



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

11 January 2024*

(Reference for a preliminary ruling – Common fisheries policy – Conservation of resources – Total allowable catches (TACs) applicable to stocks of cod in the West of Scotland and the Celtic Sea, whiting in the Irish Sea and plaice in the Celtic Sea South – Regulation (EU) 2020/123 – Annex IA – TACs above zero – Expiry of the period of application – Assessment of validity – Regulation (EU) No 1380/2013 – Article 2(2), second subparagraph – Objective of achieving a maximum sustainable yield (MSY) exploitation rate at the latest by 2020 for all stocks – Articles 2, 3, 9, 10, 15 and 16 – Socioeconomic and employment objectives – Best available scientific advice – Landing obligation – Mixed fisheries – ‘Choke species’ – Regulation (EU) 2019/472 – Articles 1 to 5, 8 and 10 – Target stocks – By-catches – Remedial measures – Discretion)

In Case C-330/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the High Court (Ireland), made by decision of 7 April 2022, received at the Court on 16 May 2022, in the proceedings

Friends of the Irish Environment CLG

v

Minister for Agriculture, Food and the Marine,

Ireland,

Attorney General,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, Z. Csehi, M. Ilešič, I. Jarukaitis and D. Gratsias (Rapporteur), Judges,

Advocate General: T. Ćapeta,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 16 March 2023,

* Language of the case: English.

after considering the observations submitted on behalf of:

- Friends of the Irish Environment CLG, by J. Devlin, Senior Counsel, J. Kenny, Barrister-at-Law, and F. Logue, Solicitor,
- the Minister for Agriculture, Food and the Marine, Ireland and the Attorney General, by M. Browne, A. Joyce, M. Lane and M. Tierney, acting as Agents, and by D. Browne, Barrister-at-Law, and C. Toland, Senior Counsel,
- the European Parliament, by I. Anagnostopoulou, E. Ni Chaoimh and I. Terwinghe, acting as Agents,
- the Council of the European Union, by F. Naert, A. Nowak-Salles and P. Pecheux, acting as Agents,
- the European Commission, by A. Dawes and A. Stobiecka-Kuik, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2023,

gives the following

Judgment

- 1 This request for a preliminary ruling concerns the validity of 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 (OJ 2020 L 25, p. 1), in the light of Article 2(1) and (2) and Article 3(c) and (d) of 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), read in combination with Articles 9, 10, 15 and 16 of Regulation No 1380/2013 and Articles 1 to 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) No 1300/2008 (OJ 2019 L 83, p. 1), in so far as that annex set, for the year 2020, the total allowable catches (TACs) for cod (*Gadus morhua*), first, in zone 6a and in European Union and international waters of zone 5b east of 12°00' W (COD/5BE6A) and, second, in zones 7b, 7c, 7e to 7k and 8 to 10 and in European Union waters of Fishery Committee for the Eastern Central Atlantic (CECAF) zone 34.1.1 (COD/7XAD34), for whiting (*Merlangius merlangus*) in zone 7a (WHG/07A) and for plaice (*Pleuronectes platessa*) in zones 7h, 7j and 7k (PLE/7HJK) ('the TACs at issue').
- 2 The request has been made in proceedings between, on the one hand, Friends of the Irish Environment CLG ('FIE'), a non-governmental organisation working in the field of the environment, and, on the other hand, the Minister for Agriculture, Food and the Marine

(Ireland), Ireland and the Attorney General (Ireland), concerning the legality of fisheries management opinions 15, 16, 19, 20, 23 and 24 issued by that minister for the months of April, May and June 2020.

Legal context

International law

- 3 Article 61 of the United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982 ('UNCLOS'), entitled 'Conservation of the living resources', sets out the general principles relating to the conservation of marine living resources.
- 4 Those general principles are applied to the conservation and management of straddling or highly migratory fish stocks by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, signed in New York on 4 August 1995 ('the UN Fish Stocks Agreement'), in particular by Article 5 thereof.

European Union law

Regulation No 1380/2013

- 5 Recitals 5 to 8 of Regulation No 1380/2013 state:
 - '(5) The [European] Union is a contracting party to UNCLOS and, ... to the [UN Fish Stocks Agreement] ...
 - (6) Those international instruments predominantly lay down conservation obligations, including obligations to take conservation and management measures designed to maintain or restore marine resources at levels which can produce the maximum sustainable yield ... [and] obligations to apply the precautionary approach widely to conservation, management and exploitation of fish stocks ... The [common fisheries policy (CFP)] should, therefore, contribute to the Union's implementation of its international obligations under those international instruments. ...
 - (7) At the World Summit on Sustainable Development at Johannesburg in 2002, the Union and its Member States committed themselves to act against the continued decline of many fish stocks. Therefore, the Union should improve the CFP by adapting exploitation rates so as to ensure that, within a reasonable time frame, the exploitation of marine biological resources restores and maintains populations of harvested stocks above levels that can produce the maximum sustainable yield. The exploitation rates should be achieved by 2015. Achieving those exploitation rates by a later date should be allowed only if achieving them by 2015 would seriously jeopardise the social and economic sustainability of the fishing fleets involved. After 2015, those rates should be achieved as soon as possible and in any event no later than 2020. Where scientific information is insufficient to determine those levels, approximative parameters may be considered.

(8) Management decisions relating to maximum sustainable yield in mixed fisheries should take into account the difficulty of fishing all stocks in a mixed fishery at maximum sustainable yield at the same time, in particular where scientific advice indicates that it is very difficult to avoid the phenomenon of “choke species” by increasing the selectivity of the fishing gears used. Appropriate scientific bodies should be requested to provide advice on the appropriate fishing mortality levels in such circumstances.’

6 Article 2 of that regulation, entitled ‘Objectives’, provides, in paragraphs 1 to 3 and 5 thereof:

‘1. The CFP shall 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, and of contributing to the availability of food supplies.

2. The CFP shall apply the precautionary approach to fisheries management, and 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.

In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, 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.

3. The CFP shall implement the ecosystem-based approach to fisheries management in order to ensure that negative impacts of fishing activities on the marine ecosystem are minimised ...

...

5. The CFP shall, in particular:

(a) gradually eliminate discards, on a case-by-case basis, taking into account the best available scientific advice, by avoiding and reducing, as far as possible, unwanted catches, and by gradually ensuring that catches are landed;

...

(c) provide conditions for economically viable and competitive fishing capture and processing industry and land-based fishing related activity;

...

(f) contribute to a fair standard of living for those who depend on fishing activities, bearing in mind coastal fisheries and socioeconomic aspects;

...’

7 Under Article 3 of the said regulation, entitled ‘Principles of good governance’:

‘The CFP shall be guided by the following principles of good governance:

...

(c) the establishment of measures in accordance with the best available scientific advice;

(d) a long-term perspective;

...’

