



Reports of Cases

OPINION OF ADVOCATE GENERAL

ĆAPETA

delivered on 15 June 2023¹

Case C-330/22

Friends of the Irish Environment CLG

v

Minister for Agriculture, Food and the Marine,

Ireland,

Attorney General

(Request for a preliminary ruling from the High Court (Ireland))

(Reference for a preliminary ruling – Validity – Common fisheries policy – Article 43(2) TFEU – Regulation (EU) No 1380/2013 – Regulation (EU) 2019/472 – Setting of fishing opportunities – Total allowable catch limits above maximum sustainable yield – Discretion of the Council under Article 43(3) TFEU – Regulation (EU) 2020/123)

I. Introduction

1. A name which echoes through many ancient Irish myths and legends is that of the spirit of the oceans, Manannán mac Lir. A mighty warlord, for whom the waves were his chariot, he was also considered a prosperous farmer on the ‘plains of the sea’. Shoals of fish instead of cattle and sheep were his herds. Such was the abundance of his crop in the waters surrounding Ireland that when consecutive royal commissions examined the fishing industry in 1863 and 1885, the leading ichthyologists of the day concluded that the fisheries were ‘inexhaustible’.²

2. Alas, they were wrong. Fish stocks are not a perpetual self-renewing resource, independent of human influence. As we have learned in this century, fish stocks require careful management in order to secure their survival. At its heart, that is the point that the applicant’s case seeks to make. Indeed, that party’s argument is that Regulation (EU) 2020/123³ setting fishing opportunities for the year 2020 fixes fishing limits for certain stocks in the waters around

¹ Original language: English.

² See Roney, J.B., ‘[Mis-]managing Fisheries on the West Coast of Ireland in the Nineteenth Century’, *Humanities*, Vol. 8(1), No 4, 2019, p. 10, quoting the first systematic marine zoologist in Britain, who served on the Royal Commission of 1885, with the following words: ‘with some exceptions, the fauna of the open sea, from its nature and environment, would appear, to a large extent, to be independent of man’s influence. ... Nature almost invariably carries out her own laws, and, as a rule, in the sea these are beyond man’s influence’. See also Roberts, C., *The Unnatural History of the Sea*, Island Press, 2007, pp. 142, 143 and 157 (finding that the Royal Commissions of both 1863 and 1885 essentially endorsed the conclusion of unlimited fishing).

³ Council Regulation of 27 January 2020 fixing for 2020 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters (OJ 2020 L 25, p. 1) (‘the 2020 Regulation’).

Ireland⁴ above levels that are sustainable in the long term.⁵ In making that argument, the applicant principally relies on the basic legislation establishing the common fisheries policy ('the CFP').⁶ In that act, the EU legislature designated the year 2020 as the last point in time by which fishing in Union waters for *all* stocks should be carried out at sustainable levels.

3. Legally, however, the present case does not raise the question as to whether or not the levels set by the Council are sustainable. That is not a decision for the Court to make. Rather, the applicant's legal case concerns the existence and the limits of the Council's discretion when setting fishing opportunities in Union waters under Article 43(3) TFEU. In answering that question of competence, the Court will equally have to untangle the related issue regarding the extent to which the basic objectives of the CFP may be affected by area-specific and subject-specific legislation in that field.

II. Background of the case and the questions referred

4. Every year, the Council allocates fishing opportunities among the Member States, based on a predictable share of the stocks for each species of fish in Union waters. Those individual shares are what are known as the total allowable catch ('TAC'). In determining and distributing yearly TACs, the Council is obliged to act within the objective of the CFP, as set out in the CFP Basic Regulation.

5. Article 2 of the CFP Basic Regulation lists a number of objectives pursuant to which the CFP should operate. Its first paragraph notes, *inter alia*, that the CFP 'shall ensure that fishing and aquaculture activities are environmentally sustainable in the long-term'. The second paragraph then explains, in the first subparagraph thereof, that in managing the CFP, the European Union 'shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield'. It continues by stating in the second subparagraph that 'the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis *at the latest by 2020 for all stocks*'⁷ ('the 2020 MSY target').

6. The concept of the maximum sustainable yield ('MSY') is a harvest strategy globally used in fisheries. It assumes that there is a certain level of catch that can be taken from a fish stock without affecting its equilibrium population size. In essence, the idea is to harvest only the surplus of fish that naturally occurs as the stock reaches its equilibrium point and its reproduction rates slow down. Hence, by 'shaving off' that surplus, the reproduction rates remain maximised and the fish stock annually repletes itself without affecting its long-term survival. The MSY is thus a theoretical assumption that seeks to strike a balance between the objective of conserving commercially harvested fish stocks for generations to come, on the one hand, and the economic and social interest of harvesting those stocks, on the other.

⁴ To be specific, those species and fishing grounds are 'Cod (*Gadus morhua*) in Division 6.a (West of Scotland)' (published on 28 June 2019); 'Cod (*Gadus morhua*) in Divisions 7.e-k (western English channel and southern Celtic Seas)' (published on 16 August 2019); 'Whiting (*Merlangius merlangus*) in Division 7.a (Irish Sea)' (published on 28 June 2019); and 'Plaice (*Pleuronectes platessa*) in Divisions 7.h-k (Celtic Sea South, southwest of Ireland)' (published on 13 November 2019) (for simplicity, those stocks are referred to as 'the four stocks at issue' and those divisions as 'the waters around Ireland').

⁵ The relevant fishing opportunities at issue in this case are identified in Annex IA to the 2020 Regulation.

⁶ That is, Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ 2013 L 354, p. 22) ('the CFP Basic Regulation').

⁷ Emphasis added.

7. Under the CFP Basic Regulation, what constitutes the MSY for a given stock and how to achieve it is calculated on the basis of ‘the best available scientific advice’,⁸ and, in the absence of adequate scientific data, on the basis of the precautionary approach.⁹ As all parties to the present case agree, the advice specifically prepared for the European Commission by the International Council for the Exploration of the Sea (‘ICES’) for the four stocks at issue took account of both of those approaches. There is, accordingly, no dispute over the fact that both ‘the best available scientific advice’ and the precautionary approach, on the basis of which ICES prepared its advice, showed that the TAC for the four stocks at issue in the waters around Ireland must be set *at a level of zero* for the year 2020 in order to achieve the MSY of those stocks in the future.¹⁰

8. There is also no dispute over the fact that the presence of ‘zero-catch’ stocks, coupled with the ‘landing obligation’, in ‘mixed fisheries’¹¹ leads to the allied problem of ‘choke species’ and the obligation to force fishing vessels to cease operations well before they have caught their main quota allocations. That phenomenon deserves clarification. Mixed fisheries are waters in which more than one species of fish is present and where different species are likely to be caught together in the same fishing operation. The landing obligation requires all fishing vessels to retain all fish caught on board, record that fish and count it against the quotas which apply to those stocks.¹² In practice, the combination of those elements means that a zero TAC stock can ‘choke’ fishing for other stocks in mixed fisheries as soon as they are caught, often as by-catch when another stock is actually targeted. A by-catch of an unexhausted (or zero) quota stock can thus have the effect of ‘choking’ the fishery by requiring it to cease operations well before it has caught its main quota allocations.

