

JUDGMENT OF THE COURT (Second Chamber)

15 May 2008*

In Case C-442/04,

ACTION for annulment under Article 230 EC, brought on 21 October 2004,

Kingdom of Spain, represented by E. Braquehais Conesa and A. Sampol Pucurull,
acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by J. Monteiro and F. Florindo Gijón,
acting as Agents,

defendant,

* Language of the case: Spanish.

supported by

Commission of the European Communities, represented by T. van Rijn and F. Jimeno Fernández, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of Chamber, J. Makarczyk, P. Kūris (Rapporteur), J.-C. Bonichot and C. Toader, Judges,

Advocate General: Y. Bot,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2008,

gives the following

Judgment

- ¹ In its application, the Kingdom of Spain is seeking annulment of Articles 1 to 6 of Council Regulation (EC) No 1415/2004 of 19 July 2004 fixing the maximum annual fishing effort for certain fishing areas and fisheries (OJ 2004 L 258, p. 1).

Legal context

Regulation (EC) No 1954/2003

- 2 Article 4(1) of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358, p. 59) provides that ‘the Council shall establish Community measures governing access to waters and resources and the sustainable pursuit of fishing activities’. Among such measures, Article 4(2)(f) of that regulation mentions measures limiting ‘fishing effort’, that term meaning, for a fishing vessel, the product of its capacity and its activity and, for a group of vessels, the sum of the fishing effort of all vessels in the group.
- 3 Council Regulation (EC) No 1954/2003 of 4 November 2003 on the management of the fishing effort relating to certain Community fishing areas and resources and modifying Regulation (EC) No 2847/93 and repealing Regulations (EC) No 685/95 and (EC) No 2027/95 (OJ 2003 L 289, p. 1) is one of the measures which, according to Article 1 thereof, establishes the criteria and procedures for a system relating to the management of fishing effort in ICES areas V, VI, VII, VIII, IX and X and CECAF divisions 34.1.1, 34.1.2 and 34.2.0.
- 4 According to the second and fourth recitals in the preamble thereto, Regulation No 1954/2003 is intended, inter alia — following the expiry on 31 December 2002 of the provisions of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985, 302, p. 23, ‘the Act of Accession’) governing access to certain waters and resources — to adapt to the new legal situation certain provisions of Council Regulation (EC) No 685/95 of 27 March 1995 on the management of the fishing effort relating to

certain Community fishing areas and resources (OJ 1995 L 71, p. 5) and Council Regulation (EC) No 2027/95 of 15 June 1995 establishing a system for the management of fishing effort relating to certain Community fishing areas and resources (OJ 1995 L 199, p. 1), as amended by Council Regulation (EC) No 149/1999 of 19 January 1999 (OJ 1999 L 18, p. 3), and to ensure that there is no increase in the overall levels of existing fishing effort in the areas involved.

5 Article 3 of Regulation No 1954/2003, entitled ‘Measures concerning the catching of demersal species and certain molluscs and crustaceans’, provides as follows:

‘1. Except for the area defined in Article 6(1), Member States shall:

(a) assess the levels of fishing effort exerted by vessels equal to or more than 15 metres in length overall, as an annual average of the period 1998 to 2002, in each of the ICES areas and CECAF divisions referred to in Article 1 for demersal fisheries, excluding demersal fisheries, those covered by Council Regulation (EC) No 2347/2002 of 16 December 2002 establishing specific access requirements and associated conditions applicable to fishing for deep-sea stocks and fisheries for scallops, edible crab and spider crab, as laid down in the Annex to this Regulation. For the calculation of fishing effort the fishing capacity of a vessel shall be measured as the installed power expressed in kilowatts (kW);

(b) allocate the level of fishing effort assessed conforming to [point] (a) in each ICES area or CECAF division, with regard to each of the fisheries mentioned in [point] (a).

...’

