



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

10 March 2020*

(Fisheries — Conservation of marine biological resources — Regulation (EU) 2018/120 — Measures concerning the fishing for European seabass (*Dicentrarchus labrax*) — Action for annulment brought by an association — Article 263 TFEU — Regulatory act not entailing implementing measures — Direct concern of the members of the association — Admissibility — Competence of the European Union to regulate recreational fisheries — Legal certainty — Protection of legitimate expectations — Equal treatment — Principle of non-discrimination — Proportionality — Precautionary principle — Freedom of association and freedom to conduct a business)

In Case T-251/18,

International Forum for Sustainable Underwater Activities (IFSUA), established in Barcelona (Spain), represented by T. Gui Mori and R. Agut Jubert, lawyers,

applicant,

v

Council of the European Union, represented by F. Naert and P. Plaza García, acting as Agents,

defendant,

supported by

European Commission, represented by M. Morales Puerta, F. Moro and A. Stobiecka-Kuik, acting as Agents,

intervener,

ACTION under Article 263 TFEU for annulment in part of Council Regulation (EU) 2018/120 of 23 January 2018 fixing for 2018 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, and amending Regulation (EU) 2017/127 (OJ 2018 L 27, p. 1),

THE GENERAL COURT (First Chamber),

composed of V. Valančius, acting as President, P. Nihoul (Rapporteur) and J. Svenningsen, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 16 October 2019,

* Language of the case: Spanish.

gives the following

Judgment

Background to the dispute

- 1 The applicant, the International Forum for Sustainable Underwater Activities (IFSUA), is a non-profit association governed by Spanish law which brings together some 30 entities from various Member States of the European Union. Those entities consist of federations, associations and sports clubs, which are active in the field of underwater activities and recreational sea fishing, and of undertakings which manufacture or sell underwater fishing equipment.
- 2 The applicant's mission is to protect the interests of its members in the practice of underwater activities in the marine environment. It also aims to influence, through the knowledge and experience of its members, national and international regulations on the sustainable use of the marine environment. In addition, it is a permanent member of the Working Group on Recreational Fisheries Surveys within the International Council for the Exploration of the Sea (ICES). ICES is a scientific and technical body which conducts assessments relating to fish species, groups of species and fisheries. It issues opinions based mainly on biological criteria, and makes recommendations concerning catch levels or attendant technical measures.
- 3 On the basis of Article 43(3) TFEU and in accordance with the arrangements laid down in Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC (OJ 2013 L 354, p. 22, 'the CFP Regulation'), the Council of the European Union fixes and allocates fishing opportunities annually.
- 4 On 23 January 2018, the Council adopted Regulation (EU) 2018/120 fixing for 2018 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, and amending Regulation (EU) 2017/127 (OJ 2018 L 27, p. 1, 'the contested regulation').
- 5 Article 2(2) of the contested regulation, which concerns the scope of that regulation, provides that it is to apply to recreational fisheries where they are expressly referred to in its provisions.
- 6 Article 3(b) of the contested regulation defines recreational fisheries as 'non-commercial fishing activities exploiting marine biological resources such as for recreation, tourism or sport'.
- 7 Article 9(1) to (3) of the contested regulation lays down the measures applicable to commercial fishing for European seabass.
- 8 Article 9(4) and (5) of the contested regulation regulates recreational fishing for European seabass in two areas.
- 9 To the north, the first area referred to in paragraph 8 above comprises the statistical areas identified and defined by the ICES ('ICES divisions') as ICES divisions 4b, 4c and 7a to 7k, which correspond to the central and southern North Sea, the Irish Sea, the west of Ireland, the Porcupine Bank, the English Channel, the Bristol Channel, the Celtic Sea and the south-west of Ireland ('the first area').