9. In view of that problematic and following the receipt of zero-catch advice for the four stocks at issue, the Commission requested another ICES advice specifically related to the amount of by-catch of the four stocks at issue that is caught when fishing for ‘target’ stock in mixed fisheries. As its name suggests, target stock is the kind of stock that a fishing vessel intends to catch during a particular fishing operation when it goes out to sea. The fish that ends up in its nets by accident or chance is the by-catch.

10. In line with the Commission’s request,¹³ ICES gave estimates according to how much by-catch of the four stocks at issue would likely be caught if fishing at TAC levels were to occur for certain target stock during the year 2020 in mixed fisheries around Ireland. It is important to state that the

⁸ As arises, for instance, from Article 3(c) of the CFP Basic Regulation.

⁹ In accordance with Article 4(1)(8) of the CFP Basic Regulation, the precautionary approach to fisheries management means ‘an approach according to which the absence of adequate scientific information should not justify postponing or failing to take management measures to conserve target species, associated and dependent species and non-target species and their environment’.

¹⁰ That ICES advice explains that the zero TAC advice for the two stocks of cod and for the stock of whiting were based on the MSY approach, whereas the zero TAC advice for the stock of plaice was based on the precautionary approach. However, it should be pointed out, as the ICES advice contained in the court file attests and as the Council and the Commission confirmed at the hearing, that, even if TAC levels at MSY were used for the four stocks at issue, those stocks would still remain below the limit reference point for spawning stock biomass. In other words, below the point beyond which reproduction rates of those stocks are deemed to be impaired. It is, therefore, possible to conclude that it would take more than one year to increase the TAC for the four stocks at issue to a level above zero.

¹¹ Article 15 of the CFP Basic Regulation.

¹² Under the previous CFP framework, established by 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), vessels did not have to stop fishing once their quota for one of those stocks was exhausted. Instead, they were able to continue fishing for other target stocks. As a result, they continued to catch the stocks for which quotas were already exhausted, even though they could not legally land those catches. Catches in excess of the quota were discarded. With the introduction of the landing obligation, that practice of discarding unwanted catches is no longer available.

¹³ In the abstract, the question posed by the Commission to ICES centred around the following: if fishing occurs for Target Stock X (for example, haddock) in Mixed Fisheries Waters Y, how much by-catch of another type of stock (for example, cod) would likely end up in the nets of EU fishermen if the quantity reaching the maximum TAC of target fish is caught?

opinion received from ICES was not claiming that such levels of by-catch are consistent with achieving the MSY for the four stocks at issue if those stocks were only caught as by-catch. The relevant ICES estimates only constituted that body's mathematical estimate of the quantity of each of those four stocks that would inevitably be caught if another stock were targeted.

11. In its 2020 Regulation, the Council, acting on those estimates, fixed the fishing opportunities for the year 2020 for the four stocks at issue at levels above zero, at the levels which ICES had estimated as unavoidable by-catch in mixed fisheries, or at below those levels.

12. Basing its data on the annual TAC fixed by the Council for the year 2020 and the relevant quantities allocated to Ireland, the Minister for Agriculture, Food and the Marine ('the Minister') issued monthly fisheries management notices pursuant to Section 12(1) of the Sea-Fisheries and Maritime Jurisdiction Act 2006. Those notices stipulate the quantity of the four fish stocks at issue that may be landed by Irish vessels in each month of 2020.

13. Friends of the Irish Environment CLG ('the applicant') has brought proceedings in Ireland against those notices issued by the Minister. Its case is essentially that, by fixing TAC for the four stocks at issue above zero for the year 2020, the Council infringed the CFP Basic Regulation, in particular the 2020 MSY target contained in Article 2(2) thereof. The Minister's notices would thus be invalid.

14. The Minister defends its course of action (and thereby the Council's TAC levels) inter alia on the basis that the CFP Basic Regulation must be read alongside Regulation (EU) 2019/472.¹⁴ The latter regulation is an instrument of equal hierarchical rank that specifically recognises the difficulty of fishing in mixed fisheries and the related problem of avoiding a 'choke species'. It is claimed that the Western Waters Regulation had the effect of permitting the designation of TAC above zero for those stocks for which zero-catch advice was issued, where that would, to some extent, 'avoid the choke'.

15. Against that factual and legal background, the High Court (Ireland) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- '(1) In circumstances where the 2020 Regulation has been superseded and/or the national implementing measures have expired, is the within reference necessary to be referred?
- (2) Is Annex IA [to the 2020 Regulation] invalid, having regard to the aims and objectives of [the CFP Basic Regulation], and specifically Article 2(1) and ... (2) [thereof] including the objective of the second sentence of Article 2(2) and the principles of good governance set out in [Article] 3(c) and (d) of the CFP [Basic] Regulation (including the extent to which it applies to stocks for which a precautionary approach is required), when read in conjunction with Articles 9, 10, 15 and 16 of the CFP [Basic] Regulation and the recitals [thereof,] and Articles 1, 2, 3, 4, 5, 8 and 10 of Regulation [(EU)] 2019/472 of the European Parliament and of the Council [of 19 March 2019] establishing a multiannual plan for stocks fished in the Western Waters [and adjacent waters, and for fisheries exploiting those stocks, amending Regulations (EU) 2016/1139 and (EU) 2018/973, and repealing Council Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007 and (EC)

¹⁴ Regulation of the European Parliament and of the Council of 19 March 2019 establishing a multiannual plan for stocks fished in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulations (EU) 2016/1139 and (EU) 2018/973, and repealing Council Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007 and (EC) No 1300/2008 (OJ 2019 L 83, p. 1) ('the Western Waters Regulation').

No 1300/2008 (OJ 2019 L 83, p. 1)] (“the Western Waters Regulation”), in so far as the [TACs] set by the 2020 Regulation do not follow zero-catch advice for [MSY] issued by [ICES] for certain species?’

16. Written observations have been submitted by the applicant, Ireland, the Council as well as the Commission. With the addition of the Parliament, those parties presented oral argument at the hearing that took place on 16 March 2023.

III. Analysis

A. Introduction

17. The referring court wishes to know, in essence, whether the 2020 Regulation is valid in so far as it fixes fishing opportunities above zero for the four stocks at issue in the waters around Ireland.¹⁵ The answer to that question would enable that court to decide on the validity of the national measures by which those quotas were allocated in Ireland. However, the 2020 Regulation can be considered valid only if it was adopted within the limits of the discretion – if any – left to the Council by the EU legislature. Thus, the Court’s analysis must start with the question whether or not the CFP Basic Regulation leaves the Council the discretion to set annual fishing opportunities for the four stocks at issue at levels above zero. If, as I will suggest, the answer to that question must be answered in the negative, the Court, by way of a second step, would need to assess whether other elements of ‘CFP primary law’, such as the Western Waters Regulation, affect that conclusion.

18. Accordingly, I will first deal with the Treaty framework within which this dispute takes place (B). Therein, I seek to explain why the validity of the 2020 Regulation, and the review method to be applied by the Court to assess it, depends on the interpretation of the two regulations at issue in the present case: the CFP Basic Regulation and the Western Waters Regulation. I will then turn to the interpretation of those regulations (C). I will first explain why I think that the CFP Basic Regulation did not leave the Council any discretion to depart from the catch advice received in the present case when determining TACs for by-catch in mixed fisheries (C1). I will then assess whether that regulatory choice was at all affected by the Western Waters Regulation (C2). Only then will I turn to assessing the validity of the 2020 Regulation in the light of my conclusions (D1). I will also, however, offer the Court an alternative route, should it not agree with my conclusion that the Western Waters Regulation did not derogate from the clear mandate set by the CFP Basic Regulation (D2). Given that, in both cases, I conclude that the 2020 Regulation is invalid, I will briefly outline the need nevertheless to maintain the effects of that regulation (E).