8 Article 4 of the same regulation, entitled ‘Definitions’, provides, in paragraph 1 thereof:

‘For the purpose of this Regulation the following definitions shall apply:

...

(7) “maximum sustainable yield” means the highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average environmental conditions without significantly affecting the reproduction process;

...

(14) “stock” means a marine biological resource that occurs in a given management area;

...

(36) “mixed fisheries” means fisheries in which more than one species is present and where different species are likely to be caught in the same fishing operation;

...’

9 Article 6 of Regulation No 1380/2013, headed ‘General provisions’, provides, in paragraph 2 thereof:

‘... Conservation measures shall be adopted taking into account available scientific, technical and economic advice ...’

10 Article 9 of that regulation, entitled ‘Principles and objectives of multiannual plans’, is worded as follows, in paragraphs 1 to 3 and 5 thereof:

‘1. Multiannual plans shall be adopted as a priority, based on scientific, technical and economic advice, and shall contain conservation measures to restore and maintain fish stocks above levels capable of producing maximum sustainable yield in accordance with Article 2(2).

2. Where targets relating to the maximum sustainable yield as referred to in Article 2(2) cannot be determined, owing to insufficient data, the multiannual plans shall provide for measures based on the precautionary approach, ensuring at least a comparable degree of conservation of the relevant stocks.

3. Multiannual plans shall cover either:

...

(b) in the case of mixed fisheries or where the dynamics of stocks relate to one another, fisheries exploiting several stocks in a relevant geographical area ...

...

5. Multiannual plans may contain specific conservation objectives and measures based on the ecosystem approach in order to 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. ...'

11 Article 10 of the said regulation, entitled 'Content of multiannual plans', provides, in paragraph 1 thereof:

'As appropriate and without prejudice to the respective competences under the Treaty, a multiannual plan shall include:

...

(b) objectives that are consistent with the objectives set out in Article 2 and with the relevant provisions of Articles 6 and 9;

(c) quantifiable targets such as fishing mortality rates and/or spawning stock biomass;

...'

12 Article 15 of the same regulation, entitled 'Landing obligation', provides, in paragraphs 1 and 9 thereof:

'1. All catches of species which are subject to catch limits ..., caught during fishing activities in Union waters or by Union fishing vessels outside Union waters in waters not subject to third countries' sovereignty or jurisdiction, ... shall be brought and retained on board the fishing vessels, recorded, landed and counted against the quotas where applicable, ... in accordance with the following time frames:

...

(d) From 1 January 2017 at the latest for species which define the fisheries and from 1 January 2019 at the latest for all other species ...

...

9. For stocks subject to the landing obligation, Member States may use a year-to-year flexibility of up to 10% of their permitted landings. For this purpose, a Member State may allow landing of additional quantities of the stock that is subject to the landing obligation provided that such quantities do not exceed 10% of the quota allocated to that Member State. ...'

- 13 Article 16 of Regulation No 1380/2013, entitled ‘Fishing opportunities’, is worded as follows, in paragraphs 2 and 4 thereof:

‘2. When the landing obligation in respect of a fish stock is introduced, fishing opportunities shall be fixed taking into account the change from fixing fishing opportunities that reflect landings to fixing fishing opportunities that reflect catches, on the basis of the fact that, for the first and subsequent years, discarding of that stock will no longer be allowed.

...

4. Fishing opportunities shall be fixed in accordance with the objectives set out in Article 2(2) and shall comply with quantifiable targets, time frames and margins established in accordance with Article 9(2) and points (b) and (c) of Article 10(1).’

Regulation 2019/472

- 14 Article 1 of Regulation 2019/472, entitled ‘Subject matter and scope’, provides, in paragraphs 1 and 4 thereof:

‘1. This Regulation establishes a multiannual plan ... for the demersal stocks listed below ... in the Western Waters ..., and for the fisheries exploiting those stocks:

...

4. This Regulation also applies to by-catches caught in the Western Waters when fishing for the stocks listed in paragraph 1. ...’

- 15 Under Article 2 of that regulation, entitled ‘Definitions’:

‘For the purposes of this Regulation, the following definitions shall apply ...:

(1) “Western Waters” means the North Western Waters ([International Council for the Exploration of the Sea (ICES)] subareas 5 (excluding division 5a and only Union waters of division 5b), 6 and 7) and the South Western Waters (ICES subareas 8, 9 and 10 (waters around Azores), and CECAF zon[e] ... 34.1.1 ... (waters around Madeira and the Canary Islands));

(2) “range of F_{MSY} ” means a range of values provided in the best available scientific advice, in particular from ICES ..., where all levels of fishing mortality within that range result in maximum sustainable yield (MSY) in the long term with a given fishing pattern and under current average environmental conditions without significantly affecting the reproduction process for the stock in question. ...

...

(8) “ B_{lim} ” means the spawning stock biomass reference point provided in the best available scientific advice, in particular by ICES or a similar independent scientific body recognised at Union or international level, below which there may be reduced reproductive capacity;

...’

- 16 Article 3 of the said regulation, entitled ‘Objectives’, is worded as follows, in paragraph 1 thereof:
‘The plan shall contribute to the achievement of the objectives of the [CFP] listed in Article 2 of Regulation ... No 1380/2013, in particular by applying the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce MSY.’
- 17 Article 4 of the same regulation, headed ‘Targets’, provides, in paragraph 1 thereof:
‘The target fishing mortality in line with the ranges of F_{MSY} defined in Article 2 shall be achieved as soon as possible, and on a progressive, incremental basis by 2020 for the stocks listed in Article 1(1), and shall be maintained thereafter within the ranges of F_{MSY} , in accordance with this Article.’
- 18 Article 5 of Regulation 2019/472, entitled ‘Management of by-catch stocks’, provides, in paragraphs 1 to 3 thereof:
‘1. Management measures for the stocks referred to in Article 1(4) including, where appropriate, fishing opportunities shall be set taking into account the best available scientific advice and shall be consistent with the objectives laid down in Article 3.
2. The stocks referred to in Article 1(4) shall be managed under the precautionary approach to fisheries management ... when no adequate scientific information is available ...
3. In accordance with Article 9(5) of Regulation ... No 1380/2013, the management of mixed fisheries with regard to stocks referred to in Article 1(4) of this Regulation 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.’
- 19 Article 8 of Regulation 2019/472, entitled ‘Safeguards’, provides, in paragraph 2 thereof, that, where, inter alia, the spawning stock biomass is below the B_{lim} , remedial measures may be taken and, in particular, the targeted fishery for the stock or functional unit concerned may be suspended and fishing opportunities adequately reduced.
- 20 Article 10 of that regulation, entitled ‘Fishing opportunities’, provides, in paragraph 1 thereof:
‘When allocating fishing opportunities available to them in accordance with Article 17 of Regulation ... No 1380/2013, Member States shall take account of the likely catch composition of vessels participating in mixed fisheries.’

