleisch* [1993] ECR I-4147, paragraph 22, and *Beemsterboer Coldstore Services*, paragraph 25 above, paragraph 21).

- 27 It is therefore appropriate to consider whether it follows from the general scheme of Regulation No 1224/2009 and the objectives it pursues that Article 105 thereof must serve as a legal basis for the contested regulation, when the latter regulation makes deductions from certain quotas allocated for 2010 on account of overfishing which was completed before that article became applicable on 1 January 2010.
- 28 In that context it should be borne in mind, first of all, that under the applicable legislation the Commission was not able to make deductions from the quotas allocated for 2010 before 15 January 2010.
- 29 First of all, the quotas allocated for 2010 were allocated by Council Regulation (EU) No 23/2010 of 14 January 2010 fixing for 2010 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in EU waters and, for EU vessels, in waters where catch limitations are required and amending Regulations (EC) No 1359/2008, (EC) No 754/2009, (EC) No 1226/2009 and (EC) No 1287/2009 (OJ 2010 L 21, p. 1).
- 30 Secondly, the Commission did not have all the data concerning fishing completed in 2009 until 15 January 2010. It is apparent from Article 33(2)(a) of Regulation No 1224/2009 that the Member States were not required to notify the fishing data for December 2009 until 15 January 2010.
- 31 Next, it must be observed that, in 2010, the Commission could no longer base the contested regulation on the legal bases provided for by the legislation preceding Article 105 of Regulation No 1224/2009, namely Article 23(4) of Regulation No 2371/2002 and Article 5 of Regulation No 847/96. Under Article 121(2)(b) and Article 121(1) of Regulation No 1224/2009, the abovementioned provisions were no longer in force as from 1 January 2010.
- 32 The only legal basis on which the Commission could base the contested regulation was therefore Article 105 of Regulation No 1224/2009. An interpretation of that article to the effect that it was not applicable to overfishing completed before 1 January 2010 would have the consequence that that overfishing could not give rise to deductions and would therefore be of no import. Such a result would be manifestly contrary to the purposes pursued by Regulation No 1224/2009, including the objective of ensuring full compliance with restrictions on fishing opportunities, as referred to in recital 43 in the preamble thereto.
- 33 The Commission did not therefore err in law in basing the contested regulation on Article 105 of Regulation No 1224/2009.
- 34 This conclusion is not called into question by the argument put forward by the Kingdom of Spain to the effect that the application of Article 105 of Regulation No 1224/2009 to situations existing before it entered into force could lead to results running counter to the principle of legal certainty. As is apparent from the observations set out above, the Commission is obliged to follow the clear statements of the European Union legislature and to apply Article 105 of Regulation No 1224/2009 as from 1 January 2010. If the application of that article to situations existing before it entered into force or became applicable were to prove problematic from the viewpoint of the principle of legal certainty, the Commission would have to interpret it restrictively in order to ensure compliance with that primary law.
- 35 The first plea, alleging inapplicability *ratione temporis* of Article 105 of Regulation No 1224/2009, must therefore be rejected.

*The second plea: infringement of the principle of legal certainty and the principle that penalties must have a proper legal basis*

36 By the second plea, the Kingdom of Spain criticises the Commission for having infringed the principle of legal certainty and the principle that penalties must have a proper legal basis.

The principle of legal certainty

37 The Kingdom of Spain criticises the Commission for having infringed the principle of legal certainty in basing the contested regulation on Article 105 of Regulation No 1224/2009 and in thus applying new, less favourable legislation to a situation which existed under the scheme in place under the previous legislation.

38 It does not, therefore, criticise retroactive application per se, that is, provision in a legal rule for legal effects to be applied to a point in time previous to the entry into force of that rule.

39 Yet, as correctly pointed out by the Kingdom of Spain, the application of new legislation to a factual situation existing before its entry into force under the previous legislation may also give rise to problems from the viewpoint of the principle of legal certainty. In such a scenario, legal consequences for the present or the future are attached to a situation which is in the past and hence can no longer be changed. For that reason, the principle of legal certainty precludes the application of more stringent new legislation to a situation existing under earlier, more favourable legislation, since the party concerned may rely on the legitimate expectation that the earlier legislation applied (see, to that effect, *Beemsterboer Coldstore Services*, paragraph 25 above, paragraph 24).