B. The Treaty framework and the applicable standard of review

19. Article 43 TFEU sets the legal basis for the adoption of measures establishing and managing the CFP. Article 43(2) provides for the ordinary legislative procedure for the adoption of legislative acts in the field of fisheries; it must be used for all policy decisions reserved for the EU legislature.¹⁶ Article 43(3), in turn, provides for a special legislative procedure, allowing the

¹⁵ That was the core of the referring court’s second question, which both the Commission and the Council proposed to reformulate. The Court did not ask for my opinion on the first question.

¹⁶ See, inter alia, judgment of 26 November 2014, *Parliament and Commission v Council* (C-103/12 and C-165/12, EU:C:2014:2400, paragraph 48).

Council to adopt acts on the proposal from the Commission. That provision may be used for the adoption of the specific measures listed therein, including the fixing of ‘fishing opportunities’, that is to say, the setting of the TAC for a particular stock.

20. The relationship between those provisions is somewhat peculiar.¹⁷ In the field of fisheries, the Council’s power is based directly on the Treaty. As such, it can adopt measures based on Article 43(3) TFEU even if no legislative act adopted under Article 43(2) TFEU empowers it to do so.¹⁸ However, Article 43(3) TFEU does not allow the Council to determine basic policy choices in the field of the CFP. Such choices need to be made in the legislative procedure under Article 43(2) TFEU.¹⁹ If the legislature sets the objectives of the fisheries policy on the basis of that article, those policy choices bind the Council when adopting acts under it. Thus, even if Article 43(2) and (3) TFEU do not, strictly speaking, relate to each other in the same way as basic acts and implementing acts would, the acts adopted on the basis of Article 43(2) TFEU determine the powers of the Council acting under Article 43(3) TFEU.²⁰

21. Therefore, assessing the validity of a Council act that sets annual fishing opportunities starts with determining the extent to which the EU legislature has itself already legislated on that matter under Article 43(2) TFEU.²¹ It implies assessing the kind of discretion – if any – the policy framework set by the EU legislature grants to the Council.

22. Three acts are at issue in the present case: the CFP Basic Regulation and the Western Waters Regulation, under Article 43(2) TFEU, and the 2020 Regulation, under Article 43(3) TFEU.

23. In reviewing the validity of the 2020 Regulation against the CFP Basic Regulation and the Western Waters Regulation, the review method to be applied by the Court will differ depending on whether the contested ‘decision’ (that is, the decision to set TACs for the four stocks at issue above zero) was or was not within the scope of the discretion left to the Council. If the EU legislature did not provide the Council with the choice of undertaking any balancing exercise when determining and allocating the TAC from the year 2020 onwards, then the mere finding that the Council departed from the legislative choice results in the invalidity of its decision. On the contrary, if the Council was legitimately able to balance the objective to achieve MSY for by-catch in mixed fisheries with other objectives of the CFP, and depart, if necessary, from the zero TAC advice issued by ICES, then the validity of its decision would depend on whether it exceeded the

¹⁷ The predecessor to those articles, Article 37 TEC, contained only one legal basis for the adoption of CFP acts.

¹⁸ See, to that effect, judgment of 7 September 2016, *Germany v Parliament and Council* (C-113/14, EU:C:2016:635, paragraphs 58 and 59). See also, by analogy, judgment of 24 November 2022, *Parliament v Council (Technical measures relating to fishing opportunities)* (C-259/21, EU:C:2022:917, paragraph 74), which explains that the Commission’s power to adopt delegated acts on the basis of the basic regulations in the field of fisheries does not prevent the Council from adopting, on the basis of its power under Article 43(3) TFEU, technical measures relating to matters similar to those covered by the Commission’s delegated power.

¹⁹ See judgment of 1 December 2015, *Parliament and Commission v Council* (C-124/13 and C-125/13, EU:C:2015:790, paragraph 48), noting that the ‘adoption of provisions under Article 43(2) TFEU necessarily presupposes an assessment of whether those provisions are “necessary” for the pursuit of the objectives of the common policies governed by the FEU Treaty, with the result that it entails a policy decision that must be reserved to the EU legislature’.

²⁰ See judgment of 1 December 2015, *Parliament and Commission v Council* (C-124/13 and C-125/13, EU:C:2015:790, paragraphs 54 and 58).

²¹ As explained by the Court, the Council must not only act within the limits of its powers under Article 43(3) TFEU but also within the framework imposed by CFP primary law. See judgment of 1 December 2015, *Parliament and Commission v Council* (C-124/13 and C-125/13, EU:C:2015:790, paragraphs 58 and 59).

limits of the discretion left to it.²² The level of scrutiny to be applied by the Court would, in such a case, depend on the extent of the discretion left to the Council as well as on the complexity of the assessment the Council had to make.²³

24. The overarching issue is therefore to determine how much leeway the EU legislature left to the Council in relation to setting the TAC for by-catch in mixed fisheries.

C. *Interpreting CFP primary law*

1. *The policy framework of the CFP Basic Regulation*

25. The CFP Basic Regulation constitutes the EU legislature's response to overfishing in Union waters. In its 2009 Green Paper preceding the proposal for the CFP Basic Regulation, the Commission found that 'the [previous] CFP has not worked well enough' and warned that an ecological and sustainable vision of the CFP 'is a far cry from the current reality of overfishing ... and decline in the volume of fish caught by European fishermen'.²⁴

26. Thus, in its legislative proposal, the Commission explained that the overall objective of the envisaged framework 'is to ensure that fishing and aquaculture activities provide long-term sustainable environmental conditions, which are a prerequisite to reach an economically and socially sustainable fishing industry that contributes to the availability of food'.²⁵ In other words, the CFP Basic Regulation was proposed with a view to reorienting the CFP towards the long-term goal of *sustainable* fishing activities.

27. That policy choice is expressed in Article 2 of the CFP Basic Regulation. Laying down the objectives of the (revised) CFP, Article 2(1) of that regulation stresses the need for a long-term perspective and refers to both environmental and socioeconomic concerns. In that regard, it states that the CFP aims to ensure that 'fishing and aquaculture activities are environmentally sustainable *in the long-term* and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits'.²⁶

28. Article 2(2) of the CFP Basic Regulation provides that fisheries management 'shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species *above levels which can produce the maximum sustainable yield*'.²⁷ The second subparagraph of Article 2(2) then adds the target date for achieving such a goal: 'by 2015 where

²² Along the same lines, see Opinion of Advocate General Wahl in Joined Cases *Parliament and Commission v Council* (C-124/13 and C-125/13, EU:C:2015:337, point 89), noting that 'the measure of discretion (whether more or less) that the Council enjoys in adopting measures under Article 43(3) TFEU depends on how much leeway the EU legislature has decided to leave it'.

²³ See, for example, judgment of 30 April 2019, *Italy v Council (Fishing quota for Mediterranean swordfish)* (C-611/17, EU:C:2019:332, paragraphs 57 and 58 and the case-law cited).