Regulation 2020/123

- 21 Recitals 7, 8, 16 to 18 and 26 of Regulation 2020/123 state:
‘(7) There are certain stocks for which ICES has issued scientific advice for no catches. If TACs for those stocks are established at the level indicated in the scientific advice, the obligation to land all catches, including by-catches from those stocks, in mixed fisheries would lead to the phenomenon of ‘choke species’. In order to strike the right balance between continuing fisheries in view of the potentially severe socioeconomic implications, and the need to achieve a good biological status for those stocks, taking into account the difficulty of fishing all stocks in a mixed fishery at [MSY] at the same time, it is appropriate to establish specific

TACs for by-catches for those stocks. The level of those TACs should be such that mortality for those stocks is decreased and that it provides incentives for improvements in selectivity and avoidance. In order to guarantee to the extent possible the use of fishing opportunities in mixed fisheries in accordance with Article 16(2) of Regulation ... No 1380/2013, it is appropriate to establish a pool for quota exchanges for those Member States that have no quota to cover their unavoidable by-catches.

- (8) In order to reduce catches of the stocks for which by-catch TACs are set, fishing opportunities for the fisheries in which fish from those stocks is caught should be set at levels that help the biomass of vulnerable stocks to recover to sustainable levels. Technical and control measures that are intrinsically linked to fishing opportunities should also be established to prevent illegal discarding.

...

- (16) In accordance with Article 8 of the Western Waters multiannual plan, where scientific advice indicates that the spawning stock biomass of any of the stocks referred to in Article 1(1) of that plan is below the B_{lim} , further remedial measures must be taken to ensure rapid return of the stock to levels above the level capable of producing MSY. In particular, those remedial measures may include suspending the targeted fishery for the stock concerned and the adequate reduction of fishing opportunities for those stocks and/or other stocks in the fisheries having by-catches of cod or whiting.

- (17) In its advice, ICES indicated that stocks of cod and whiting in the Celtic Sea are below B_{lim} . Therefore, further remedial measures should be taken for those stocks. ... As regards whiting in the Celtic Sea, those measures should consist of technical modifications to characteristics of gear to decrease by-catches of whiting, which are functionally linked to fishing opportunities for fisheries in which those species are being caught.

- (18) Remedial measures have been taken in 2019 fishing opportunities in respect of the Celtic Sea cod. On that occasion, the TAC for this stock was reserved for by-catches only. However, since the stock is under B_{lim} , further remedial measures should be taken in order to bring the stock above the level capable of producing MSY, in accordance with Article 8(2) of the Western Waters multiannual plan. Such measures would improve selectivity by making the usage of gears that have lower levels of by-catches of cod mandatory in the areas where cod catches are significant, thus decreasing the fishing mortality of this stock in mixed fisheries. The level of the TAC should be established to avoid premature closure of the fishery in early 2020. In addition, the TAC should be such as to avoid potential discarding, which could undermine data collection and scientific assessment of the stock. Establishing the TAC at 805 tonnes would ensure a considerable increase in the stock spawning biomass in 2020 of at least 100%, in order to ensure rapid return of the stock to levels capable of producing MSY ...

...

- (26) ... given that the biomass of the stocks of ... COD/5BE6A; ... WHG/07A and PLE/7HJK is below B_{lim} and that only by-catch and scientific fisheries are permitted in 2020, Member States have undertaken not to apply Article 15(9) of Regulation ... No 1380/2013 for those stocks in 2020 so that catches in 2020 would not exceed the established TACs.'

- 22 Article 5 of Regulation 2020/123, entitled ‘TACs and allocations’, provides, in paragraph 1 thereof:
‘The TACs for Union fishing vessels in Union waters or in certain non-Union waters and the allocation of such TACs among Member States, and the conditions functionally linked thereto, where appropriate, are set out in Annex I.’
- 23 Article 8 of that regulation, entitled ‘Quota-exchange mechanism for TACs for unavoidable by-catches with regard to the landing obligation’, provides, in paragraphs 1 to 3 thereof:
‘1. In order to take into account the introduction of the landing obligation and to make quotas for certain by-catches available to Member States without a quota, the quota-exchange mechanism set out in paragraphs 2–5 of this Article shall apply to the TACs identified in Annex IA.
2. 6% of each quota from the TACs for cod in the Celtic Sea, cod in the West of Scotland, whiting in the Irish Sea and plaice in ICES divisions 7h, 7j and 7k, ... allocated to each Member State, shall be made available for a pool for quota exchanges, which shall open as of 1 January 2020. Member States without quota shall have exclusive access to the quota pool until 31 March 2020.
3. The quantities drawn from the pool may not be exchanged or transferred to the following year. Any unused quantities shall be returned, after 31 March 2020, to those Member States that have initially contributed to the pool for quota exchanges.’
- 24 Article 13 of the said regulation, entitled ‘Remedial measures for cod and whiting in the Celtic Sea’, imposes a number of measures aimed at improving the selectivity of the bottom trawls and seines used in several areas of the Celtic Sea by vessels whose catches consist of at least 20% haddock. Those vessels may not fish in those areas unless they use gear having certain technical characteristics, in particular minimum requirements as regards the mesh size of the trawl, listed in that article. Those rules do not apply, however, to vessels whose by-catches of cod do not exceed 1.5%, as assessed by the Scientific, Technical and Economic Committee for Fisheries (STECF). In addition, Union vessels may deploy an alternative highly selective gear to those listed in that article, the technical attributes of which result, according to a scientific study assessed by the STECF, in catches of less than 1% of cod.
- 25 Annex IA to Regulation 2020/123 sets, for the European Union, the TACs at issue, respectively, at 1 279 tonnes for cod (*Gadus morhua*) in zone 6a and in Union and international waters of zone 5b east of 12°00’ W (COD/5BE6A), at 805 tonnes for the same species in zones 7b, 7c, 7e to 7k and 8 to 10 and in Union waters of CECAF zone 34.1.1 (COD/7XAD34), at 721 tonnes for whiting (*Merlangius merlangus*) in zone 7a (WHG/07A) and at 67 tonnes for plaice (*Pleuronectes platessa*) in zones 7h, 7j and 7k (PLE/7HJK). It is specified in that Annex IA that those TACs relate exclusively to by-catches of cod, whiting and plaice in fisheries for other species and that no directed fisheries for those species are permitted under the quota allocated to each Member State.

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 26 Following the adoption of Regulation 2020/123, the Minister for Agriculture, Food and the Marine issued, inter alia, fisheries management opinions 15 and 16 for April 2020, 19 and 20 for May 2020, and 23 and 24 for June 2020. Those opinions set, for the stocks concerned by the TACs at issue, catch limits above zero, exclusively by way of by-catch.