40 In basing the contested regulation, which entered into force on 1 January 2010 and which makes deductions from certain quotas allocated for 2010 on account of overfishing in previous years, on Article 105 of Regulation No 1224/2009, applicable as from 1 January 2010, the Commission applied new legislation to a factual situation existing under the earlier legislation.

41 It is therefore appropriate to consider whether the Commission made that overfishing subject to a less favourable scheme than that provided for by the legislation in force at the time it was completed.

42 In that context it should be noted, first, that the multiplying factors for the calculation of the deductions provided for by Article 105(2) of Regulation No 1224/2009 are less favourable than those provided for by Article 5 of Regulation No 847/96. Yet, as is apparent from recital 8 in the preamble to the contested regulation, the Commission did not apply those less favourable multiplying factors. It therefore interpreted Article 105 of Regulation No 1224/2009 in a manner aimed at ensuring observance of the principle of legal certainty (see paragraph 34 above).

43 Secondly, it is appropriate to consider the Kingdom of Spain's complaint that, in the contested regulation, the Commission made deductions from the quotas in question not only on account of overfishing completed during the previous year, but also on account of overfishing completed during an earlier year, which would not have been possible under the legislation in place prior to Article 105 of Regulation No 1224/2009, which allowed for deductions to be made only on account of overfishing completed during the previous year.

44 It should be borne in mind in that regard that the last provision to enter into force before Article 105 of Regulation No 1224/2009 was Article 23(4) of Regulation No 2371/2002.

45 According to the wording of the latter provision, 'the Commission shall operate deductions from future fishing opportunities'. That provision thus allows the Commission, when it has established overfishing for a given year, to make deductions not only from the quotas allocated for the following year, but also



from quotas for subsequent years, in so far as all of the deductions made on account of overfishing for a given year could not be taken into account in the deductions from the quotas allocated for the following year.

- 46 That interpretation of Article 23(4) of Regulation No 2371/2002 is confirmed by teleological considerations. As is apparent from recitals 3 and 4 in the preamble to that regulation, its purpose is *inter alia* the conservation and management of living aquatic resources as well as the sustainable exploitation of those resources. Only an approach which allows all deductions on account of overfishing in previous years is consistent with those objectives.
- 47 Moreover, only such an interpretation of Article 23(4) of Regulation No 2371/2002 allows the principle of non-discrimination to be observed. If deductions could be made only from the quotas allocated for the year following the overfishing, Member States which comply with their quotas risk being discriminated against as compared to Member States which engage in significant overfishing. In a situation where overfishing of quotas allocated for a given year is the basis for deductions which exceed the quotas allocated for the following year, the greater the overfishing, the greater the advantage generated by the overfishing. It is not acceptable for a Member State to derive an advantage from conduct which not only is contrary to the objectives of conservation and management of living aquatic resources as well as sustainable exploitation of those resources, but is also unfair conduct towards those Member States which comply with their quotas.
- 48 In that context, the Kingdom of Spain replies that the provision governing deductions until Regulation No 1224/2009 became applicable on 1 January 2010 was not Article 23(4) of Regulation No 2371/2002, but rather Article 5 of Regulation No 847/96, which allows deductions to be made only from quotas ‘in the following year’. Under that provision, the Commission was not able to make deductions from the quotas allocated for a year subsequent to the one immediately following the overfishing in question.
- 49 Yet even if Article 5 of Regulation No 847/96 were to be interpreted in that manner, which would not be in keeping with the principle of equal treatment (see paragraph 47 above), thereby giving rise to a conflict between that article and Article 23(4) of Regulation No 2371/2002, the approach adopted in Article 23(4) of Regulation No 2371/2002, and not that in Article 5 of Regulation No 847/96, would prevail.
- 50 It is useful to bear in mind the chronological order in which those provisions were adopted. First of all, the Council adopted Regulation No 2847/93, Article 23(1) of which provides that, where a Member State has overfished its quota, the Commission is to operate deductions from the quotas of that Member State. Next, it established the scheme of deductions from quotas in Article 5 of Regulation No 847/96. Lastly, it adopted Regulation No 2371/2002. Article 23(4) of Regulation No 2371/2002 is therefore a provision which is subsequent to Article 5 of Regulation No 847/96.
- 51 In the absence of a specific rule governing the relationship between Article 23(4) of Regulation No 2371/2002, on the one hand, and Article 5 of Regulation No 847/96, on the other, it is appropriate to apply the general rule that the later legislation prevails over the earlier legislation. Consequently, in so far as there is a conflict between Article 23(4) of Regulation No 2371/2002 and Article 5 of Regulation No 847/96, Article 23(4) of Regulation No 2371/2002 must prevail. This approach is, moreover, consistent with recital 19 in the preamble to Regulation No 2371/2002, which states that that regulation is intended to retain and reinforce the main provisions on control, inspection and enforcement of the Common Fisheries Policy provided for by Regulation No 2847/93.
- 52 Contrary to the argument put forward by the Kingdom of Spain, this conclusion is not called into question by recital 19 in the preamble to Regulation No 2371/2002, which states that Regulation No 2847/93 is to remain in force until all of the necessary implementing rules have been adopted. The Kingdom of Spain infers therefrom that, in the absence of implementing rules, Article 23(4) of Regulation No 2371/2002 was not applicable.