²⁴ Commission Green Paper, Reform of the Common Fisheries Policy (COM(2009) 163 final), 22 April 2009, pp. 4-5. That was not the first time the Commission had despaired over the state of the European Union's fish resources: in a 1994 publication, that institution noted that 'too many fishermen are chasing too few fish, and too many young, immature fish are being caught. Increased public demand, pressure on fishermen to cover rising investment costs and the development of ever more sophisticated equipment like sonar and radar, which are able to pinpoint shoals of fish with greater accuracy, have all increased strains on a scarce resource' (European Commission, Directorate-General for Maritime Affairs and Fisheries and Secretariat-General, *The new common fisheries policy*, Office for Official Publications of the European Communities, Luxembourg, 1994, p. 13).

²⁵ Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy (COM(2011) 425 final), 13 July 2011, p. 6.

²⁶ Emphasis added.

²⁷ Emphasis added.

possible and, on a progressive, incremental basis *at the latest by 2020 for all stocks*.²⁸ Article 2(5) of that regulation subsequently lays down other objectives of the CFP, including the objective to ‘provide conditions for economically viable and competitive fishing capture’ (Article 2(5)(c)) and to ‘contribute to a fair standard of living for those who depend on fishing activities, bearing in mind coastal fisheries and socio-economic aspects’ (Article 2(5)(f)).

29. Viewed in its totality, Article 2 of the CFP Basic Regulation certainly allows for the balancing of the competing ideals of sustainability and fisheries management, on the one hand, with the economic and social objectives of the communities dependent on the sea for their livelihood, on the other. When thus tasked with determining and allocating fishing opportunities, the Council has in principle a certain amount of discretion to weigh the competing interests inherent in Article 2 of the CFP Basic Regulation.

30. To my mind, however, as of 2020, Article 2(2) of the CFP Basic Regulation removed those elements of discretion from the Council which relate to the decision as to whether and by when to achieve MSY levels for the stocks covered by the CFP Basic Regulation. Indeed, I consider that, by setting a fixed deadline, the EU legislature aimed to prevent the Council from putting short-term economic interests before the overarching long-term goal of progressively restoring and maintaining populations of fish stock above biomass levels capable of producing MSY. The EU legislature dealt with this in a way similar to the ‘no more chocolate from Monday’ promise; because, if Monday is not understood as a fixed deadline, one will keep eating chocolate and Monday will never come.

31. To ensure such accountability, Article 2(2) of the CFP Basic Regulation binds the Council in two ways. First, the MSY goal cannot be circumvented *after the year 2020* (a). Second, that goal concerns *all stocks*, without distinction, whether or not in certain fishing operations they are referred to as ‘target stock’ or as ‘by-catch’ (b).

(a) *The year 2020 as a fixed date*

32. Article 2(2) of the CFP Basic Regulation appears to set a fixed date, that of 2020. In doing so, that provision precludes departing from the legislative decision to achieve MSY as of 2020. In other words, until then it was still possible to balance the objective of achieving MSY against other socioeconomic objectives. From that year, however, that possibility fell away, and with it the Council’s discretion to depart from the objective to achieve MSY when setting its annual TACs. In other words, by reason of Article 2(2) of the CFP Basic Regulation, the EU legislature seems to have aimed at excluding short-term socioeconomic pressures from overriding the achievement of long-term sustainability goals after 2020.

33. That interpretation is supported by recital 7 of the CFP Basic Regulation, according to which achieving MSY exploitation rates may still be postponed until after the original target date of 2015, if achieving them by that year would seriously jeopardise the social and economic sustainability of the fishing fleets involved. The consequence is that, after 2020, such concerns can no longer be taken into consideration.

34. To my mind, excluding the MSY objective from the balancing exercise which the Council undertakes when setting annual fishing opportunities is also consistent with the ‘first and overall objective’ (as the Council has termed it in its written observations), as stated in Article 2(1) of the

²⁸ Emphasis added.

CFP Basic Regulation. It requires that environmentally sustainable fishing be achieved *in the long term*. The Commission itself has, in the past, observed that fishing at MSY levels is actually *more* profitable for the fishing industry in the long run than continuously undermining those levels.²⁹ Therefore, separating the short-term socioeconomic objectives from decisions on measures to achieve the MSY goal serves, in the long term, not only the environmental objectives of the CFP, but also its economic, social, employment and food-supply objectives.

35. At the hearing, the applicant proposed that that conclusion is also supported by contextual elements within the CFP Basic Regulation. In that regard, I would like to draw the Court's attention to the references to Article 2(2) of the CFP Basic Regulation in other provisions of that regulation: that provision is specifically referred to whenever that regulation appears to lay down a specific fisheries management style for which no further balancing should occur. Thus, Article 16(4) of the CFP Basic Regulation, which governs how the fishing opportunities are set, refers solely to Article 2(2) of that regulation. By contrast, the more general reference to Article 2 thereof is used whenever an approach that balances *all* the objectives of the CFP appears necessary.³⁰

(b) '*All stocks*'

36. The MSY goal to be achieved by 2020 applies, according to the second subparagraph of Article 2(2) of the CFP Basic Regulation, to '*all stocks*'.³¹ Accordingly, a plain reading of that provision sets out a clear and binding obligation to fish '*all stocks*' (that is, both target and by-catch), without difference, at MSY levels from 2020.³² I agree with the applicant's position that there is no credible way of reading that definition differently, otherwise the Court would inadvertently re-write the definition of 'stock', as contained in the CFP Basic Regulation.³³ Therefore, a plain reading of Article 2(2) of the CFP Basic Regulation does not allow for the distinction between 'target' stock and 'by-catch' stock, which the Council seeks to draw in the 2020 Regulation.

²⁹ See, in that regard, Communication from the Commission to the Council and the European Parliament, Implementing sustainability in EU fisheries through maximum sustainable yield (COM(2006) 360 final), 4 July 2006, point 2.2: 'Fishing at MSY levels would reduce costs and increase profits for the fishing industry, as the amount of effort (and associated costs, such as fuel) required per tonne of fish caught decreases. Choices for Member States and those who make their living from fishing will be easier when more fish can be caught and more wealth spread among the fishing industry'.

³⁰ Apart from Article 16 of the CFP Basic Regulation, the provisions on the principles and objectives of multiannual plans (Article 9) and the management of stocks of common interest (Article 33) specifically refer to Article 2(2) of the CFP Basic Regulation and thus can be read as mandating environmental sustainability as a mode of operation. Given that no further reference to other balancing objectives is made, I do not see any support in the argument that the Council has discretion to balance the 2020 MSY target against other objectives. Contrast that with, for instance, conservation measures (Articles 6 and 11); the content of multiannual plans (Article 10); national measures (Articles 19 and 20); the obligations of the European Union's international fisheries organisations (Article 29); the organisation of the common fisheries market (Article 35); or financial assistance by the European Union (Article 40). Where those provisions refer back to the objectives of the CFP, they do so generally to Article 2 of the CFP Basic Regulation, and thus to the collective competing objectives contained therein. Here, I would argue, the Council holds a certain discretion to balance those competing interests which it deems necessary.

³¹ Emphasis added.