- 10 Under Article 9(4) of the contested regulation, in the first area, only catch-and-release fishing for European seabass is allowed in recreational fisheries. Accordingly, recreational fishermen are prohibited from retaining on board, relocating, transshipping or landing European seabass caught in that area.
- 11 To the west, the second area referred to in paragraph 8 above covers ICES divisions 8a and 8b, which correspond to a part of the Bay of Biscay ('the second area').
- 12 In the second area, recreational fishermen are permitted to retain European seabass, but the number of specimens is limited to three per day per fisherman, in accordance with Article 9(5) of the contested regulation.

Procedure and forms of order sought

- 13 By an application lodged at the Court Registry on 23 April 2018, the applicant brought the present action.
- 14 By a separate document lodged on 7 June 2018, the applicant made an application for interim measures seeking to suspend the operation of Article 2(2) and Article 9(4) and (5) of the contested regulation. By order of 20 August 2018, *IFSUA v Council* (T-251/18 R, not published, EU:T:2018:516), the President of the General Court dismissed the application for interim measures and ordered that the costs be reserved.
- 15 By a document lodged at the Court Registry on 10 August 2018, the European Commission applied for leave to intervene in support of the form of order sought by the Council. By decision of 17 September 2018, the President of the First Chamber of the General Court granted leave to intervene. The intervener lodged its statement in intervention and the main parties lodged their observations on that statement within the period prescribed.
- 16 By a measure of organisation of procedure, on the basis of Article 89(3) of its Rules of Procedure, the Court put written questions to the applicant and invited the other parties to submit their observations on the applicant's replies.
- 17 The parties presented oral argument at the hearing on 16 October 2019.
- 18 The applicant claims that the Court should:
- annul Article 2(2) and Article 9(4) and (5) of the contested regulation;
 - annul the recitals of that regulation which relate to those provisions.
- 19 In its observations on the statement in intervention, the applicant withdrew its challenge to Article 2(2) of the contested regulation.
- 20 At the hearing, the applicant stated that the action was not directed against the recitals of the contested regulation, contrary to what was stated in the second paragraph of the first page of the application, formal note of which was recorded in the minutes of the hearing.
- 21 The Council contends that the Court should:
- dismiss the action as inadmissible in part and, as to the remainder, as unfounded;
 - order the applicant to pay the costs.

- 22 The Commission contends that the Court should:
- dismiss the action as inadmissible or as unfounded;
 - order the applicant to pay the costs.

Law

- 23 At the outset, it should be noted that, during the proceedings before the Court, the applicant withdrew its claims in so far as they were directed, first, against Article 2(2) of the contested regulation and, second, against the recitals of the contested regulation which relate to Article 2(2) and Article 9(4) and (5) thereof, with the result that there is no need to rule on those heads of claim.

Admissibility

Severability of the contested provisions

- 24 The Commission takes the view that the action is inadmissible in that it seeks the annulment in part of the contested regulation. The Commission submits that, contrary to the requirements of the case-law, Article 9(4) and (5) of the contested regulation, whose annulment the applicant seeks ('the contested provisions'), cannot be severed from the remainder of the contested regulation.
- 25 In that regard, even though, in its capacity as intervener, the Commission cannot raise a plea of inadmissibility on its own initiative, pursuant to Article 142(3) of the Rules of Procedure (see, to that effect, judgment of 20 June 2019, *a&o hostel and hotel Berlin v Commission*, T-578/17, not published, EU:T:2019:437, paragraph 36), the Court must, in any event, examine the question at issue, since the admissibility of the action is a matter of public policy (see, to that effect, order of 25 January 2017, *Internacional de Productos Metálicos v Commission*, T-217/16, not published, EU:T:2017:37, paragraph 24, and judgment of 20 June 2019, *a&o hostel and hotel Berlin v Commission*, T-578/17, not published, EU:T:2019:437, paragraph 36).
- 26 In that regard, it should be noted that annulment in part of an act of EU law can be ordered by the EU judiciary only if the elements whose annulment is sought may be severed from the remainder of the act. That is not the case where the annulment in part of an EU act would have the effect of altering its substance (see judgment of 27 June 2006, *Parliament v Council*, C-540/03, EU:C:2006:429, paragraphs 27 and 28 and the case-law cited).
- 27 In the present case, the contested provisions relate to a specific subject matter, namely recreational fishing for European seabass in specified areas, and differ in that respect from the other provisions of the contested regulation, in particular, those contained in Article 9(1) to (3) of the regulation, which relate to commercial fishing for European seabass, even though the latter provisions cover the same geographical areas.
- 28 In other words, the annulment of the contested provisions, as sought by the applicant, would, if the Court were to grant that application, have no effect on the substance of the other provisions of the contested regulation not covered by the application, in particular Article 9(1) to (3) of the regulation, since the restrictions imposed on commercial fishing for European seabass, which are at issue in those latter provisions, would not be affected.
- 29 Accordingly, it should be held that the contested provisions are severable from the other provisions of the contested regulation and that the application for annulment in part of the regulation is admissible.