- 53 Even if that recital does not cover only the provisions of Regulation No 2847/93, but also those of Regulation No 847/96, it cannot be inferred therefrom that Article 23(4) of Regulation No 2371/2002 was not applicable as from the time of its entry into force. That recital concerns only situations where it is appropriate to continue applying the provisions of the earlier legislation until the adoption of the necessary implementing rules, when the provisions of Regulation No 2371/2002 are not sufficiently specific. That recital is thus intended at avoiding a legal vacuum.
- 54 The risk of such a legal vacuum occurring is not present in respect of Article 23(4) of Regulation No 2371/2002.
- 55 Since that provision indicates that overfishing during a given year may serve as a basis for deductions from quotas not only for the following year, but also for subsequent years, it was sufficiently specific. It was accordingly not necessary to adopt accompanying implementing rules.
- 56 Admittedly, Article 23(4) of Regulation No 2371/2002 does not set out multiplying factors for the calculation of deductions. It was not necessary, however, to adopt implementing rules for that purpose, either. Since Article 23(4) of Regulation No 2371/2002 does not provide for new rules for the calculation of deductions, that provision has no bearing on the specific rules on multiplying factors laid down in Article 5 of Regulation No 847/96. Article 23(4) did not, therefore, derogate from Article 5 of Regulation No 847/96. Thus, Article 23(4) of Regulation No 2371/2002, read in conjunction with the specific rules on multiplying factors laid down in Article 5 of Regulation No 847/96, was sufficiently specific to be applied without prior adoption of implementing rules.
- 57 This approach to the interpretation of the relationship between those two provisions is, moreover, corroborated by Article 121 of Regulation No 1224/2009, which indicates that Article 5 of Regulation No 847/96 was repealed only as from the time Article 105 of Regulation No 1224/2009, which provides for a new scheme of multiplying factors, became applicable.
- 58 Accordingly, the plea relating to recital 19 in the preamble to Regulation No 2371/2002 must be rejected. It is, moreover, apparent from the observations set out above that, as regards the temporal limitations on deductions, contrary to the Kingdom of Spain's submissions, Article 5 of Regulation No 847/96 cannot be considered *lex specialis* in relation to Article 23(4) of Regulation No 2371/2002.
- 59 Lastly, it is appropriate to consider the argument put forward by the Kingdom of Spain to the effect that it may be inferred from the very existence of Council Regulation (EC) No 338/2008 of 14 April 2008 providing for the adaptation of cod fishing quotas to be allocated to Poland in the Baltic Sea (subdivisions 25 to 32, EC waters) from 2008 to 2011 (OJ 2008 L 107, p. 1), and of Commission Regulation (EC) No 635/2008 of 3 July 2008 adapting the cod fishing quotas to be allocated to Poland in the Baltic Sea (subdivisions 25 to 32, EC waters) from 2008 to 2011 pursuant to Council Regulation No 338/2008 (OJ 2008 L 176, p. 8), that, under the legislation applicable before the entry into force of Regulation No 1224/2009, the Commission could not make deductions from quotas allocated for a year subsequent to the one in which the overfishing was completed.
- 60 As is apparent from recital 3 in the preamble to Regulation No 338/2008, it concerns a situation in which the Commission found, in July 2007, that catches of cod by vessels flying the flag of Poland were already three times greater than the quantities initially declared and that it was a case of considerably overshooting the quota allocated to that Member State. Moreover, it is apparent from recitals 9 and 10 in the preamble to that regulation that, faced with that situation, the Council decided to derogate from the rule laid down in Article 5 of Regulation No 847/96 and to allow a deduction from the quotas for a period of four years.
- 61 Contrary to the Kingdom of Spain's submission, it cannot be inferred from those recitals that the legislation preceding the entry into force of Article 105 of Regulation No 1224/2009 did not allow deductions to be made from quotas for a year subsequent to the year in which overfishing was