³² There is no serious argument explaining a change in the linguistic meaning of the text between 2013 and now; we do not have before us a statute from the time of the reign of Henry VII, a famous example of which required a member of the King's household accused of conspiring to murder the King or any Lord of the realm to be tried by a jury of 'twelve sad men'. As Lord Leggatt explained, 'the word "sad" then meant sober and discreet. It would be absurd when the ordinary meaning of the word later changed to have interpreted the statute as requiring a jury to consist of twelve dolourous individuals', United Kingdom Supreme Court, *News Corp UK & Ireland Ltd (Appellant) v Commissioners for His Majesty's Revenue and Customs (Respondent)*, [2023] UKSC 7, paragraph 82.

³³ Article 4(14) of the CFP Basic Regulation refers to 'stock' as 'a marine biological resource that occurs in a given management area'.

37. I am further supported in reaching that conclusion by the position of the Parliament, which, at the hearing, submitted that *no exceptions* to that rule could realistically be interpreted in Article 2(2) of the CFP Basic Regulation, be that from within that provision or from other parts of that regulation.

(c) Should Article 2(2) of the CFP Basic Regulation be interpreted differently when it comes to mixed fisheries?

38. In principle, the Council and the Commission share the above interpretation of a binding target to which no derogations apply. Their argument, however, based on a reading of Article 2(2) of the CFP Basic Regulation as putting in place both a rigid scope ('all stocks') as well as an end date (the year 2020) for fishing for the four stocks at issue, leads to unsustainable practical issues. In particular, those parties argue that, by virtue of the combination of mixed fisheries, zero-catch TAC and the landing obligation, not allowing any derogation from the 2020 MSY target for zero-catch stocks would 'choke' fishing fleets operating in mixed fisheries. Accordingly, Article 2(2) of the CFP Basic Regulation should be read as allowing for the exclusion of by-catch from the MSY obligation in mixed fisheries, if setting zero targets for those stocks would require fleets prematurely to stop their fishing operations for target fish.

39. I am of the opinion that the text of the CFP Basic Regulation does not suggest the possibility for such an interpretation. When asked at the hearing, the participants could not point to a precise article that would grant the possibility to make such a distinction. In fact, the entire CFP Basic Regulation only refers twice to 'by-catch', and then only in places not connected to the question of whether the MSY obligation should or should not apply to by-catch in mixed fisheries.³⁴ Moreover, the reference, in Article 16(4) of the CFP Basic Regulation, that 'fishing opportunities shall be fixed in accordance with the objectives set out in Article 2(2)' uses the qualifier 'in accordance with' precisely to demonstrate a mandatory link between fixing TAC and ensuring that the MSY level is reached at the latest by the year 2020 for all stocks. That provision, too, therefore does not distinguish between 'target' stock and 'by-catch' stock.

40. The landing obligation, invoked by some participants, cannot be relied on to allow for the different treatment of by-catch in mixed fisheries. That is supported by recital 32 of the CFP Basic Regulation, which explains that an increase of the TAC by reason of the landing obligation should only be possible 'subject to scientific advice and *without jeopardising the objectives of maximum sustainable yield*'.³⁵ Again, no difference between those two stocks is envisaged.

41. Nor can the possibility of distinguishing between them realistically be based on Article 9(5) of the CFP Basic Regulation, as Ireland has noted. I will explain this when assessing the impact of the Western Waters Regulation (see point 47 of this Opinion).

³⁴ The CFP Basic Regulation refers to 'by-catch' in recital 29 thereof when speaking of the facility of Member States to count 'by-catch species against the quota of the target species'. That facility is, in turn, contained in Article 15(8) of the CFP Basic Regulation and allows Member States to deduct from their quota of the target stock 'catches of species that are subject to the landing obligation and that are caught in excess of quotas of the stocks in question, or catches of species in respect of which the Member State has no quota ... [provided] the stock of the non-target species is within safe biological limits'. However, as explained above, and as confirmed by the Council and the Commission at the hearing, the ICES advice for the four stocks at issue evidences that none of those stocks would have reached safe biological limits for the year 2020 even if no TAC had been set for them. In other words, in the present case, even recourse to Article 15(8) of the CFP Basic Regulation – had that been the source of the alleged discretion by the Council – would not have been available.

³⁵ Emphasis added.

(d) *Interim conclusion*

42. To conclude, Article 2(2) of the CFP Basic Regulation binds the Member States to fish at MSY levels by 2020 at the latest for all stocks, *without exception*. Therefore, the CFP Basic Regulation did not leave any discretion to the Council to depart from the MSY obligation in relation to by-catch when setting fishing opportunities in mixed fisheries.

2. *The impact of the Western Waters Regulation*

43. The Western Waters Regulation is a multiannual plan, within the meaning of Article 7(1)(a) of the CFP Basic Regulation, adopted on the basis of Article 43(2) TFEU. According to Article 9(1) of the CFP Basic Regulation, such plans seek to ensure the objective of ‘restor[ing] and maintain[ing] fish stocks above levels capable of producing maximum sustainable yield in accordance with Article 2(2)’. Thus, whereas those plans are important for the attainment of the objectives of the CFP, in particular because they balance the broad principles of conservation and sustainability against socioeconomic objectives,³⁶ multiannual plans are not aimed at altering the 2020 MSY target of Article 2(2) of the CFP Basic Regulation, but rather at enabling it.

44. The Western Waters Regulation establishes a multiannual plan for the management of the Western Waters, including around Ireland.³⁷ Article 1(1) of that regulation lists the types of demersal stocks that fall within the scope of its application. However, by virtue of Article 1(4) thereof, that regulation also applies to unlisted by-catch caught when fishing for the former types of stocks.³⁸ By reason of that distinction, Articles 4 and 5 of the Western Waters Regulation also distinguish between targets for ‘target’ stock³⁹ and ‘by-catch’ stock respectively. For the latter, it provides that the management of mixed fisheries with regard to by-catch stock ‘shall take into account the difficulty of fishing all stocks at MSY at the same time, especially in situations where that leads to a premature closure of the fishery’.

45. Can that provision be understood as changing the finding (see point 42 of this Opinion) that the CFP Basic Regulation mandates that ‘all stocks’ are to be fished at MSY levels as of 2020, whether caught as ‘target’ stock or ‘by-catch’ stock? In my mind, it cannot.

(a) *The Western Waters Regulation as an expression of Article 9(5) of the CFP Basic Regulation*

46. At the hearing, Ireland suggested that the Western Waters Regulation would constitute an expression of the possibility, contained in Article 9(5) of the CFP Basic Regulation, that multiannual plans may ‘address the specific problems of mixed fisheries in relation to the achievement of the objectives set out in Article 2(2) for the mixture of stocks covered by the plan in cases where scientific advice indicates that increases in selectivity cannot be achieved’.

³⁶ See Opinion of Advocate General Wahl in Joined Cases *Parliament and Commission v Council* (C-124/13 and C-125/13, EU:C:2015:337, point 73).

³⁷ The scope of the Western Waters Regulation is set out in Article 2(1) thereof.

³⁸ Out of the four stocks at issue in the present case, only one type (cod (*Gadus morhua*) in ICES Divisions 7.e-k) is listed under Article 1(1) of the Western Waters Regulation. That means that that regulation applies to the other three stocks only as by-catch, pursuant to Article 1(4) of the Western Waters Regulation.

³⁹ According to Article 4 of the Western Waters Regulation, when fished as targets, stocks must meet the 2020 MSY objective.