- 27 By an action brought on 17 June 2020 before the High Court (Ireland), which is the referring court, FIE inter alia requested that court to refer a question to the Court of Justice for a preliminary ruling on the validity of Regulation 2020/123 and to issue an order of *certiorari* for the annulment, in essence, of the abovementioned fisheries management opinions.
- 28 In that action, FIE raises a plea of illegality in respect of Regulation 2020/123, alleging that, by setting the TACs at issue at levels above zero, the Council of the European Union disregarded the advice from ICES recommending, with a view to achieving MSY, zero catches for cod stocks in the West of Scotland and the Celtic Sea, whiting in the Irish Sea and plaice in the Celtic Sea South, to which the said TACs apply. The Council thereby infringed the provisions of Article 2(2) of Regulation No 1380/2013, which provides, in particular, that the MSY exploitation rate is to be achieved at the latest by 2020 for all stocks.
- 29 The defendants in the main proceedings submit, by way of objection, that the said action is moot, since Regulation 2020/123 is no longer in force and has been replaced by regulations setting the TACs for 2021 and 2022. Accordingly, they are of the view that the referring court should neither refer a question for a preliminary ruling nor examine that action.
- 30 As to the substance, those parties submit that Regulation No 1380/2013 must be read in conjunction with Regulation 2019/472 and that it follows that, in order to adopt Regulation 2020/123, the Council had to engage in a complex assessment of an issue involving multiple parameters to be taken into consideration, such as the socioeconomic effects of the measures envisaged and the inherent difficulty of mixed fisheries, relating to the fact that a particular species may be caught by way of by-catch in the context of fishing activities targeting other species.
- 31 In the first place, the referring court considers that it is for it to examine the action brought before it. In that regard, it considers, inter alia, first, that the limited period of validity of Regulation 2020/123 and of the fisheries management opinions at issue would otherwise preclude their being challenged before the Irish courts and, second, that the question which arises in the present case is liable to be raised in future disputes concerning analogous regulations.
- 32 In the second place, the referring court considers that, in the light of the criteria laid down in the judgment of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452), it is required to make a request for a preliminary ruling.
- 33 First of all, it notes that the main question of law which must be decided in the present case is whether the objective referred to in Article 2(2) of Regulation No 1380/2013 constitutes an overarching binding legal imperative that had to be observed by the Council when setting the TACs for 2020 or whether, as the defendants in the main proceedings argue, it is only one of a number of objectives which the Council must take into account along with a great deal of scientific and economic matters.
- 34 Next, the referring court indicates that it shares the view of the defendants in the main proceedings according to which the Council was obliged to have regard, when setting the TACs, to a range of matters with economic impacts, particularly on coastal communities depending on fishing income, such as by-catches in the context of mixed fisheries and the phenomenon of ‘choke species’, as well as the application of the obligation to land to all species caught, including those not targeted by fishing activities.

- 35 However, it considers that the advice furnished by ICES in 2019, recommending a zero-catch level for the stocks referred to in paragraph 28 of the present judgment, in order to ensure that the MSY exploitation rate was produced in 2020, constituted the best scientific advice available at the time when Regulation 2020/123 was adopted.
- 36 Moreover, the referring court considers that Article 2(2) of Regulation No 1380/2013 does not contain any specific rule or derogation for by-catch. It infers from this that that provision obliged the Council, in order to ensure that the MSY exploitation rate was achieved for all stocks at the latest by 2020, to set the TACs in accordance with the ICES advice referred to in the preceding paragraph.
- 37 Furthermore, the referring court is of the opinion that the TACs at issue cannot be justified by the argument based on their minimal effect, since, as is apparent from the evidence produced before it, those TACs represented 62% and 54% of the spawning stock biomass of cod in each of the areas concerned, respectively, and 52% of such biomass as regards whiting.
- 38 Last, it takes the view that the objective of Article 2(2) of Regulation No 1380/2013 is not ‘merely an aspirational objective’ but, on the contrary, a key objective of the CFP, ranking highly. Thus, compliance with that objective is required by the multiannual plans and fishing opportunities referred to in Article 9 and Article 16(4) of that regulation respectively.
- 39 In the light of all those considerations, the referring court has serious doubts as to the validity of Regulation 2020/123.
- 40 It is in those circumstances that the High Court decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) In circumstances where [Regulation 2020/123] has been superseded and/or the national implementing measures have expired, is the within reference necessary to be referred?
- (2) Is Annex IA [to Regulation 2020/123] invalid, having regard to the aims and objectives of [Regulation No 1380/2013], 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 [that 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 [said] regulation and the recitals [thereof,] and Articles 1, 2, 3, 4, 5, 8 and 10 of Regulation [2019/472], in so far as the [TACs] set by [Regulation 2020/123] do not follow zero-catch advice for [MSY] issued by [ICES] for certain species?’

Consideration of the questions referred

Admissibility

- 41 By its first question, the referring court asks, in essence, whether the present request for a preliminary ruling, concerning the validity of Regulation 2020/123, is necessary, when that regulation and the national measures implementing it, at issue in the main proceedings, are no longer applicable. It therefore calls on the Court, in essence, to rule on the admissibility of that request.

- 42 In that regard, the defendants in the main proceedings submit that the said request is inadmissible. In their view, first, having regard to the expiry of the period of application of Regulation 2020/123 and of the fisheries management opinions at issue in the main proceedings, the questions raised by that case are hypothetical, within the meaning of the case-law of the Court. Second, they submit that, in answering those questions, the Court would be assessing the validity of Regulation 2020/123 outside the two-month period provided for in Article 263 TFEU and that it would be without the benefit of the full factual material necessary for its answer, which would have been available to it in an action based on that article.
- 43 It is apparent from settled case-law of the Court that, when a question on the validity of a measure adopted by the institutions of the European Union is raised before a national court or tribunal, it is for that court or tribunal to decide whether a preliminary ruling on the matter is necessary to enable it to give judgment and consequently whether it should ask the Court to rule on that question. Consequently, where the questions referred by the national court or tribunal concern the validity of a provision of EU law, the Court is, as a general rule, obliged to give a ruling (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 49 and the case-law cited).
- 44 Thus, the Court may refuse to give a ruling on a question referred for a preliminary ruling on determination of validity only where, for instance, the requirements concerning the content of a request for a preliminary ruling, set out in Article 94 of the Rules of Procedure of the Court of Justice, are not satisfied or where it is quite obvious that the assessment of the validity of a provision of EU law which is sought by the national court bears no relation to the actual facts of the main action or to its purpose or where the problem is hypothetical (see, to that effect, judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraph 50 and the case-law cited).
- 45 In particular, in the light of the spirit of cooperation which must prevail in the operation of the preliminary reference procedure and in accordance with Article 94(c) of those rules, it is essential that the national court set out in its order for reference the precise reasons which led it to question the validity of certain provisions of EU law and the grounds of invalidity which appear to it capable of being upheld (see, to that effect, judgments of 10 January 2006, *IATA and ELFAA*, C-344/04, EU:C:2006:10, paragraph 31, and of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraphs 24 and 25 and the case-law cited).
- 46 In that regard, as is apparent from the grounds of the request for a preliminary ruling, the referring court considers, in the light of national case-law, that it is for it to examine the action in the main proceedings, notwithstanding the fact that Regulation 2020/123 and the fisheries management opinions being challenged in that action are no longer applicable. In particular, it considers that the temporary nature of those acts makes it impossible to challenge them during their limited period of validity.
- 47 In the first place, it is not for the Court to call into question the referring court's assessment of the admissibility of the action in the main proceedings, which falls, in the context of the preliminary ruling proceedings, within the jurisdiction of the national court. In the present case, the referring court rejected the objections of admissibility raised before it by the defendants in the main proceedings concerning the mootness of the said action, within the meaning of national law. In addition, the fact that the period of application of the fisheries management opinions at issue in the action in the main proceedings has expired does not prevent the Court from ruling on a question referred for a preliminary ruling, provided that such an action is permitted under