6 According to Article 4 of Regulation No 1954/2003:

‘1. The fishing effort of fishing vessels equal to or less than 15 metres in length overall shall be assessed globally for each fishery and area or division referred to in Article 3(1) during the period 1998 to 2002.

2. The fishing effort of fishing vessels equal to or less than 10 metres in length overall shall be assessed globally for each fishery and area or division referred to in Article 6(1) during the period 1998 to 2002.

3. Member States shall ensure that the fishing effort of these vessels is limited to the level of fishing effort assessed conforming to paragraphs 1 and 2.’

7 Moreover, Article 6 of Regulation No 1954/2003 establishes a specific effort regime applicable to a biologically sensitive area off the Irish coast in which ‘Member States shall assess the levels of fishing effort exerted by vessels equal to or more than 10 metres in length overall, as an annual average of the period 1998 to 2002, for demersal fisheries, excluding those covered by Regulation (EC) No 2347/2002, and fisheries for scallops, edible crab and spider crab, and allocate the level of fishing effort thus assessed for each of those fisheries.’

8 Finally, Article 11(1) and (2) of Regulation No 1954/2003 provides that, on the basis of the information to be communicated to the Commission by the Member States, the Commission is to submit to the Council a proposal for a Regulation fixing the maximum annual fishing effort for each Member State and for each area and fishery

defined in Articles 3 and 6 and that the Council, acting by qualified majority on the proposal from the Commission, is to decide on that effort. In implementation of that provision, the Council adopted Regulation No 1415/2004.

Regulation No 1415/2004

- 9 Regulation No 1415/2004 is drafted in the following terms:

‘Article 1

Subject matter

This Regulation sets the maximum annual fishing effort for each Member State and for each area and fishery defined in Articles 3 and 6 of Regulation (EC) No 1954/2003.

Article 2

Maximum levels

1. The maximum levels of annual fishing effort by group of species, area and fishery, and by Member State, for the areas referred to in Article 3(1)(a) and (b) of Regulation (EC) No 1954/2003, are set out in Annex I to this Regulation.

2. The maximum levels of annual fishing effort by group of species, area and fishery, and by Member State, for the area referred to in Article 6(1) of Regulation (EC) No 1954/2003, are set out in Annex II to this Regulation.

Article 3

Transiting through an area

1. Each Member State shall ensure that the utilisation of fishing effort allocations by area, as defined in Articles 3 and 6 of Regulation (EC) No 1954/2003, will not result in more time spent fishing by comparison to fishing effort levels exerted during the reference period.

2. Fishing effort established as a result of a vessel transiting through an area where no fishing operation had taken place during the reference period shall not be used for the purpose of carrying out fishing operations in that area. Each Member State shall record such fishing effort separately.

Article 4

Methodology

Each Member State shall ensure that the method used to record fishing effort is the same as the one used in assessing the levels of fishing effort according to Articles 3 and 6 of Regulation (EC) No 1954/2003.

Article 5

Compliance with other fishing effort limitation schemes

The maximum levels of annual fishing effort fixed in Annexes I and II shall be without prejudice to fishing effort limitations fixed under recovery plans or any other management measure under Community law provided that the measure with the lower amount of fishing effort is complied with.

Article 6

Entry into force

This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.'

Procedure and form of order sought

¹⁰ Since the Kingdom of Spain brought an action on 29 January 2004, registered as Case C-36/04, for annulment of Articles 3, 4 and 6 of Regulation No 1954/2003, it was

decided on 2 March 2005 to stay proceedings in the present case until judgment had been delivered in that action.