47. Whether or not that is the case, I cannot read Article 9(5) of the CFP Basic Regulation as enabling multiannual plans to depart from the 2020 MSY target contained in Article 2(2) thereof for the particular case of mixed fisheries. To do so would not only be contrary to the clear wording of that provision, but it would also run counter to the rationale behind the use of that wording. Allowing certain stocks to be caught as ‘by-catch’ despite scientific advice of zero TAC would mean that the Council could set fishing opportunities contrary to the very principles of good governance that the EU legislature sought to enshrine in the management of the CFP.⁴⁰ Therefore, the faculty, contained in Article 9(5) of the CFP Basic Regulation, that multiannual plans may provide for specific conservation objectives and measures to address certain problems linked to mixed fisheries cannot act as an enabler for the Council to withdraw by-catch from the MSY target set by Article 2(2) of the CFP Basic Regulation.

(b) Has the Western Waters Regulation amended the CFP Basic Regulation?

48. In their written observations, the Council and the Commission explain that the Western Waters Regulation is both the more recent and the more specific act, with the effect that the interpretative rules *lex posterior derogat legi priori* or *lex specialis derogat legi generali* would lead to the conclusion that the Western Waters Regulation prevails over the CFP Basic Regulation. Those maxims may indeed often resolve the conflict of two rules of equal hierarchical rank in the legal systems of the Member States, and it is undisputed that both the CFP Basic Regulation and the Western Waters Regulation are enacted on the basis of the same Article 43(2) TFEU.

49. However, first, EU law does not contain a clear hierarchy among its secondary legal norms.⁴¹ Secondly, I consider it unwise to apply those types of interpretive rules mechanically and without any respect being paid to the rationale and substance of the two norms that are being compared. In that respect, even if based on the same Treaty provision, it does not seem to me that a multiannual plan could hold an equally persuasive character as the CFP Basic Regulation itself. The latter is, after all, the very legislation that establishes the framework within which multiannual plans are set to operate. Accordingly, while there may be no hierarchy based on the legal basis at the level of primary law between the two regulations, there is certainly an envisaged hierarchy at the level of secondary law.

50. Multiannual plans are set out in and regulated by Articles 9 and 10 of the CFP Basic Regulation and are meant to assist in achieving the objective expressed in Article 2(2) thereof.⁴² What that means is that those plans can add to, supplement or flesh out the basic framework established by the CFP Basic Regulation, which leaves a lot of room for different policy decisions; hence why those acts must be adopted on the basis of Article 43(2) TFEU. However, irrespective of the content of a multiannual plan, that plan cannot, in itself, derogate from the express wording of the objectives of the CFP Basic Regulation.

51. If, however, one would consider the two acts as being of equal hierarchical status, can the CFP Basic Regulation be amended in a tacit or implicit way? At the hearing, the Parliament seemed to endorse that possibility. It explained that while the wording in Article 2(2) of the CFP Basic

⁴⁰ The principles of good governance, pursuant to which the CFP ‘shall’ be guided, require, as per Article 3(1)(c) of the CFP Basic Regulation, ‘the establishment of measures in accordance with the best available scientific advice’.

⁴¹ See, by analogy, judgment of 8 December 2020, *Hungary v Parliament and Council* (C-620/18, EU:C:2020:1001 paragraph 119), recalling that ‘the substantive legality of an EU act cannot be examined in the light of another EU act of the same status in the hierarchy of legal rules, unless the former has been adopted pursuant to the latter or unless it is expressly provided, in one of those two acts, that one take precedence over the other’.

⁴² See, in that respect, Article 9(1) of the CFP Basic Regulation explaining the purpose of multiannual plans.

Regulation was clear and without exception, the legal framework had ‘evolved’ with the entry into force of the Western Waters Regulation. Particularly in the context of the landing obligation, as the Parliament observed, the EU legislature no longer considered it feasible to stick to the 2020 MSY target for *all stocks*. Accordingly, Articles 4 and 5 of the Western Waters Regulation sought to distinguish between target and by-catch stock *inter alia* in the setting of fishing opportunities. Those provisions thus ‘implicitly amended’ (as the Parliament explained at the hearing) Article 2(2) of the CFP Basic Regulation, by effectively removing by-catch from the reference to ‘all stocks’ in that provision. The result is a difference in fishing targets for target and by-catch stocks, with only the former being harvested at biomass levels capable of restoring the MSY. When the same stock is caught as by-catch, the establishment of TACs would then not be constrained by the 2020 MSY target; in short, the Council would be ‘re-granted’ the discretion to balance that with other CFP objectives, at least when it comes to the limited region of the Western Waters.⁴³

52. What constitutes an amendment for the purposes of EU law is not regulated. It might be accepted that as soon as the substance of an act is changed, an amendment has taken place. For that purpose, a separate amending act may be issued. It is indeed the usual practice of the EU institutions that a new act amending a prior act expressly identifies previous provisions which are amended. However, strictly speaking, that is not necessary in the case of acts of equal hierarchical rank.

53. Likewise, there is no constitutional requirement laid down in either primary or secondary EU law to mandate an express amendment mode of lawmaking. Although some aspects of the way in which amendments or repeals take place are laid down in drafting guides⁴⁴ or interinstitutional agreements,⁴⁵ those texts are nevertheless not law. Accordingly, the *way* in which the EU legislature goes about amending or repealing prior legislation remains part of its ‘parliamentary privilege’.

54. One may ask why it should matter whether an amendment is effected expressly or by implication if the consequence is in any event contemplated by legislation.

⁴³ As it only relates to a certain area, the Western Waters Regulation cannot amend Article 2(2) of the CFP Basic Regulation as such. At best, it could introduce regional derogations from the framework set up by the CFP Basic Regulation.

⁴⁴ See, for instance, Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of European Union legislation, 2016, point 18.14: ‘where an act is to be amended, this should, as a general rule, be done by formal amendment’.

⁴⁵ See, for instance, Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation (OJ 1999 C 73, p. 1), points 18 and 21, laying down that ‘every amendment of an act shall be clearly expressed’ and that ‘obsolete [acts] and provisions shall be expressly repealed’.

55. The first and most obvious concern is that implicit amendments are not transparent for the public. That stakeholder must, at least generally, know what the law is at any given moment.⁴⁶ That is one aspect of the rule of law.⁴⁷ Implied amendments without explanation are thus the very enemy of transparent lawmaking. They risk jeopardising the certainty and predictability of pre-existing relationships and their attendant rights and obligations.⁴⁸

56. Second, I would argue that one reason for insisting upon an expressly indicated intention of amendment, in particular of policy choices, lies in the requirement to allow for participation in the legislative process. That is an important aspect of democratic societies. If the EU legislature is open about its (proposed) intentions, meaningful ‘legislative opposition’ can form in the EU legislative process not only in the Parliament but also among the different stakeholders. It may also encourage the public to reflect their agreement or disagreement at the ballot.

57. Finally, how is the Court to decide whether legislation was amended if no express explanation of the intention to amend previous legislative choices exists in either the normative text itself or its supporting documents? It is the Court’s duty to arrive at the legal meaning of a particular EU provision, read within its context and purpose. That duty is significantly more complicated where that context and purpose may have been implicitly changed by the EU legislature, and where no trace of an explanation relating to such a change is found in preparatory or final documentation. Even more so when it concerns amendments of core elements of policy which may be of interest to the public. Where, as in the present case, the Court is essentially forced to decide on the ‘true’ intention of the EU legislature, there is an added element of legitimacy in siding with the alleged intent of a legislative text if that text or its supporting documents *actually* espouse what the constituent elements of that legislature later claim to be the intended outcome.