national law and that the question meets an objective need for the purpose of settling the dispute properly brought before the referring court (see, to that effect, judgment of 10 December 2018, *Wightman and Others*, C-621/18, EU:C:2018:999, paragraphs 30 and 31 and the case-law cited).

- 48 In the second place, in terms of the expiry of the period of application of the TACs at issue, suffice it to note, first, that the fisheries management opinions being challenged in the action in the main proceedings were adopted on the basis of those TACs, second, that they were in force on the date on which those opinions were adopted and, third, that their invalidity is invoked, incidentally, in support of the said action. It follows that the expiry of the period of application of the said TACs cannot render inadmissible a question relating to their validity, since that question meets an objective need for the purpose of settling the dispute properly brought before the referring court.
- 49 Those considerations cannot be called into question by the line of argument of the defendants in the main proceedings according to which the Court would then be assessing the validity of Regulation 2020/123 outside the two-month period provided for in Article 263 TFEU and without the benefit of the full factual material necessary for its answer, which would have been available to it in an action for annulment.
- 50 It is sufficient to recall that it is inherent in the complete system of legal remedies and procedures established by the FEU Treaty in Articles 263 and 277 thereof, on the one hand, and in Article 267 thereof, on the other, that persons bringing proceedings must, when an action is brought before a national court or tribunal, have the right to challenge the legality of provisions contained in European Union acts on which a decision or national measure adopted in respect of them is based, pleading the invalidity of that decision or measure, in order that the national court or tribunal, having itself no jurisdiction to declare such invalidity, consults the Court on that matter by means of a reference for a preliminary ruling, unless those persons unquestionably had the right to bring an action against those provisions on the basis of Article 263 TFEU and failed to exercise that right within the period prescribed (judgment of 28 March 2017, *Rosneft*, C-72/15, EU:C:2017:236, paragraphs 66 and 67 and the case-law cited). It does not appear that FIE would unquestionably have been entitled to bring an action for annulment under Article 263 TFEU against the TACs at issue, which the defendants in the main proceedings do not dispute.
- 51 In the third place, as paragraphs 35 to 38 of the present judgment illustrate, in the order for reference, the referring court set out, with all due precision, the reasons why it had serious doubts as to the validity of the TACs at issue, on the ground that they did not comply with the ICES advice, recommending a zero-catch level for the stocks mentioned in paragraph 28 of the present judgment. Thus, the referring court has provided the Court with the necessary information on the reasons why it considers the request for a preliminary ruling relevant for the purpose of settling the dispute brought before it.
- 52 In the light of all the foregoing considerations, it must be held that the request for a preliminary ruling is admissible.

The second question

- 53 By its second question, the referring court asks, in essence, whether Annex IA to Regulation 2020/123 is valid, in so far as, for 2020, it set the TACs at issue above the zero-catch level recommended by the ICES advice furnished in 2019 for cod stocks in the West of Scotland and the Celtic Sea, whiting in the Irish Sea and plaice in the Celtic Sea South ('the ICES zero-catch advice'), in the light of the objectives of the CFP, referred to in Article 2(1) and (2) of Regulation

No 1380/2013, in particular that set out in the second subparagraph of Article 2(2) of that regulation, and of the principles of good governance of that policy, in particular those referred to in Article 3(c) and (d) of the said regulation, and taking into account Articles 9, 10, 15 and 16 of the same regulation and Articles 1 to 5, 8 and 10 of Regulation 2019/472.

- 54 As is apparent from paragraphs 35, 36 and 38 of the present judgment, the referring court's doubts as to the validity of the TACs at issue are based essentially on two considerations. On the one hand, it considers that Regulations No 1380/2013 and 2019/472 must be interpreted as meaning that Article 2(2) of Regulation No 1380/2013 placed the Council under a clear and non-derogable obligation to set the TACs at issue in accordance with the best available scientific advice in order to achieve, for all stocks, including those covered by those TACs, the MSY exploitation rate at the latest by 2020. On the other hand, it is of the view that the ICES zero-catch advice constituted, in this case, the best available scientific advice, within the meaning, inter alia, of Article 3(c) of Regulation No 1380/2013.
- 55 Accordingly, it is for the Court to examine, first, to what extent the Council's discretion in determining the TACs at issue was limited by the objective set out in the second subparagraph of Article 2(2) of Regulation No 1380/2013 and by the ICES zero-catch advice and, second, whether the Council did not, in this case, exceed the limits of its discretion.

The limits of the Council's discretion to set the TACs at issue

- 56 As a preliminary point, it should be recalled that, as is apparent from the wording of Article 43(2) TFEU, the European Parliament and the Council are required to adopt, in accordance with the ordinary legislative procedure, inter alia, the 'provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy', whereas, in accordance with Article 43(3) TFEU, the Council, acting on a proposal from the European Commission, is to adopt 'measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities'.
- 57 It should also be borne in mind that, according to the case-law of the Court, measures which entail a policy choice reserved to the EU legislature because the measures are necessary for the pursuit of the objectives of the common policies for agriculture and fisheries must be adopted on the basis of Article 43(2) TFEU, whereas the adoption of measures on the fixing and allocation of fishing opportunities, in accordance with Article 43(3) TFEU, does not require such an assessment since such measures are of a primarily technical nature and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2) TFEU (see, to that effect, judgments of 26 November 2014, *Parliament and Commission v Council*, C-103/12 and C-165/12, EU:C:2014:2400, paragraph 50, and of 1 December 2015, *Parliament and Commission v Council*, C-124/13 and C-125/13, EU:C:2015:790, paragraphs 48 and 50).
- 58 Moreover, according to the same case-law, paragraphs 2 and 3 of Article 43 TFEU pursue different aims and each have a specific field of application, which means that they may be used separately as a basis for adopting particular measures under the CFP, provided that the Council, when it adopts measures on the basis of Article 43(3) TFEU, acts within the limits of its powers and, where relevant, within the legal framework already established by the EU legislature under Article 43(2) TFEU (see, to that effect, judgment of 1 December 2015, *Parliament and Commission v Council*, C-124/13 and C-125/13, EU:C:2015:790, paragraph 58).