Locus standi

- 30 According to the Council and the Commission, the action must be dismissed as inadmissible because the applicant does not meet the conditions laid down in the fourth paragraph of Article 263 TFEU for the institution of proceedings by a natural or legal person.
- 31 At the outset, it should be noted that, under the fourth paragraph of Article 263 TFEU, ‘any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures’.
- 32 The applicant submits that its position corresponds to that described in the last scenario in the fourth paragraph of Article 263 TFEU since, according to the applicant, the contested provisions are regulatory in nature, do not entail implementing measures and directly affect its members.
- 33 In that regard, in the first place, as all of the parties to the dispute have acknowledged, the contested provisions are regulatory in nature within the meaning of the last limb of the fourth paragraph of Article 263 TFEU.
- 34 The concept of ‘regulatory act’ within the meaning of that provision covers any act of general application other than legislative acts (judgment of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraphs 60 and 61).
- 35 First, the contested provisions are of general application in that they apply to objectively determined situations and have legal effects for categories of persons envisaged generally and in the abstract.
- 36 Second, the contested provisions are not legislative in nature since, like the contested regulation in which they are contained, they are based on Article 43(3) TFEU and were adopted by the Council on a proposal from the Commission, without the involvement of the European Parliament, in accordance with a procedure which is not a legislative procedure (order of 10 February 2017, *Acerga v Council*, T-153/16, not published, EU:T:2017:73, paragraph 33).
- 37 In the second place, as the parties to the dispute agree, the contested provisions themselves lay down the restrictions applicable to recreational fishing for European seabass in the two areas at issue and thus take effect, in particular with regard to recreational fishermen, without the need for implementing measures either at EU level or at the level of the Member States.
- 38 In the third place, the contested provisions directly affect certain members of the applicant, namely (i) the Fédération nautique de pêche sportive en apnée (Maritime Federation of Recreational Freediving Fishing, ‘the FNPSA’), (ii) the Fédération de la chasse sous-marine passion (Federation of Recreational Spearfishing, ‘the FCSMP’) and (iii) Emerald Water Normandie Spearfishing.
- 39 The FNPSA is a non-profit association established in Pau (Pyrénées-Atlantiques, France) which has as its object, as stated in its statutes, the promotion, organisation and development of recreational freediving fishing, and observation, knowledge, protection and restoration of the marine environment. The members of that association are entities and natural persons holding a licence which entitles them to engage in recreational freediving fishing. The FNPSA thus includes among its members people who are engaged in underwater fishing.