completed. It should be noted *inter alia* that recital 10 in the preamble to Regulation No 338/2008, which states that the derogation was necessary in order to reduce the socio-economic consequences of the deductions ‘in particular in the first year’, precludes such a reading. As is readily apparent from that recital, the European Union legislature took the view that, under the legislation preceding the entry into force of Article 105 of Regulation No 1224/2009, overfishing during a given year could give rise to deductions from quotas allocated not only for the following year, but also for subsequent years. The derogation introduced by Regulation No 338/2008 does not, therefore, concern that aspect.

- 62 Consequently, the derogation referred to in the abovementioned recitals 9 and 10 concerns another aspect. As evidenced by recital 10 in the preamble to Regulation No 338/2008, the Council wished to avoid the deductions having socio-economic consequences which were, in its view, excessive. The derogation therefore concerns the maximum quantity of deductions which could be made per year. The regulation thus provided for the deductions to be spread out over a number of years.
- 63 The plea relating to the existence of Regulation No 338/2008 must accordingly be rejected.
- 64 By way of conclusion, the Court finds that, under the legislation preceding Article 105 of Regulation No 1224/2009, the Commission could already make deductions from quotas allocated for a given year on account of overfishing not only in relation to the quotas for the previous year, but also those relating to years preceding that year.
- 65 Consequently, the plea alleging infringement of the principle of legal certainty must be rejected, without its being necessary to consider whether, in the contested regulation, the Commission made deductions not only on account of overfishing of quotas allocated for the previous year, but also on account of overfishing of quotas allocated for a year preceding that year.

The principle that penalties must have a proper legal basis

- 66 The principle that penalties must have a proper legal basis requires that any penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis (Case 117/83 *Könecke* [1984] ECR 3291, paragraph 11, and Case C-210/00 *Käserei Champignon Hofmeister* [2002] ECR I-6453, paragraph 52).
- 67 In that context, the Court finds, first of all, that Article 105 of Regulation No 1224/2009 constitutes a clear and unambiguous legal basis which allows the Commission to make deductions from quotas allocated for a given year due to overfishing which was completed not only during the preceding year, but also in years before that.
- 68 However, as the principle of legal certainty in principle precludes the Commission from applying new, less favourable legislation to a situation existing under the earlier, more favourable legislation, it is also necessary to consider the question whether the principle that penalties must have a proper legal basis allows the Commission to make such deductions on the basis of the legislation preceding Article 105 of Regulation No 1224/2009.
- 69 In that context, it should be ascertained, first of all, whether the principle that penalties must have a proper legal basis applies to deductions such as those that were provided for by Article 23(4) of Regulation No 2371/2002 and Article 5 of Regulation No 847/96. It is accordingly appropriate to consider whether those deductions are penalties for the purposes of that principle.
- 70 It should be remembered, as a preliminary point, that the system of fishing quotas pursues the objective of ensuring the conservation and sustainable exploitation of living aquatic resources. Deductions from quotas are aimed at ensuring compliance with quotas and therefore have the same purpose. As correctly pointed out by the Kingdom of Spain, however, the mere fact that the

deductions have that objective does not rule out the possibility that they are penalties for the purposes of the principle that penalties must have a proper legal basis, since penalties may also pursue the same objectives.