- 59 In the case at hand, the relevant legal framework established by the EU legislature comprises, first, Regulation No 1380/2013, which lays down the general framework of the CFP, and, second, Regulation 2019/472, which has established a multiannual plan for the stocks fished in the Western Waters and adjacent waters and for fisheries exploiting those stocks ('the multiannual plan for the Western Waters'). Regarding the field of application of that latter regulation, Article 1(1) and (4) thereof provides that it covers both the stocks listed in that paragraph 1 and by-catches caught in the Western Waters when fishing for the said stocks. As is apparent from the wording of Annex IA to Regulation 2020/123, however, the TACs at issue apply to stocks which are caught exclusively as by-catch and found in fishing zones listed in Article 1(1) of Regulation 2019/472. It was thus for the Council to set those TACs in compliance not only with the provisions of Regulation No 1380/2013, but also with those of Regulation 2019/472.
- 60 So far as concerns, in the first place, Regulation No 1380/2013, it should be noted that the first subparagraph of Article 2(2) thereof lays down the principle according to which the CFP 'shall apply the precautionary approach to fisheries management' and indicates that that policy is to 'aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the [MSY]'.
- 61 Indeed, as recital 6 of that regulation states, the CFP should contribute to the Union's implementation of its obligations under UNCLOS and the UN Fish Stocks Agreement, to which it is a contracting party, in respect of the conservation, management and exploitation of fish stocks.
- 62 In particular, as is apparent from recital 7 of that regulation and as the Advocate General emphasised, in essence, in points 25 and 26 of her Opinion, the adoption of that regulation seeks to act against the 'continued decline of many fish stocks' and to 'improve' the CFP by reorienting it towards the objective of the long-term sustainability of fishing activities, in particular by 'adapting [the] exploitation rates' of those stocks so as to ensure, 'within a reasonable time frame', the achievement of the objective of restoring and maintaining harvested populations above levels that can produce the MSY.
- 63 More specifically, 'in order to achieve [that] objective', the second subparagraph of Article 2(2) of Regulation No 1380/2013 provides that 'the [MSY] exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks'.
- 64 It is apparent from the wording of that provision that, while there is some latitude in setting an exploitation rate to achieve MSY between 2015 and 2020, on the other hand, as is emphasised by the expressions 'at the latest' and 'all stocks', the period for achieving that objective expires, in principle, in 2020, for all of the biological resources that occur in the management areas covered by the CFP, in accordance with the definition of 'stock' in Article 4(14) of that regulation.
- 65 However, first, the said provision must be interpreted in the light of Article 2 of Regulation No 1380/2013 as a whole, which requires, in paragraph 1 thereof, that the CFP 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, and of contributing to the availability of food supplies. The latter objectives include, in Article 2(5)(c) and (f) of that regulation, the objective of providing conditions for economically viable and competitive fishing capture and processing industry and land-based fishing related activity, and that of contributing to a fair standard of living for those who depend on fishing activities, bearing in mind coastal fisheries and socioeconomic aspects.

- 66 Furthermore, it follows also from that Article 2, read as a whole, that the long-term environmental sustainability of fishing activities entails not only the setting of the rates of exploitation of species which can produce the MSY, but also, in accordance with paragraph 3 thereof, the minimisation of the negative impacts of those activities on the marine ecosystem and, in particular, as paragraph 5(a) thereof indicates, the gradual elimination of discards, on a case-by-case basis, taking into account the best available scientific advice, by avoiding and reducing, as far as possible, unwanted catches and by gradually ensuring that catches are landed.
- 67 Second, it is appropriate to note that, under Article 10(1)(b) and (c) of Regulation No 1380/2013, multiannual plans are to contain, in particular, objectives that are consistent with the objectives set out, inter alia, in Article 2 and with the relevant provisions of Article 9 of that regulation, as well as quantifiable targets such as fishing mortality rates.
- 68 In that regard, it should be noted that Article 9(5) of the said regulation provides that the multiannual plans adopted on the basis of Article 9(1) of the same regulation may contain specific conservation objectives and measures based on the ecosystem approach in order to address the specific problems of mixed fisheries in relation to the achievement of the objectives set out in Article 2(2) of Regulation No 1380/2013 for the mixture of stocks covered by the plan in cases where scientific advice indicates that increases in selectivity cannot be achieved.
- 69 That Article 9(5) must be read in the light of recital 8 of that regulation, which states that ‘management decisions relating to [MSY] in mixed fisheries’ must ‘take into account the difficulty of fishing all stocks in [such a] fishery at [MSY] at the same time, in particular where scientific advice indicates that it is very difficult to avoid the phenomenon of “choke species” by increasing the selectivity of the fishing gears used’. The fact that the EU legislature considered it necessary to provide those details, immediately after having set out, in recital 7 of the said regulation, the objective of restoring all stocks to MSY level by 2020 at the latest, underlines its intention not to exclude the possibility of adapting that objective in cases where it could not be achieved simultaneously for all stocks in a mixed fishery.
- 70 As the Advocate General indicates, in essence, in point 8 of her Opinion, in the case of mixed fisheries, within the meaning of Article 4(36) of Regulation No 1380/2013, that is to say, fisheries where different species are likely to be caught together in the same fishing operation, the stocks for which the allocated quota is zero or exhausted most quickly can have a ‘choking’ effect, by obliging fishing vessels to cease operations before the quotas allocated for other species – especially those targeted by those operations – are caught. That phenomenon is exacerbated by the landing obligation, introduced by Article 15 of that regulation, which requires the retention on board, recording and counting against the quotas applicable to the stock concerned of all fish caught and which, in accordance with the time frame laid down in paragraph 1 of that article, is fully applicable from 1 January 2019. Furthermore, as recital 8 of the said regulation emphasises, the phenomenon of ‘choke species’ cannot always be avoided by increasing the selectivity of the fishing gears used.
- 71 It therefore follows from Article 9(5) of Regulation No 1380/2013, read in the light of recital 8 thereof, that the EU legislature intended to provide for the possibility, in the context of multiannual plans, of adapting the objectives set out in Article 2(2) of that regulation, in particular that contained in the second subparagraph of that paragraph, to take account of the difficulty, in the context of mixed fisheries, of achieving an MSY exploitation rate for all stocks exploited at the same time, regard being had to the phenomenon of ‘choke species’, where increasing the selectivity of fishing gears does not enable that phenomenon to be avoided.