- 11 By order of the President of the Court of 9 March 2005, the Commission was granted leave to intervene in support of the form of order sought by the Council in the present case.
- 12 By judgment of 30 March 2006 in Case C-36/04 *Spain v Council* [2006] ECR I-2981, the Court dismissed the application for annulment of Articles 3, 4 and 6 — only — of Regulation No 1954/2003, since it considered that those provisions were not severable from the rest of that regulation, with the result that the action was inadmissible.
- 13 Following delivery of that judgment, and the resumption of the proceedings in the present case, the Kingdom of Spain formally raised, in its reply, a plea of illegality in regard to Regulation No 1954/2003, and maintained its claim that the Court should annul Articles 1 to 6 of Regulation No 1415/2004 and order the Council to pay the costs.
- 14 The Council and the Commission contend that the Court should dismiss the action and order the Kingdom of Spain to pay the costs.

Admissibility of the plea of illegality

Arguments of the parties

- 15 The Council contends that the Kingdom of Spain's plea of illegality concerning Regulation No 1954/2003 is inadmissible since, on the one hand, it was raised out of time — that is, in the reply rather than in the application — and, on the other, the

Member State cannot in any event challenge the validity of that regulation after the expiry of the time-limit laid down in the fifth paragraph of Article 230 EC.

16 It argues, first, that Article 42(2) of the Rules of Procedure prohibits the introduction of new pleas in law in the course of proceedings and that the dismissal of the Kingdom of Spain's action in *Spain v Council*, cited above, cannot be regarded as a new fact for the purposes of that provision.

17 The Council points out, secondly, that if a Member State were permitted to challenge the validity of a Community regulation after the expiry of the time-limit laid down in the fifth paragraph of Article 230 EC by raising a plea of illegality each time an institution adopts a measure implementing that regulation, it would be possible to challenge indefinitely Community measures producing legal effects, which would be contrary to the purpose of the time-limits for bringing actions, which is to ensure legal certainty. Although the Kingdom of Spain challenged Regulation No 1954/2003 within those time-limits in *Spain v Council* and the measure is not a decision, application should none the less be made in the present case of the case-law to the effect that the addressee of a decision adopted by a Community institution which has not been challenged by him within the time-limits laid down in the fifth paragraph of Article 230 EC cannot plead the illegality of that decision, which has become definitive as against that person (Case 52/83 *Commission v France* [1983] ECR 3707, paragraph 10; Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraph 13; and Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 29).

18 The Commission, which is intervening in support of the Council and which contends that the action should be dismissed as unfounded, states that Regulation No 1954/2003 is so closely linked to Regulation No 1415/2004, which merely implements it, that the present action is merely an almost literal repetition of the action in *Spain v Council*. The present action has not really been brought against Regulation

No 1415/2004 but against Articles 3, 4 and 6 of Regulation No 1954/2003, since none of the pleas put forward mention Regulation No 1415/2004 specifically or directly. In short, by continuing the present procedure after the delivery of judgment in *Spain v Council*, the Kingdom of Spain is seeking to avoid the consequences of that judgment. Since its application was dismissed in the latter case, the present case is 'without purpose'.

19 In addition, in the Commission's view, the applicant cannot raise a plea of illegality in regard to a measure in respect of which it could have brought an action for annulment. Moreover, that plea, which does not raise a question of public policy, should have been expressly put forward at the stage of the application. It was raised out of time and constitutes the introduction of a new plea in law and an amendment of the initial application, contrary to Article 42 of the Rules of Procedure. For all of those reasons, the Commission considers that the present action should be dismissed without there being any need to examine the substance of the case.

20 The Kingdom of Spain claims that Regulations Nos 1954/2003 and 1415/2004 are directly linked in law and that the judgment in *Spain v Council* constitutes a new matter of fact and of law which came to light in the course of the procedure, with the result that the plea of illegality which it has raised is admissible. It adds that the plea does not undermine the principle of legal certainty or the principle of *res judicata* because it was raised within the time-limits for bringing an action against the basic regulation and the implementing regulation, and the Court did not rule on the substance of the case in its earlier judgment.

Findings of the Court

21 Pursuant to Article 241 EC, '[n]otwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation

adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the [European Central Bank] is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation’.