- 71 It should also be borne in mind, however, that a measure which merely provides for compensation for damage caused and therefore merely restoring the statu quo ante is not a penalty for the purposes of the principle that penalties must have a proper legal basis (see, by analogy, Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569, paragraph 56, and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 93). Consequently, it must be considered whether the deductions provided for by Article 23(4) of Regulation No 2371/2002 and Article 5 of Regulation No 847/96 merely compensate for the damage caused by overfishing or whether they contain elements which go further.
- 72 Article 23(4) of Regulation No 2371/2002 and Article 5(1) of Regulation No 847/96 provide merely for deductions consisting simply in compensation for overfishing; they make no provision for penalties, that is to say, any measures beyond that compensation.
- 73 In that context, the Kingdom of Spain argues that the deductions are not measures having a direct link with the conservation and sustainable exploitation of living aquatic resources, since the Commission makes deductions even where the total allowable catches for that stock have not been exceeded at European Union level. They are therefore a measure penalising the conduct of a Member State and accordingly a penalty.
- 74 That argument cannot be upheld. First of all, it must be borne in mind that the scheme of fishing quotas provides for a decentralised control system in which the Member States are obliged to ensure that the quotas allocated to them are not exceeded. Such an approach, under which deductions are made from Member States' quotas only if two requirements are met – firstly, a Member State must have overfished its quotas and, secondly, the total allowable catches at European Union level must also have been overfished – risks undermining the very efficaciousness of the quotas scheme. Such an approach would allow Member States to justify overfishing their quotas after the fact on the basis that the total allowable catches at European Union level were not exceeded. Such an approach could encourage Member States not to be stringent in their monitoring of the quotas allocated to them, since any overfishing could potentially be of no import. That would increase the risk of subsequent overfishing of the total allowable catches at European Union level as well. It should also be borne in mind that overfishing confers an undue advantage on a Member State and that deductions therefore also have a compensatory effect in relation to those Member States which have complied with their quotas. Moreover, Member States may overfish if they negotiate a quota exchange with other Member States before the quota for the relevant stock is exhausted (see, to that effect, Case C-62/89 *Commission v France* [1990] ECR I-925, paragraph 20). The Kingdom of Spain could therefore have negotiated such an exchange, which would have allowed it to overfish its initial quota without increasing the risk of the total allowable catches at European Union level being exceeded and without obtaining an undue advantage in relation to those Member States which have complied with their quotas.
- 75 The failure to take account of the total allowable catches at European Union level is therefore a factor which forms part of the nature and scheme of a system which both allocates individual quotas for each Member State and provides for a system of decentralised control. Contrary to the argument put forward by the Kingdom of Spain, it cannot be inferred therefrom that the deductions have no direct link with the conservation and sustainable exploitation of living aquatic resources. It follows that, despite the fact that the Commission makes deductions from quotas without considering whether the total allowable catches at European Union level have been exceeded, those deductions are a compensatory measure and not a penalty.