- 40 The FCSMP is also a non-profit association, which is established in Ollioules (Var, France) and brings together underwater fishermen, as stated in its statutes. It aims in particular to protect the continued existence of recreational spearfishing as cultural and sporting heritage, freedom of access and practice for the greatest possible number of people, especially young people, and equal treatment with other types of fishing.
- 41 Emerald Water Normandie Spearfishing is an association whose aim is to promote spearfishing on a local, regional or even national level, in the form of information campaigns through all types of media and of the organisation of competitions and events, and through any other lawful means that may be made available. It is established in Le Havre (Seine-Maritime, France) and its active members are persons aged 16 and over who have provided a medical certificate attesting to their capacity to engage in freediving and spearfishing.
- 42 The Commission maintains that the fishermen who are members of those three associations are not active in the geographical areas covered by the contested provisions, which, in its view, should lead to the action being inadmissible.
- 43 In that regard, it should be noted that, as stated in paragraphs 8 to 11 above, the contested provisions concern recreational fishing for European seabass in two specific geographical areas, namely, the first area and the second area.
- 44 In the present case, the applicant provided, for the three associations concerned, a certificate signed by their president certifying that their members were active in the first area, where they engaged in underwater fishing. That information was not challenged by the Council. In those circumstances, it can be held, after examining the documents provided by those associations, that the admissibility requirement is met in their regard in relation to the provisions which apply to that area.
- 45 Furthermore, in its replies to the Court's written questions, the applicant stated that one of its associations, the FNPSA, had organised, in the second area, the 2018 French Underwater Fishing Championship, with the result that, in its view, the admissibility requirement is also met for that area.
- 46 In the same regard, at the hearing, the applicant produced a statement from the President of the FNPSA indicating that, in accordance with the contested provisions, the catch of European seabass in the second area had been limited during the 2018 championship to three specimens.
- 47 In the statement in question, the President of the FNPSA also explains that the entry into force of the contested provisions has led to a reduction in the number of entries for competitions organised by that association, particularly in the second area.
- 48 The Council and the Commission maintain that the statement in question cannot be taken into account because it was produced too late.
- 49 In that regard, it should be noted that the effect of the contested provisions on the number of entries for competitions organised by the FNPSA was felt gradually after the contested provisions entered into force, which explains why the applicant could not see the trend prior to the hearing and, consequently, why it could only be brought to the Court's attention during the proceedings.
- 50 For those reasons, the statement in question, produced by the applicant at the hearing, must be declared admissible under Article 85(3) of the Rules of Procedure, which governs the production of new documents before the Court.

- 51 In the light of those factors, the Court finds, first, that the three entities whose circumstances have been examined above have members who are engaged in recreational fishing or who organise fishing competitions in the areas covered by the contested provisions and, second, that the legal position of the entities and fishermen concerned has been directly affected by those provisions, since they have been faced, in exercising their activities, with the restrictions laid down therein.
- 52 In that regard, it should be noted that associations may bring an action before the EU judicature, inter alia, where they have members who meet in their own right the admissibility requirements laid down in Article 263 TFEU (see, to that effect, judgment of 15 September 2016, *Molinos Río de la Plata and Others v Council*, T-112/14 to T-116/14 and T-119/14, not published, EU:T:2016:509, paragraph 33 and the case-law cited).
- 53 Consequently, the contested provisions are of direct concern to the applicant, which brings together entities including within them fishermen who are affected by those provisions.
- 54 In the light of the foregoing considerations, the action must be declared admissible.

Substance

- 55 In support of its action, the applicant raises four pleas in law, alleging, respectively:
- that the European Union lacked competence to act in the field of recreational fisheries through the contested provisions;
 - infringement of the principles of legal certainty and the protection of legitimate expectations;
 - infringement of the principles of equal treatment and non-discrimination;
 - infringement of the principle of proportionality and of the freedom of association and the freedom to conduct a business.
- 56 The third and fourth pleas refer exclusively to Article 9(4) of the contested regulation.

The first plea: the European Union lacked competence

- 57 The applicant submits that the European Union was not competent to regulate recreational fishing for European seabass as it has done in the contested provisions.
- 58 The Council, supported by the Commission, disputes the applicant's arguments.
- 59 In that regard, it should be noted that, as is apparent from its preamble, the contested regulation was adopted on the basis of Article 43(3) TFEU, in Title III of Part Three of the FEU Treaty on agriculture and fisheries, which provides that 'the Council, on a proposal from the Commission, shall adopt measures on ... the fixing and allocation of fishing opportunities'.
- 60 As set out in Article 4(2)(d) TFEU, the competences conferred on the European Union in the area of agriculture and fisheries are shared.