58. In such situations, the Court can only speak in terms of principles: legal certainty demands that an implied amendment be sufficiently clear to enable the conclusion that it is an amendment. Even more so when it concerns an implied policy amendment, which results in a change of legislative direction or policy. Particularly as regards the latter type of change to a legal text, I would in fact argue that there exists a presumption against the implicit amendment of a rule of EU secondary law. Irrespective of the way in which a derogation is brought about, explicitly or implicitly, it must be clear to the Court that an amendment took place.

59. In the present case, it is far from clear that the Western Waters Regulation sought to implicitly amend Article 2(2) of the CFP Basic Regulation. Therefore, as it is impossible to conclusively find whether or not there was an amendment, the Court can only decide by presuming that no amendment of the CFP Basic Regulation took place.

⁴⁶ Although, realistically, full transparency of the state of the law is an unattainable ideal; see, in that regard, by analogy, ECtHR, 10 November 2005, *Leyla Şahin v. Turkey* (CE:ECHR:2005:1110JUD004477498, § 91: ‘It must also be borne in mind that, however clearly drafted a legal provision may be, its application involves an inevitable element of judicial interpretation, since there will always be a need for clarification of doubtful points and for adaptation to particular circumstances. A margin of doubt in relation to borderline facts does not by itself make a legal provision unforeseeable in its application. Nor does the mere fact that such a provision is capable of more than one construction mean that it fails to meet the requirement of “foreseeability” for the purposes of the Convention’. See also the often-quoted remark of Advocate General Wahl that looking for a “true” *acte clair* ... would ... seem just as likely as encountering a unicorn’ (Opinion of Advocate General Wahl in Joined Cases *X and van Dijk*, C-72/14 and C-197/14, EU:C:2015:319, point 62).

⁴⁷ On formal and substantive aspects of the concept of the rule of law, see Bačić Selanec, N. and Čapeta, T., ‘The Rule of Law and Adjudication of the Court of Justice of the European Union’, *The Changing European Union: A Critical View on the Role of Law and the Courts*, Modern Studies in European Law, Hart Publishing, Oxford, 2022, pp. 35-62.

⁴⁸ See, by analogy, judgment of 26 January 2017, *GGP Italy v Commission* (T-474/15, EU:T:2017:36, paragraph 63), explaining that ‘the principle of legal certainty aims to ensure that situations and legal relationships governed by EU law remain foreseeable. For that purpose, it is essential for the institutions to respect the principle that they may not alter measures which they have adopted and which affect the legal and factual situation of persons, so that they may amend such acts only in accordance with the rules on competence and procedure’. See also, to that effect, judgments of 9 July 1981, *Gondrand and Garancini* (169/80, EU:C:1981:171, paragraph 17), and of 22 February 1984, *Kloppenborg* (70/83, EU:C:1984:71, paragraph 11).

(c) Interim conclusion

60. I am of the opinion that the distinction introduced by Articles 4 and 5 of the Western Waters Regulation between target and by-catch does not affect, and hence remains subject to, the overarching policy obligation contained in Article 2(2) of the CFP Basic Regulation of fishing all stocks at MSY levels by the year 2020 at the latest. That means that the Council had no discretion to set the TAC for the four stocks at issue at levels above zero, even if only when they are caught as by-catch.

D. The validity of the 2020 Regulation

1. Invalidity due to the lack of discretion left to the Council

61. Against the backdrop of the above conclusions, my analysis of the validity of the 2020 Regulation can be rather short.

62. As is common ground between the parties to these proceedings, and as arises from Article 1(1) of and Annex IA to the 2020 Regulation, the Council set the TACs for the four stocks at issue in the waters around Ireland above zero.

63. Those TACs are not in line with the ‘best available scientific advice’ or the precautionary approach to fisheries management to achieve MSY; this is not disputed by the parties. The 2020 Regulation therefore, in part, runs contrary to the objective, laid down in Article 2(2) of the CFP Basic Regulation, of progressively restoring and maintaining populations of fish stock above biomass levels capable of producing MSY at the latest by 2020 for all stocks. As I have explained in points 43 to 60 of this Opinion, the Western Waters Regulation does not affect that conclusion.

64. It follows that the Council lacked discretion to set the fishing opportunities in the waters around Ireland for the four stocks at issue above zero. Its decision was, consequently, unlawful. I therefore propose that the Court declare Annex IA to the 2020 Regulation invalid in so far as it sets fishing opportunities for the four stocks at issue in the waters around Ireland above zero.

2. Invalidity due to the Council overstepping the boundaries of its discretion

65. It is, however, possible that the Court will not agree with my interpretation of the CFP Basic Regulation and/or will find that the Western Waters Regulation could and did amend Article 2(2) of the CFP Basic Regulation so as to exclude by-catch in mixed fisheries from the notion of ‘all stocks’. In that case, the assessment of validity of the 2020 Regulation would require a review of whether the Council stayed within the limits of its discretion when determining the TAC for the four stocks at issue.

66. Under this scenario, the CFP Basic Regulation and the Western Waters Regulation would allow the Council, when setting its annual fishing opportunities, to balance the 2020 MSY target for the four stocks at issue when caught as by-catch in mixed fisheries with the other objectives of the CFP. In other words, the Council would be in a position to depart from the zero-catch advice issued for the four stocks at issue to achieve MSY if it found it necessary to preserve, for instance, the survival of the fishing fleets or the number of jobs in the fishing industry.

67. How is the Court to assess the observance of the Council's discretion in that case? In my mind, what is required is that the Court verify whether the Council took into account all concerns that should enter into that balancing exercise, even if it cannot question how those elements were balanced.

68. It is clear from the explanation of the Council and the Commission that the 2020 Regulation set TACs at levels above zero for the four stocks at issue in the waters around Ireland in order to prevent the 'choke' of fishing operations for other (target) stocks. In other words, the Council's action served the socioeconomic objectives of the CFP. That institution should thus demonstrate that it took into consideration all concerns that related to the various objectives that it balanced against one another. That would include, in my mind, at least an explanation of the possible (financial or economic) damage that the 'choke species' phenomenon would cause to the fishing industry and the relevant coastal population(s), as well as the dangers for and prospect of the fish stocks at issue to reach the 2020 MSY target.

69. The Council itself appeared to agree that its discretion is not limited to the nature and scope of the measures to be taken, but that it also extends to the finding of basic facts. It should, therefore, demonstrate to the Court that it entered into that fact-finding exercise when setting the fishing opportunities at issue in the present case.

70. However, when prompted at the hearing to explain precisely the extent of the socioeconomic effects expected if the relevant zero TAC were adopted, the Council could not provide the Court with any specifics on what information it took into account for the purposes of its balancing exercise. Nor was it able to explain what financial, economic or social consequences would have resulted from it setting the TAC for the four stocks at issue in the waters around Ireland at zero. The only party able to respond to that point, the Commission explained that the number of vessels potentially impacted would be approximately 6 000 and that the potential damage arising from a closure of the entire sea basin around Ireland would be approximately EUR 1 thousand million.⁴⁹ I have no reason to doubt those numbers, but offering two economic indicators out of many⁵⁰ is not sufficient to persuasively explain the manner in which the Council's balancing exercise was allegedly conducted. After all, it is on the basis of that statement of reasons that the Court then performs its judicial review, even in areas where its powers to do so are 'limited'. In the abstract, it is simply not possible for the Court to 'do its job' when confronted with institutional promises that the relevant data '[were] taken into consideration'.