22 It follows from that article that a Member State may, in the course of legal proceedings, challenge the legality of a regulation against which it has not brought an action for annulment before the expiry of the time-limits laid down in the fifth paragraph of Article 230 EC. It should be pointed out in that regard that since the right of the Member States to bring an action for annulment of a regulation is not limited, the plea of inadmissibility raised by the Council and the Commission — to the effect, essentially, that a Member State may not plead the illegality of a regulation after the expiry of the abovementioned time-limits if it could have sought the annulment thereof within those time-limits — would mean, if accepted, that Member States do not have the right to query, in the course of legal proceedings, the legality of a regulation in order to invoke its inapplicability before the Court. As the Advocate General points out in paragraph 61 of his Opinion, since such an approach would constitute an infringement of the terms of Article 241 EC which gives that right to ‘any party’ (see Case C-11/00 *Commission v ECB* [2003] ECR I-7147, paragraph 76), the plea of inadmissibility must be rejected.

23 As regards the plea of inadmissibility raised by the Council and the Commission contending that the plea of illegality raised by the Kingdom of Spain is out of time, it is common ground that the plea of illegality was formally submitted in the reply, after delivery of the judgment in *Spain v Council* dismissing the applicant’s action challenging Articles 3, 4 and 6 of Regulation No 1954/2003, whereas, to be admissible, such a plea should, in principle, have been raised in the application and, contrary to the Kingdom of Spain’s argument, dismissal of that action cannot be regarded as constituting a matter of fact or of law which came to light in the course of the procedure within the meaning of Article 42(2) of the Rules of Procedure (see, to that effect, Case 11/81 *Dürbeck v Commission* [1982] ECR 1251, paragraph 17).

24 However, in the present case, it is clear from the application that the Kingdom of Spain is seeking annulment of Articles 1 to 6 of Regulation No 1415/2004 — that is to say, all the provisions contained in the regulation — on the sole ground that Regulation No 1415/2004 implements Articles 3, 4 and 6 of Regulation No 1954/2003, the legality of which it challenges on the basis that those articles infringe the principle of non-discrimination and that the Council misused its powers when it adopted Article 6 of the latter regulation. However, although the Kingdom of Spain raised expressly in its reply a plea of illegality in regard to Regulation No 1954/2003 as a whole, it did not introduce in support thereof any pleas in law not already put forward in the application, in regard to which the Council was able to express its position in the defence. It is thus apparent that the plea of illegality was implicitly but clearly contained in the application, with the result that the plea of inadmissibility based on the allegedly late submission of the plea of illegality must also be rejected.

25 It should also be noted that the plea of illegality raised by the Kingdom of Spain in regard to Regulation No 1954/2003 does not infringe the principle of *res judicata*. That principle extends only to matters of fact and of law actually or necessarily settled by the judicial decision in question (Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others v Commission* [2002] ECR I-8375, paragraph 44 and the case-law cited therein). However, in its judgment in *Spain v Council*, the Court did not rule on the legality of Articles 3, 4 and 6 of Regulation No 1954/2003 — covered by the plea of illegality raised in the present case — but rejected the pleas on the basis of which annulment of those articles was sought, on the ground that the pleas were inadmissible.

26 It follows from all the foregoing that the plea of illegality raised by the Kingdom of Spain is admissible and the substance of the submissions put forward in support thereof must be considered; those submissions allege, first, breach of the principle of non-discrimination and, secondly, misuse of powers.

The merits of the plea of illegality

Alleged breach of the principle of non-discrimination

Arguments of the parties

²⁷ Relying on Article 12 EC and Article 34(2) EC, the Kingdom of Spain claims that Articles 3, 4 and 6 of Regulation No 1954/2003, implemented by Regulation No 1415/2004, are discriminatory in regard to the Spanish fleet as compared with that of other Member States since the Council failed to take into account the specific situation of the Spanish fleet under the rules of the Act of Accession. That discrimination is to be found in the reference period used in those articles for the calculation of the fishing effort, and in the delimitation of the biologically sensitive area defined in Article 6(1) of Regulation No 1954/2003.