- 61 However, the shared nature of the competences conferred on the European Union in the area of agriculture and fisheries is limited in Article 4(2)(d) TFEU, since measures adopted under that policy are no longer a shared competence but are an exclusive competence when they concern the conservation of marine biological resources, an area in which, under Article 3(1)(d) TFEU, the European Union has exclusive competence.
- 62 It was in order to achieve the objective of conserving marine biological resources that the contested provisions — as measures on the fixing and allocation of fishing opportunities within the meaning of Article 43(3) TFEU — were adopted.
- 63 As stated in recital 1 of the contested regulation, that regulation was adopted in order to fix for 2018 the fishing opportunities for certain fish stocks or groups of fish stocks in Union waters.
- 64 In that context, and as is apparent from recitals 7 and 8 of the contested regulation, the Council sought to reduce the mortality of European seabass after having received from ICES, first, alarming data on how the stock of that fish had evolved and, second, recommendations encouraging it to adopt conservation measures.
- 65 In those circumstances, it must be held that, in adopting the contested provisions as measures on the fixing and allocation of fishing opportunities within the meaning of Article 43(3) TFEU, the EU legislature acted within the area of exclusive competence conferred on it by Article 3(1)(d) TFEU.
- 66 That assessment cannot be called into question by the applicant's arguments.
- 67 In the first place, the applicant submits that the competence conferred on the European Union in the field of fisheries and agriculture is limited to commercial activities and does not extend to recreational fishing with the consequence, according to the applicant, that it was not possible to adopt the contested provisions under that policy.
- 68 As set out in Article 43(3) TFEU, the Council, on a proposal from the Commission, is to adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.
- 69 Thus, Article 43(3) TFEU does not distinguish between fishing activities depending on whether or not they are commercial; only the activity itself, that is to say, the activity of taking fish from available resources, is considered.
- 70 In the present case, the content of the contested provisions reveals that they were adopted in accordance with the last limb of Article 43(3) TFEU, which allows the Council, on a proposal from the Commission, to fix fishing opportunities.
- 71 The purpose of Article 43(3) TFEU is, first, to allocate the opportunities among fishermen but also, second, to manage the available stocks so as to ensure the sustainability of this activity.
- 72 Consequently, in order to ensure the attainment of the objective pursued by Article 43(3) TFEU, it was permissible, appropriate and even necessary for the Council, when it adopted the contested provisions, to take into account all activities which may have an impact on the stock status of European seabass and the replenishment of that stock, irrespective of whether or not those activities are commercial.
- 73 In the second place, the applicant takes the view that recreational fishing cannot be regulated under the agricultural and fisheries policy because that activity falls under sport and tourism, for which the European Union's competence is limited to the coordination of the actions of the Member States, in accordance with Article 6(d) and (e) TFEU.