- 72 In that regard, in the second place, in the context of Regulation 2019/472, the EU legislature established, in Articles 4 and 5 thereof, a differentiated management regime, first, for target stocks and, second, for by-catch stocks, aimed precisely at taking into account the specific problems of mixed fisheries, in accordance with Article 9(5) of Regulation No 1380/2013.
- 73 On the one hand, Article 4(1) of Regulation 2019/472 sets, for the target stocks, a targeted objective of fishing mortality in line within the ranges of F_{MSY} , within the meaning of Article 2(2) of that regulation, that is to say ranges of values ‘provided in the best available scientific advice, ... where all levels of fishing mortality within [those ranges] result in [MSY] in the long term’, and provides that that objective must be achieved as soon as possible, on a progressive, incremental basis, by 2020. Thus, that targeted objective specifies, as regards the target stocks covered by the multiannual plan for the Western Waters, the objective of achieving the MSY exploitation rate for all stocks, at the latest by 2020, set out in the second subparagraph of Article 2(2) of Regulation No 1380/2013.
- 74 On the other hand, Article 5(1) of Regulation 2019/472 provides that management measures for by-catch stocks including, where appropriate, fishing opportunities are to be set ‘taking into account the best available scientific advice’ and that they are to be consistent with the objectives laid down in Article 3 of that regulation, which reiterate, in general terms, the long-term environmental sustainability objectives set out in Article 2 of Regulation No 1380/2013. In addition, Article 5(3) of Regulation 2019/472 provides that, in accordance with Article 9(5) of Regulation No 1380/2013, the management of mixed fisheries with regard to by-catch stocks is to 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’.
- 75 It must be inferred from this that the maximum period for achieving an MSY exploitation rate, laid down in the second subparagraph of Article 2(2) of Regulation No 1380/2013, applies strictly and without exception to the target stocks listed in Article 1(1) of Regulation 2019/472. However, for the management of by-catch stocks falling within the scope of the latter regulation, and in particular for the setting of fishing opportunities for those stocks, the Council has discretion, regard being had to the difficulties arising from the setting of such exploitation rates for all stocks fished at the same time, especially if that fixing would lead to the premature closure of a fishery as a result of the phenomenon of ‘choke species’ described in paragraph 70 of the present judgment.
- 76 That interpretation of Articles 4 and 5 of Regulation 2019/472 is supported by the general scheme and legislative history of that regulation.
- 77 As far as the general scheme of the said regulation is concerned, it should be noted that that regulation provides for other measures aimed at taking account of the specific problems of mixed fisheries, indicated in paragraph 71 of the present judgment, which are additional to the differentiated management regime for target stocks and for by-catch stocks established by the said Articles 4 and 5. Thus, in particular, first, where the reproductive capacity of that stock is threatened, Article 8(2) of the same regulation provides for the possibility of adopting a remedial measure to suspend the targeted fishery for that stock, together with the adequate reduction of fishing opportunities. In such a scenario, the stock concerned may be caught only as by-catch. Second, Article 10(1) of Regulation 2019/472 lays down, for the Member States, the obligation, when allocating the fishing opportunities made available to them by the Council, to take account of the likely composition of the catches taken by vessels participating in mixed fisheries.

- 78 As for the legislative history of that regulation, in the Explanatory Memorandum to its Proposal for a Regulation of the European Parliament and of the Council establishing a multiannual plan for fish stocks in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulation (EU) 2016/1139 establishing a multiannual plan for the Baltic Sea, and repealing Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) 509/2007 and (EC) 1300/2008 (COM(2018) 149 final), having led to the adoption of Regulation 2019/472, the Commission emphasises, in particular, the risk of ‘under-utilisation of quotas in the Western Waters mixed fisheries’, due to the phenomenon of ‘choke species’ arising in the event of full application of the landing obligation. It is for that reason that it stipulates that, in the context of the multiannual plan for the Western Waters, ‘stocks which determine fishermen’s behaviour and are economically important should be managed in line with ranges of F_{MSY} ’ and that ‘around 95% of landings in the Western Waters in terms of volume will be managed in line with the [MSY]’, ‘the remainder, i.e. stocks that are predominantly caught as by-catch, [having to] be managed according to the precautionary approach’.
- 79 It follows from all the foregoing that, since the TACs at issue apply to stocks which are caught exclusively as by-catch, the Council had discretion to determine whether it was possible to set those TACs at the level capable of producing MSY and therefore whether it was necessary to comply with the ICES zero-catch advice.
- 80 However, it must be borne in mind that, when the Council is setting TACs and allocating fishing opportunities among Member States, it has to evaluate a complex economic situation, for which it has, in principle, broad discretion which is not limited to the nature and scope of the measures to be taken but extends, to some degree, to the finding of the basic facts. In reviewing the exercise of such a power, the Court must confine itself to examining whether there has been a manifest error or misuse of power or whether the authority in question has clearly exceeded the bounds of its discretion (see, to that effect, judgment of 11 January 2017, *Spain v Council*, C-128/15, EU:C:2017:3, paragraph 46 and the case-law cited). It is therefore for the Court to examine whether the Council clearly exceeded the bounds of that discretion.

Whether the Council clearly exceeded the bounds of its discretion

- 81 First, as is expressly stated in recital 7 of Regulation 2020/123, the Council found that, if the TACs at issue were established at the level indicated in the ICES zero-catch advice, the obligation to land all catches, including by-catches from those stocks, in mixed fisheries would lead to the phenomenon of ‘choke species’. That is why, according to the wording of that recital 7, ‘in order to strike the right balance between continuing fisheries in view of the potentially severe socioeconomic implications, and the need to achieve a good biological status for those stocks’, the Council deemed it appropriate, ‘taking into account the difficulty of fishing all stocks in a mixed fishery at [MSY] at the same time’, to establish specific TACs for by-catches for those stocks and to set them at a ‘level ... such that mortality for those stocks is decreased and that it provides incentives for improvements in selectivity and avoidance’.
- 82 That finding is not vitiated by a manifest error of assessment.
- 83 In that regard, it must be noted that the said finding is based on advice of ICES from November 2019, in which that committee assessed the likely level of by-catch taken, in 2020, from stocks for which it had issued zero-catch advice, under the assumption that the TACs for target stocks were in line with the advice that it had issued in respect of those latter stocks. In that advice, however, ICES estimated those likely by-catches at levels significantly above zero, namely 1 279 tonnes for

the cod stock covered by the first TAC at issue, between 1 606 and 1 854 tonnes for the stock of the same species concerned by the second of those TACs, depending on the level of catches of haddock, between 901 and 917 tonnes for whiting, depending on the level of catches of *Nephrops*, and, in the absence of scientific data, approximately 100 tonnes for plaice, having regard to the level of recent landings. It could therefore be inferred from the said advice that the setting of zero TACs for those stocks was likely to lead to the premature closure of the fisheries relating to the target stocks with which those stocks were associated and, consequently, to affect the economic viability of the fishing fleets concerned and the standard of living of the persons dependent on those activities.