²⁸ First of all, the reference period, running from 1998 to 2002, corresponds to a period in which — by reason of the transitional arrangements under the Act of Accession, which expired on 31 December 2002 — the Kingdom of Spain was subject to greater restrictions in regard to fishing than the other Member States. Since 1996, after the revision of the transitional arrangements in 1995 pursuant to Regulations Nos 685/95 and 2027/95, only the Spanish fleet was subject to rules which, on the one hand, restricted access to ICES areas V b, VI, VII and VIII a, b, d and e, as provided for in Article 158 of the Act of Accession, and, on the other, limited the number of ships that may be present at any one time in the sensitive area known as the ‘Irish Box’, which is now partially covered by the biologically sensitive area defined in Article 6(1) of Regulation No 1954/2003. Consequently, since the Member States were not in an identical position during the reference period, the use of that period to calculate the fishing effort has the effect of perpetuating the transitional measures and, in consequence, of discriminating on grounds of nationality.

29 Secondly, the establishment of the biologically sensitive area and the procedure for the calculation of the maximum permissible fishing effort in that area discriminate against the Spanish fleet and show an intention to continue to apply measures similar to those applied to the former Irish Box, which were also discriminatory in regard to the Spanish fleet. The reason given in the seventh recital in the preamble to Regulation No 1954/2003 for the delimitation of that area — namely, the existence in the area of a high concentration of juvenile hake — in fact merely serves to justify the continuance of those discriminatory measures.

30 The Council states that the limitation of the fishing effort is a measure intended to limit the number of days on which certain ships fish in particular waters, with a view to conserving fisheries resources and also to make more efficient the catch limitations laid down for certain stocks of fish. It argues that the limitation of the fishing effort on the basis of the effort carried out by each national fleet in each area and for each fishery in the period from 1998 to 2002, as laid down in Regulation No 1954/2003, applies to all Community fishing vessels regardless of nationality, with the result that there is no overt discrimination based on nationality. Although all covert forms of discrimination are also prohibited, the Council argues that account must nevertheless be taken of the case-law to the effect that a measure will not be regarded as discriminatory unless it is arbitrary, that is, devoid of adequate justification and not based on objective criteria (Case 106/81 *Kind v EEC* [1982] ECR 2885, paragraph 22; Case 179/84 *Bozzetti* [1985] ECR 2301, paragraph 34; and Case C-353/92 *Greece v Council* [1994] ECR I-3411, paragraph 25). However, the criterion used in the present case to limit the fishing effort — namely, the effort deployed in a recent earlier period — is fully justified, appropriate and proportionate to the objective sought.

31 In addition, in the Council's view, the applicant does not show that the limitations on the fishing effort laid down in Regulations Nos 685/95 and 2027/95 were more strict than those imposed on the other Member States; nor does it show that, in the absence of those limitations, the effort exerted by the Spanish ships would have been greater than that actually exerted during the period from 1998 to 2002.

32 With regard to the limitation of the fishing effort in the biologically sensitive area defined in Article 6 of Regulation No 1954/2003, the Council states that a specific restriction of the fishing effort in that area is intended to guard against the risk that, by reason of the restrictions applying to large areas such as the ICES areas and CECAF divisions, the fishing effort would be concentrated in specific areas, such as the area at issue, in which there is a high concentration of juvenile hake. That biologically sensitive area is not to be confused with the Irish Box since it covers less than half of it, with the result that even supposing that the limitations imposed on the Kingdom of Spain in the Irish Box by Regulations Nos 685/95 and 2027/95 were more strict than those applied to other Member States and that the Spanish fleet's effort had been higher in the Irish Box in the period from 1998 to 2002, it has not been shown that that has given rise to any negative consequences for the Spanish fleet.