- 76 Although Article 23(4) of Regulation No 2371/2002 and Article 5(2) of Regulation No 847/96 provide for multiplying factors for the calculation of deductions, those multiplying factors cannot be considered penalties going beyond the objective of compensation. As rightly pointed out by the Commission, those multiplying factors are intended to ensure full restitution for the damage caused by overfishing. Overfishing has a negative impact on the relevant stock's ability to reproduce, which is likely to slow down its regeneration and lead to its decline.
- 77 Contrary to the argument put forward by the Kingdom of Spain, this reasoning is not called into question by the fact that multiplying factors are applied to overfishing in respect of stocks which are not covered by measures aimed at replenishing the stock. It must be remembered that plans for stock reconstitution concern stocks which are under safe biological limits and are aimed at enabling them once again to attain those limits. By contrast, deductions from quotas pursue the objective of conservation and sustainable exploitation of living aquatic resources. They therefore aim to ensure that stocks remain within safe biological limits. It follows that overfishing may itself justify deductions aimed at ensuring full restitution for the damage caused by overfishing.
- 78 Consequently, the deductions provided for by Article 23(4) of Regulation No 2371/2002 and Article 5 of Regulation No 847/96 are not penalties and accordingly do not come within the scope of the principle that penalties must have a proper legal basis.
- 79 Contrary to the argument put forward by the Kingdom of Spain, this conclusion is not called into question by the eighth recital in the preamble to Regulation No 847/96. Although that recital refers to the purpose of the deductions as being to 'penalise' overfishing, it cannot be inferred therefrom that the European Union legislature intended to introduce penalties per se. Such an interpretation of that recital is contradicted in particular by recital 43 in the preamble to Regulation No 1224/2009. Although that later regulation provides for a more stringent scheme of multiplying factors than that provided for in Article 5 of Regulation No 847/96, it is apparent from recital 43 in the preamble thereto that the objective behind the deductions is to repair the damage caused to the relevant living aquatic resources and to other Member States and to restore the situation which existed previously. In any event, the nature of the deductions from quotas cannot be determined by reference to the eighth recital in the preamble to Regulation No 847/96, but rather should be viewed in the light of the objective criteria discussed in paragraphs 71 to 78 above.
- 80 Next, even if the principle that penalties must have a proper legal basis did apply to the deductions provided for by Article 23(4) of Regulation No 2371/2002 and Article 5 of Regulation No 847/96, it is clear that that principle does not prevent the Commission from basing itself on those provisions to impose deductions from quotas allocated for a given year on account of overfishing which was completed not only during the previous year but also in years previous to that year.
- 81 Not only do Article 23(4) of Regulation No 2371/2002 and Article 5 of Regulation No 847/96 constitute a legal basis for such deductions, they are also sufficiently clear and precise. As discussed in paragraphs 43 to 64 above, a combined reading of those provisions shows that, at the latest when Article 23(4) of Regulation No 2371/2002 entered into force, once the Commission had established overfishing for a given year, it could make deductions not only from quotas allocated for the following year, but also from quotas allocated for subsequent years. Given the wording of Article 23(4) of Regulation No 2371/2002 and the fact that this interpretation is the only one that could be regarded as being in keeping with the principle of non-discrimination and the objectives pursued by that regulation, the Kingdom of Spain could not have any reasonable doubt on this point.
- 82 This finding is not called into question by the fact that, from 2004 to 2008, the Commission merely imposed deductions from quotas allocated for the year following the overfishing (see paragraph 9 above). The clear and unambiguous nature of a legal basis must be assessed in the light of objective criteria and not according to an interpretation made by the Commission.

83 Consequently, the plea alleging infringement of the principle that penalties must have a proper legal basis must also be rejected as unfounded.

84 The second plea must accordingly be rejected in its entirety.

*The third plea: infringement of the principle that less favourable penalty provisions must not be applied retroactively*

85 By its third plea, the Kingdom of Spain criticises the Commission for having infringed the principle that less favourable penalty provisions must not be applied retroactively, by applying the more stringent scheme under Article 105 of Regulation No 1224/2009 to a situation existing under the earlier legislation.

86 This plea must also be rejected. First of all, it is apparent from paragraphs 70 to 79 above that deductions from quotas are not penalties. Secondly, it should be borne in mind that, as discussed in paragraphs 37 to 65 above, the Commission did not apply a more stringent scheme than the one provided for by the legislation preceding Article 105 of Regulation No 1224/2009.

*The fourth plea: it must not be left to the Commission to choose the applicable legal basis*

87 By the fourth plea, the Kingdom of Spain submits, in essence, that it must not be left to the Commission to choose the provision on which it bases a legal instrument such as the contested regulation. In order to preclude such a choice, Article 105 of Regulation No 1224/2009 should not be applied to overfishing which was completed before 1 January 2010.

88 This plea is unfounded.

89 As discussed in paragraphs 27 to 33 above, the Commission had no choice as to the legal basis enabling adoption of the contested regulation. Article 105 of Regulation No 1224/2009 was the only provision on which it could base a regulation providing for deductions from the 2010 quotas.

90 In that context, it should also be remembered that, contrary to the Commission's submissions, it does not have a choice as to the timeliness of applying or not applying Article 105 of Regulation No 1224/2009. It is, in principle, obliged to apply the rules laid down in that article. It is only where primary law, such as the principle of legal certainty, so requires that it must interpret that provision narrowly, in order to ensure compliance with that law.

91 The fourth plea in law must be rejected, as must accordingly the action in its entirety.

### **Costs**

92 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

93 Since the Kingdom of Spain has been unsuccessful and the Commission has applied for costs, the Kingdom of Spain must be ordered to pay the costs.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the Kingdom of Spain to pay the costs.**

Czúcz

Labucka

Gratsias

Delivered in open court in Luxembourg on 21 November 2012.

[Signatures]