- 74 In support of this, the applicant cites recital 3 of the CFP Regulation which, in the applicant's view, confers on the Member States the competence to regulate recreational fisheries.
- 75 In that regard, it should be noted that recital 3 of the CFP Regulation cited by the applicant does not have the scope which the applicant ascribes to it.
- 76 Recital 3 of the CFP Regulation consists of two clauses stating that 'recreational fisheries can have a significant impact on fish resources' and that 'Member States should, therefore, ensure that they are conducted in a manner that is compatible with the objectives of the [common fisheries policy]'.
- 77 Thus, the first clause of recital 3 of the CFP Regulation emphasises the impact which recreational fisheries may have on fish stocks and, thus, the importance of action which seeks to ensure the conservation of biological resources such as that implemented by the contested provisions in the present action.
- 78 The second clause of recital 3 of the CFP Regulation requires Member States to exercise a certain vigilance to ensure that fishing activities are carried out in a manner that is compatible with the common fisheries policy.
- 79 Such a requirement corresponds, in a general way, to the competence afforded to national authorities in the implementation of EU law and cannot be interpreted as affording Member States a specific legislative competence in relation to recreational fisheries.
- 80 On the contrary, by emphasising the importance of ensuring compliance with the objectives of the common fisheries policy, recital 3 of the CFP Regulation presupposes that measures have been taken to define those objectives, which, pursuant to Article 43(3) TFEU, entails action by the European Union institutions with each institution acting within the powers conferred on it by the Treaties.
- 81 Thus, recital 3 of the CFP Regulation relied on by the applicant, far from supporting the view that the Member States are competent to regulate recreational fishing for European seabass, tends rather to reinforce the view taken by the Council and the Commission, according to whom measures must be taken to ensure the conservation of marine biological resources, where Article 3(1)(d) and Article 43(3) TFEU constitute the legal basis for those measures.
- 82 In the third place, the applicant submits that, in so far as the contested provisions determine how recreational fishing for European seabass may be carried out, they amount to harmonisation reflecting the Council's intention to regulate a given economic sector.
- 83 According to the applicant, such action is contrary to the TFEU, as the Court of Justice held in the case which gave rise to the judgment of 5 October 2000, *Germany v Parliament and Council* (C-376/98, EU:C:2000:544), in which a directive harmonising national measures applicable to various activities concerning tobacco was annulled on the ground that the EU legislature had exceeded its competence.
- 84 In order to reject that argument, it is sufficient to point out that, in the judgment of 5 October 2000, *Germany v Parliament and Council* (C-376/98, EU:C:2000:544), the Court of Justice annulled the directive the legality of which was disputed on the basis, in essence, that an express exclusion of all harmonisation in the area at issue had been circumvented, whereas, in the present case, there is no such exclusion and, in any event, it is apparent from paragraphs 57 to 65 of the present judgment that the contested regulation was adopted on an express and appropriate legal basis.
- 85 Accordingly, the first plea must be rejected as unfounded.

The second plea: infringement of the principles of legal certainty and the protection of legitimate expectations

- 86 The applicant submits that, by restricting recreational fishing for European seabass, the EU legislature radically and unpredictably changed the rules which applied to recreational fisheries and undermined, first, legal certainty and, second, the legitimate expectation which it had created by its earlier actions.
- 87 The Council, supported by the Commission, disputes the applicant's arguments.
- 88 In that regard, it should be recalled that, according to settled case-law, the principle of legal certainty requires, first, that rules of law must be clear and precise and, second, that their application must be foreseeable by those subject to them (see, to that effect, judgment of 11 September 2019, *Călin*, C-676/17, EU:C:2019:700, paragraph 50 and the case-law cited).
- 89 Case-law makes clear that the corollary of the principle of legal certainty is an obligation on the EU authorities to protect legitimate expectations where they have caused an applicant to entertain expectations (see, to that effect, judgment of 29 November 2016, *T & L Sugars and Sidul Açúcares v Commission*, T-103/12, not published, EU:T:2016:682, paragraph 150).
- 90 However, according to case-law, it is not possible to have a legitimate expectation that an existing situation will be maintained where that situation falls within an area in which it is capable of being altered (see, to that effect, judgment of 18 June 2014, *Spain v Commission*, T-260/11, EU:T:2014:555, paragraph 87).
- 91 The possibility of amending the rules on fishing operations is inherent in the common fisheries policy, which is an area where discretion is conferred on the EU institutions so as to permit them to adjust the measures in force in order to meet changes in economic circumstances (see, to that effect, judgment of 18 June 2014, *Spain v Commission*, T-260/11, EU:T:2014:555, paragraph 87) or, in any event, in the stock of the fish concerned (see, to that effect, judgments of 30 April 2019, *Italy v Council (Fishing quota for Mediterranean swordfish)*, C-611/17, EU:C:2019:332, paragraphs 30 and 58 to 61, and of 11 January 2017, *Spain v Council*, C-128/15, EU:C:2017:3, paragraphs 50 to 52).
- 92 As is clear inter alia from paragraph 64 above, the EU legislature was faced, in the present instance, with a situation in which, first, the stock of European seabass was a cause for concern, second, recreational fishing was contributing to the mortality of that fish and, third, the precautionary principle required, according to ICES, that, in the first area, catches of that fish through recreational fishing be prohibited and, in the second area, that they be substantially reduced.
- 93 In those circumstances, it was legitimate for the EU legislature to have recourse to the competence conferred on it by Article 3(1)(d) TFEU in adopting provisions on the basis of Article 43(3) TFEU, particularly since, according to case-law, legitimate expectations cannot be relied on where, as is the case under the common fisheries policy, the possibility that the contested measures may be taken is envisaged by a provision of EU law (see, to that effect, judgment of 17 March 2011, *AJD Tuna*, C-221/09, EU:C:2011:153, paragraph 75).
- 94 That assessment cannot be called into question by the applicant's arguments.
- 95 In the first place, the applicant submits that the measures adopted previously to ensure the conservation of marine biological resources did not regulate recreational fishing, which led it to take the view that that type of activity was outside the competence which the Council now seeks to exercise.