33 The Commission, pointing out that the method fixed by Regulation No 1954/2003 for calculating the fishing effort is identical for all the Member States, contends that the reference period from 1998 to 2002 involved no discrimination against the Spanish fleet. It states that whereas the maximum fishing effort limits had been fixed under the rules introduced in 1995 on the basis of theoretical data, the maximum fishing effort must now be calculated, pursuant to Regulation No 1954/2003, on the basis of an objective criterion, namely the fishing effort actually exerted during a recent, representative period.

34 With regard to the biologically sensitive area, the Commission is of the opinion that the period from 1998 to 2002 can validly serve as a reference period for calculating the fishing effort in that area, which does exactly coincide with the Irish Box, because it reflects the effort effectively deployed by the Spanish fleet and causes it no harm. The Spanish fleet developed an intense fishing activity in certain areas adjacent to the Irish Box which today are part of the biologically sensitive area and the fishing effort thus exerted is taken into account in the fishing effort it can deploy in the whole of that area today. Moreover, the Kingdom of Spain produces nothing to show that the limit in force in the Irish Box has reduced the activity of its fleet or even that the Spanish fishing fleet has reached that limit.

Findings of the Court

- 35 Compliance with the principle of non-discrimination, as laid down in Article 34(2) EC, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 46; Case C-304/01 *Spain v Commission* [2004] ECR I-7655, paragraph 31; and Case C-141/05 *Spain v Council* [2007] ECR I-9485, paragraph 40).
- 36 In the present case, the provisions of Articles 3, 4 and 6 of Regulation No 1954/2003, the illegality of which is pleaded by the Kingdom of Spain, are applicable in an identical manner to all Member States. In particular, the reference period from 1998 to 2002, which serves, pursuant to those provisions, for the assessment and then for the allocation of levels of fishing effort for the fisheries and areas covered by them is the same for the whole European Community. The limitation of the fishing effort, fixed on the basis of the effort actually exerted during that period by each national fleet in those areas and fisheries, thus applies to all Community fishing vessels regardless of nationality. Therefore, the measures contained in those provisions cannot be regarded as discriminating against the Kingdom of Spain unless, on the one hand, that Member State was, as it claims, in a different position from the other Member States when those provisions were adopted and, on the other, it is not objectively justified that the Kingdom of Spain should be subject, in some circumstances, to the same fishing effort management regime as the other Member States.
- 37 It should be noted, as Advocate General Léger pointed out in points 61 and 62 of his Opinion in *Spain v Council*, cited above, to which the Advocate General in the present case refers in point 95 of his Opinion, that the Kingdom of Spain was subject from the time of its accession to the European Union until 31 December 2002 to a number of restrictions relating to access to certain fishing areas and resources and

that, although its situation gradually came into line with that of the other Member States, it retained certain particular features until the end of that period, hence during the 1998-2002 reference period used in the provisions at issue for determining the fishing effort.

38 Articles 156 to 166 of the Act of Accession lay down the arrangements governing access to Community waters and their resources, thereby limiting the fishing opportunities open to Spanish fishing vessels in certain areas of Community waters. Thus, *inter alia*, Article 158 of the Act of Accession, referred to by the Kingdom of Spain in its application, provides for a list to be drawn up of 300 vessels — specified with their technical characteristics in the list of names in Annex IX to the Act of Accession — which may be authorised to fish in ICES areas V b, VI, VII, VIII a, b and d, and lays down the conditions governing the number of ships on that list that may be present in the areas concerned at the same time. Article 158 of the Act of Accession also excludes access to the Irish Box. Article 166 of the Act of Accession provides that the arrangements defined in Articles 156 to 164 thereof are to remain in force until the expiry of the period laid down in Article 8(3) of Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1), that is to say, until 31 December 2002. However, Article 162 of the Act of Accession provides for a procedure for the assessment and adjustment of those arrangements, indicating that the adjustments which proved to be necessary were to take effect on 1 January 1996.