71. However, supposing that data were available to the Court, it is clear that, in the Council's balancing exercise (provided discretion was indeed available to the Council to balance socioeconomic objectives against the 2020 MSY target), the basic goal of achieving MSY for all stocks still cannot entirely be neglected. In that respect, the Council argued that it set the TAC for the four stocks at issue at levels equal to or under the ICES estimates of unavoidable

⁴⁹ I should add that that amount of potential damage would arise only if fishing would stop entirely. The Court has however not been provided with an explanation as to why that would be the case, or indeed that the closure of the entire sea basin would be the necessary consequence of setting the TACs for the four stocks at issue at zero.

⁵⁰ Realistically, I suppose the Council would have also looked at the number of fisheries estimated to go out of business; the potential adaptability of the fishing fleets to redirect their fishing operation to different stocks or waters; the number of jobs that might be lost in a particular region or industry; or similar information relating to dependent stakeholders (or what is known in macroeconomics as 'secondary' or 'tertiary' industries).

by-catch.⁵¹ It explained that those (what I shall call) ‘more favourable’ levels allowed for some increase in the spawning stock biomass (for example, for cod in the West of Scotland of around 10%) of the four stocks at issue, and that that was indeed the Council’s clear objective. Again, while I do not contest that figure, what cannot be ignored is the fact that even at those levels the four stocks at issue would remain under the lowest limit of biomass necessary for those stocks to reproduce. In other words, those ‘more favourable’ levels would *still* cause irreparable damage to the four stocks at issue since the TAC was set at a level representing a significant percentage of their current biomass (for example, for cod, the TAC for the year 2020 represented 62% and 54% respectively of the spawning stock biomass in the two fisheries concerned).⁵² To the best of my understanding, those levels were selected on the basis of the ICES estimate of the quantity of expected by-catch. However, on the basis of the information available to the Court, it appears that no scientific advice was requested on the possible effect of the chosen TAC on the chances of the stocks at issue to recover – whether to MSY levels or otherwise.⁵³ It would thus appear to me that, in setting that TAC at a level representing a significant amount of the spawning stock biomass of the four stocks at issue, the Council did not abide by its obligation to seek and formulate that level on the basis of the ‘best available scientific advice’ or the precautionary approach.⁵⁴

72. Finally, in writing and at the hearing, the Council explained that, together with allowing for some catches of the four stocks at issue as by-catch, it has taken additional remedial measures into consideration, such as the commitment of Member States not to use the 10% increase in the TAC allowed under Article 15(9) of the CFP Basic Regulation in relation to the four stocks at issue. If one takes into consideration that 10% of the zero TAC, as advised by ICES, would still be zero, this commitment does not seem an important remedial measure. The Council also claimed that it had introduced technical measures, such as the obligatory use of fishing nets with specific mesh sizes in certain waters, which would increase the selectivity of stock caught in mixed fisheries.⁵⁵ However, not only were such obligations introduced only in the middle of 2020, but, more importantly, Article 9(5) of the CFP Basic Regulation allows for specific measures in relation to mixed fisheries only when the increase in selectivity cannot be achieved otherwise. Therefore, any measures increasing selectivity should have been taken into consideration *before* increasing the TAC for by-catch and not *subsequently*.

73. In conclusion, even if the Western Waters Regulation were to be interpreted as amending the CFP Basic Regulation in relation to by-catch stock in mixed fisheries (*quod non*), I am of the opinion that the Commission and the Council did not provide the Court with sufficient information to allow it to conclude that the 2020 Regulation was not adopted outside the limits left by the CFP Basic Regulation and the Western Waters Regulation.

74. Even in this subsidiary scenario, I therefore propose that the Court declare the 2020 Regulation invalid in so far as it sets the TAC for the four stocks at issue in the waters around Ireland at a level above zero.

⁵¹ The ICES estimate of unavoidable by-catch of cod in the West of Scotland was 1 279 tonnes, and the Council set the TAC for cod in those waters at 1 279 tonnes. For the other three stocks, the TAC set by the Council was lower than the ICES estimates: for cod in the Celtic Sea ICES estimated between 1 331 and 1 854 tonnes, and the Council set the TAC at 805 tonnes; for whiting in the Irish Sea the ICES estimated between 901 and 917 tonnes of by-catch, and the Council set the TAC at 721 tonnes; finally, for plaice the ICES estimated 100 tonnes of by-catch, and the Council set the TAC at 67 tonnes.

⁵² As explained by the referring court in paragraph 102 of the order for reference.

⁵³ That was confirmed by the Commission at the hearing. However, the Commission did not explain why that advice was not requested.

⁵⁴ See, in that respect, Article 5(1) and (2) of the Western Waters Regulation.

⁵⁵ See Article 13 of the 2020 Regulation.

E. Maintaining the effects of the 2020 Regulation

75. As a result of the declaration of invalidity of the 2020 Regulation, the basis on which fishing opportunities for that year were fixed would disappear with retroactive effect in the same way as if that regulation were annulled.⁵⁶ In those circumstances, the second paragraph of Article 264 TFEU, which is also applicable by analogy to a reference under Article 267 TFEU for a preliminary ruling on the validity of acts of the European Union, confers on the Court a discretion to decide which specific effects of the act in question must be regarded as definitive.⁵⁷

76. In the present case, the 2020 Regulation expired at the end of the year 2020. In line with the Council's request, I would not consider it justified to call into question the legality of fishing activities conducted by operators in good faith, particularly in the light of the risks of having serious repercussions on a large number of legal relations that were established on that basis.

77. Should the Court thus choose to follow my conclusion, I suggest that it limit the temporal effects of the declaration of invalidity of the relevant parts of Annex IA to the 2020 Regulation by maintaining them for the period of validity of that regulation.

IV. Conclusion

78. Having regard to all of the above considerations, I propose that the Court of Justice answer the second question referred in the following way:

- (1) Annex IA to Council Regulation (EU) 2020/123 of 27 January 2020 fixing for 2020 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters for the four stocks at issue is invalid in so far as it sets fishing opportunities above zero for:
 - cod (*Gadus morhua*) in ICES Division 6.a (Union and international waters of 5b east of 12° 00' W (COD/5BE6A));
 - cod (*Gadus morhua*) in ICES Divisions 7.e-k;
 - whiting (*Merlangius merlangus*) in ICES Division 7.a (WHG/07A.);
 - plaice (*Pleuronectes platessa*) in ICES Divisions 7.h, 7.j and 7.k (PLE/7HJK).
- (2) The effects of Annex IA to Regulation 2020/123 are to be maintained for the period of validity of that regulation.

⁵⁶ See judgment of 26 April 1994, *Roquette Frères* (C-228/92, EU:C:1994:168, paragraph 17).

⁵⁷ See, for instance and by analogy, judgment of 28 April 2016, *Borealis Polyolefine and Others* (C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14, EU:C:2016:311, paragraph 103 and the case-law cited).