- 96 In that regard, it should be noted that the contested provisions are in keeping with the previous regulatory framework since similar measures limiting the number of specimens of European seabass which may be retained for recreational fishing were adopted as early as 2015 with Council Regulation (EU) 2015/523 of 25 March 2015 amending Regulations (EU) No 43/2014 and (EU) 2015/104 as regards certain fishing opportunities (OJ 2015 L 84, p. 1).
- 97 The same type of measure was adopted in 2016 with Council Regulation (EU) 2016/72 of 22 January 2016 fixing for 2016 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 and amending Regulation (EU) 2015/104 (OJ 2016 L 22, p. 1), and in 2017 with Council Regulation (EU) 2017/127 of 20 January 2017 fixing for 2017 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 2017 L 24, p. 1).
- 98 It must therefore be held that, contrary to what the applicant maintains, the contested provisions are not the first measures seeking to restrict recreational fishing in European waters or, in particular, recreational fishing for European seabass in those waters.
- 99 A legitimate expectation can arise only if several conditions are satisfied, including that precise, unconditional and consistent assurances from authorised and reliable sources have been provided by the EU authorities (see judgment of 15 November 2018, *Deutsche Telekom v Commission*, T-207/10, EU:T:2018:786, paragraph 46 and the case-law cited).
- 100 In view of the existence of previous measures, it cannot be found in the present case that precise, unconditional and consistent information was provided to the applicant which led it to believe, at the time the contested provisions were adopted, that the European Union did not intend to regulate, or intended no longer to regulate, recreational fishing for European seabass in the areas concerned.
- 101 In the second place, the applicant submits that a legitimate expectation was created on its part by a statement made in 2011 by the Commissioner for Maritime Affairs and Fisheries.
- 102 It is true that, as the applicant submits, the (then) Commissioner for Maritime Affairs and Fisheries stated, during a debate held in the European Parliament in 2011:
- ‘Recreational fisheries is not ... an EU competence. ... [T]he European Commission is not responsible, and the national governments have to tackle all these problems ... The Commission’s only responsibility is to ensure, when we are talking about recreational fisheries, that the product cannot be sold. Everything else comes under the competence of national governments.’
- 103 Nevertheless, according to the case-law referred to in paragraph 99 above, precise, unconditional and consistent assurances from authorised and reliable sources, provided by the authorities to the person concerned, are necessary in order to give rise to a legitimate expectation on the part of that person.
- 104 In the present case, at least two of those requirements have not been satisfied.
- 105 First, the statement in question cannot create ‘consistent’ assurances, since it is merely an isolated and informal statement of position by a Commissioner, any proposal for a regulation in that area must be adopted by the College of Commissioners, and the statement is in any event manifestly at variance with the rules of EU law referred to in paragraphs 96 and 97 above.
- 106 Second, the statement in question does not have the ‘authorised’ character required to give rise to a legitimate expectation, since, as regards the fixing and allocation of fishing opportunities, the measures must be adopted by the Council and the Parliament, the Commission’s role being limited to legislative initiative and the implementation of decisions taken by the legislature.