39 The Council thus adopted Regulation (EC) No 1275/94 of 30 May 1994 on adjustments to the arrangements in the fisheries chapters of the Act of Accession of Spain and Portugal (OJ 1994 L 140, p. 1) and Regulations Nos 685/95 and 2027/95, repealed by Regulation No 1954/2003. Article 1 of Regulation No 1275/94 provides, with regard to the Kingdom of Spain, that with effect from 1 January 1996, the arrangements regarding access to waters and resources laid down in Articles 156 to 166 of the Act of Accession are to be adjusted and incorporated — in accordance with the subsequent articles of Regulation No 1275/94 — into the Community measures provided for in Articles 3 and 4 of that Regulation, which are applicable to all Community vessels. Article 3 of Regulation 1275/94 provides that the Council is to adopt, in accordance with Articles 4 and 8 of Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1), the Community measures laying down the conditions of access

to the zones and resources subject to specific rules pursuant to Articles 156 to 166 of the Act of Accession and that such measures must comply with the principle of no increase in fishing effort the level of which is laid down in Articles 158, 160, 164 and 165 of the Act of Accession. Pursuant to Article 3 of Regulation No 1275/94, the Council adopted Regulation No 685/95 which established, with effect from 1 January 1996, the criteria and procedures for the introduction of a system for the management of fishing effort in ICES areas V b, VI, VII, VIII, IX and X and CECAF divisions 34.1.1, 34.1.2, and 34.2.0. That system was introduced by Regulation No 2027/95, which fixed the maximum annual fishing effort for each Member State and for each fishery. With regard to the Irish Box, Article 3(5) of Regulation No 685/95 provides that the Member States concerned are to assess the fishing effort in that area on the basis of the level of existing activity for their respective vessels, except for those flying the flag of Spain, whose number in the area may not exceed 40.

40 Consequently, the Kingdom of Spain found itself, as it claims, in a different situation from the other Member States at the time that Regulation No 1954/2003 was adopted, marked, in particular, by no increase, in the period from 1998 to 2002, in the fishing opportunities as limited by the Act of Accession and by the number of Spanish vessels which could be in the Irish Box at the same time being limited to 40.

41 However, making the Kingdom of Spain subject to the same arrangements for management of the fishing effort as the other Member States, laid down in Regulation No 1954/2003, appears to be objectively justified. On the one hand, those arrangements lay down a method for assessing fishing effort which is based on an objective criterion, namely the fishing effort actually exerted by each Member State in the areas and fisheries concerned during a recent period of five years. On the other hand, the purpose of the arrangements is to conserve fisheries resources in order to ensure, according to the fourth recital in the preamble to Regulation No 1954/2003, that there is no increase in the overall levels of existing fishing effort.

42 It should be noted that the objective of conserving fisheries resources and the principle of relative stability of fishing are paramount in all Community rules in this field, including, from the Act of Accession to the adoption of Regulation No 1954/2003, those intended to integrate the Kingdom of Spain into the general arrangements under the common fisheries policy. Thus, the third recital in the preamble to Regulation No 1275/94 states that ‘the new provisions must make possible the full integration of Spain ... into the general scheme of the common fisheries policy and must fully comply with the “acquis communautaire”, particularly with regard to the principle of relative stability and the exceptions to the principle of free access to waters as laid down by ... Regulation (EEC) No 3760/92’. Regulation No 1275/94 also states, in the fourth and fifth recitals in the preamble, that ‘free access to waters must be accompanied by supervision of the fishing capacity deployed, in order to ensure that the means in question are appropriate to the resources available’ and that ‘these adjustments must not entail an increase in the overall levels of existing fishing effort per ICES and CECAF division nor adversely affect resources subject to quantitative catch restrictions’. Similarly, the third and fourth recitals in the preamble to Regulation No 685/95 state that ‘it is necessary to safeguard existing balances and the *acquis communautaire*, particularly the principle of relative stability’ and that ‘it is necessary to ensure that there is no increase in the overall levels of existing fishing effort within the areas and stocks covered by the Act of Accession’.