- 84 In the second place, as has been noted in paragraph 81 of the present judgment, it is apparent from recital 7 of Regulation 2020/123 that the TACs at issue were set with a view to reconciling the objective of continuing fisheries with that of achieving a good biological status for the stocks concerned. In particular, that recital 7 indicates that the level of those TACs was set such that mortality would be decreased and that it would provide incentives for improvements in selectivity and avoidance.
- 85 In that regard, first, it should be noted that the Council set the TACs at issue either, as regards the TAC for cod in the West of Scotland, at the level of the estimate of by-catches provided by ICES, or, in respect of the other TACs at issue, at a level below that estimate. Those measures were therefore such as to encourage fishing vessels to limit such by-catches when catching target stocks in order to avoid the risk of premature closure of the fisheries concerned.
- 86 Second, the Council relied on the ICES advice from November 2019 in order to establish three of the TACs at issue in such a way as to allow an increase in the biomass of the stocks concerned between approximately 10% and 100%, the TAC for plaice in the Celtic Sea South being based, in the absence of scientific data provided by ICES, on the precautionary approach. Notwithstanding the figures indicated by the referring court and confirmed at the hearing by the Commission and the Council showing the significant share of the biomass of cod and whiting stocks at issue represented by the TACs at issue applicable to those stocks, as is set out in paragraph 37 of the present judgment, it is not apparent from all the information submitted to the Court that the levels at which those TACs were set were manifestly incompatible with the Council's objective, as is apparent from recital 8 of Regulation 2020/123, of helping the biomass of vulnerable stocks to recover to sustainable levels, in accordance with the long-term perspective set out in Article 3(d) of Regulation No 1380/2013. In addition, those levels are based either, in accordance with Article 3(c) of that regulation and Article 5(1) of Regulation 2019/472, on the 'best available scientific advice' – in this case the ICES advice referred to in paragraph 83 above – or on the precautionary approach required, in the absence of such advice, by Article 5(2) of that regulation.
- 87 In the third place, it is apparent from Regulation 2020/123 that several remedial measures were adopted – in addition to the TACs at issue – in order to limit by-catches of the stocks concerned by the ICES zero-catch advice.
- 88 First, in order to take account of the landing obligation, Article 8 of that regulation provides that a quota-exchange mechanism is to apply to the TACs at issue, in order to make a percentage of the catch quotas allocated to certain Member States available to the Member States without quota, to cover the unavoidable by-catches of the latter. As recital 7 of the said regulation states, that mechanism guarantees that the fishing opportunities allocated to Member States will be used in

accordance with Article 16(2) of Regulation No 1380/2013, which provides that those fishing opportunities are no longer intended to reflect landings, but catches, given that discarding of the stock concerned will no longer be allowed.

- 89 Second, as is apparent from recital 8 of Regulation 2020/123, in order to reduce catches of the stocks for which the Council had set by-catch TACs – which include the TACs at issue – the fishing opportunities for mixed fisheries in which those catches are likely to occur were set at levels that helped the biomass of the most vulnerable stocks to recover to sustainable levels. Thus, as the Commission states, in essence, in order to reduce the pressure exerted on cod in the Celtic Sea by fishing that targeted haddock, the TAC for the target stock of haddock in the corresponding areas was set by Annex IA to that regulation at 10 859 tonnes, instead of the 16 671 tonnes recommended by ICES for that stock.
- 90 Third, as recitals 16 to 18 of the said regulation state, in the light of ICES advice assessing the level of cod stocks in the Celtic Sea below B_{lim} , within the meaning of Article 2(8) of Regulation 2019/472, that is to say, the spawning stock biomass reference point below which there may be reduced reproductive capacity, first, targeted fishing for that stock is, in accordance with Article 8(2) of that regulation, suspended and, second, measures imposing specifications of characteristics of the fishing gears used in that area, in order to improve their selectivity with regard to those stocks, are provided for in Article 13 of Regulation 2020/123.
- 91 Fourth, as recital 26 of that regulation states, in order for catches in 2020 not to exceed the established TACs, Member States undertook not to apply – particularly for cod stocks in the West of Scotland, whiting in the Irish Sea and plaice in the Celtic Sea South – the year-to-year flexibility provided for in Article 15(9) of Regulation No 1380/2013, which permits them to allow the landing, up to a limit of 10% of permitted landings, of additional quantities of the stock that is subject to a landing obligation, to be deducted from their future quotas.
- 92 Consequently, the TACs at issue were set, on the basis of the best available scientific advice, at a level which is not manifestly inappropriate for reconciling the objective of continuing mixed fisheries with that of achieving a good biological status for the stocks concerned. In addition, they were accompanied by remedial measures designed to limit the by-catches taken in 2020 from the stocks covered by those TACs and, consequently, the impact of the mixed fisheries at issue on those stocks. It must therefore be held that, in adopting the said TACs, the Council did not manifestly exceed the limits of its discretion, defined by Regulation No 1380/2013, in particular by the second subparagraph of Article 2(2), Article 3(c) and (d) and Article 9(5) of that regulation, and by Article 5 of Regulation 2019/472, in particular paragraph 3 thereof.
- 93 In the light of all the foregoing considerations, it must be concluded that the examination of the second question has disclosed no factor of such a kind as to affect the validity of Annex IA to Regulation 2020/123, in so far as that annex set, for the year 2020, the TACs at issue.

Costs

- 94 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

The examination of the second question referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of 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, in so far as that annex set, for the year 2020, the total allowable catches (TACs) for cod (*Gadus morhua*), first, in zone 6a and in European Union and international waters of zone 5b east of 12°00' W (COD/5BE6A) and, second, in zones 7b, 7c, 7e to 7k and 8 to 10 and in European Union waters of Fishery Committee for the Eastern Central Atlantic (CECAF) zone 34.1.1 (COD/7XAD34), for whiting (*Merlangius merlangus*) in zone 7a (WHG/07A) and for plaice (*Pleuronectes platessa*) in zones 7h, 7j and 7k (PLE/7HJK).

Regan

Csehi

Ilešič

Jarukaitis

Gratsias

Delivered in open court in Luxembourg on 11 January 2024.

A. Calot Escobar
Registrar

E. Regan
President of the Chamber