43 In addition, with regard to the biologically sensitive area subject to specific fishing effort management rules under Article 6 of Regulation No 1954/2003, it is clear from the file, first of all, that the overlap between that area and the Irish Box is limited, since less than half the box is covered. It cannot therefore be claimed that the establishment of the biologically sensitive area and the procedure for the calculation of the maximum annual fishing effort in the area show an intention to continue to apply measures similar to those applied in the Irish Box. Also, it follows from the seventh recital in the preamble to Regulation No 1954/2003, and Article 6 thereof, that the specific restriction of the fishing effort provided for in that article is also intended to conserve fisheries resources in an area in which there is a high concentration of juvenile hake and that the method used to assess the level of the fishing effort is based on an objective criterion, namely, the fishing effort exerted by vessels equal to or more than 10 metres in length overall, as an annual average of the period 1998 to 2002, for demersal fisheries.

44 It follows that, notwithstanding the fact that the Kingdom of Spain found itself in a different situation from the other Member States at the time that Regulation No 1954/2003 was adopted, Articles 3, 4 and 6 of that regulation cannot be regarded as constituting a breach of the principle of non-discrimination in regard to the Kingdom of Spain.

45 In those circumstances, the present submission must be rejected as unfounded.

Alleged misuse of powers

Arguments of the parties

46 The Kingdom of Spain claims that the real purpose of the establishment of the biologically sensitive area under Article 6 of Regulation No 1954/2003 was not to protect juvenile hake but to maintain the discrimination against the Spanish fleet in that area. On the basis of a study submitted by the Spanish delegation in May 2003, it claims that there were other areas with similar biological characteristics and that the adoption of measures of this kind for the protection of juvenile hake is governed by Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms (OJ 1998 L 125, p. 1). By adopting Article 6 of Regulation No 1954/2003, the Council thus misused its powers.

47 The Council contends essentially that that submission is ineffective, since Regulation No 1415/2004, which is the subject of the present action, contains only measures implementing Regulation No 1954/2003 and was adopted under the procedure provided for therein, with the result that no procedure has been evaded.

48 The Commission points out that the fact that there might be other biologically sensitive areas or that other measures could be envisaged does not establish the existence of a misuse of powers.

Findings of the Court

49 As the Court has held time and again, a measure is only vitiated by misuse of powers if it appears, on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see Case C-331/88 *FEDESA and Others* [1990] ECR I-4023, paragraph 24, and Case C-110/97 *Netherlands v Council* [2001] ECR I-8763, paragraph 137).

50 However, in the present case, the Kingdom of Spain has not shown that the specific fishing effort management arrangements laid down in Article 6 of Regulation No 1954/2003 for the biologically sensitive area at issue were adopted with the exclusive or main purpose of achieving an end other than the protection of juvenile hake. Moreover, as the Commission contends and as the Advocate General points out in paragraph 102 of his Opinion, neither the fact that technical measures for the protection of juveniles of marine organisms may also fall within another regulation nor the fact that there may be other biologically sensitive areas shows that there has been a misuse of powers on the part of the Council in the adoption of Article 6 of Regulation No 1954/2003.

51 This submission must therefore be rejected as unfounded.

52 It follows from all the foregoing that the plea of illegality raised by the Kingdom of Spain in regard to Regulation No 1954/2003 in support of its action must be rejected and since no other plea in law has been put forward concerning the legality of Regulation No 1415/2004, the present action must be dismissed.

Costs

53 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of those Rules, the Commission must bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

- 1. Dismisses the action;**

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

- 3. Orders the Commission of the European Communities to bear its own costs.**

[Signatures]