107 Accordingly, the second plea must be rejected as unfounded.

The third plea: infringement of the principles of equal treatment and non-discrimination

108 The applicant submits that one of the contested provisions, namely Article 9(4) of the contested regulation, infringes the ‘principle of equal treatment by introducing prohibited discrimination’.

109 The Council, supported by the Commission, disputes the applicant’s arguments.

110 In that regard, it should be noted that the obligation to ensure equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union (‘the Charter’).

111 According to case-law, the principle of equal treatment requires, first, that comparable situations must not be treated differently and, second, that different situations must not be treated in the same way, unless such treatment is justified on the basis of an objective and reasonable criterion and is proportionate to the aim pursued (see, to that effect, judgments of 14 September 2010, *Akzo Nobel Chemicals and Akcros Chemicals v Commission*, C-550/07 P, EU:C:2010:512, paragraph 55 and the case-law cited, and of 16 March 2004, *Afari v ECB*, T-11/03, EU:T:2004:77, paragraph 65).

112 Where the EU legislature enjoys a wide discretion, as is the case under the common fisheries policy, the examination of proportionality is to be limited to determining whether the difference in treatment is manifestly inappropriate or arbitrary in relation to the objective pursued by the legislature, irrespective of whether the measure adopted was the only or the best possible measure (see, to that effect, judgment of 15 September 1982, *Kind v EEC*, 106/81, EU:C:1982:291, paragraph 24).

113 The third plea is divided into two parts, by which the applicant submits that, in the present case, the contested provisions have introduced prohibited discrimination, first, between commercial and recreational fishing and, second, between various forms of recreational fishing.

– The first part of the third plea: discrimination between commercial and recreational fishing

114 First, the applicant submits that the EU legislature could not subject activities as different as commercial and recreational fishing to the same regulatory framework.

115 In that regard, it should be noted that a finding that the principle of non-discrimination has been breached as a result of different situations being treated in the same way presupposes that the situations concerned are not comparable, having regard to all the elements which characterise them, and those elements are to be determined and assessed in the light of the subject matter and purpose of the EU act in question, taking into consideration, moreover, the principles and objectives of the field to which the act in question relates (see, to that effect, judgment of 18 June 2014, *Spain v Commission*, T-260/11, EU:T:2014:555, paragraph 93).

116 However, in the present case, commercial and recreational fishing may be regarded as comparable in the light of the fundamental objective pursued by the contested provisions, since both activities have an effect on the population of European seabass which the contested provisions seek to protect, with the result that the applicant’s argument cannot succeed.

117 Second, even if the two activities can be regarded as comparable, the applicant submits that commercial and recreational fishing are treated differently in an unacceptable manner, since, in the contested provisions, the former is subject to a temporary ban with exceptions specific to each type of commercial fishing, whereas the limits affecting the latter are applicable to all forms of recreational fishing for European seabass.

- 118 In that regard, it should be noted that, as the applicant states, Article 9 of the contested regulation introduces a difference in treatment between recreational fishing and commercial fishing in so far as, in the case of recreational fishing, only catch-and-release is authorised in the first area, whereas, with commercial fishing, it is permissible to retain European seabass during a certain period of the year, subject to certain conditions.
- 119 It must therefore be determined, in accordance with the case-law cited in paragraph 111 above, whether the difference in treatment between the two activities in question is justified by a criterion which is objective and reasonable.
- 120 In that regard, it should be noted that, first, commercial fishing is carried out by people who earn their living from it and, second, it affects, at least potentially, all consumers. Recreational fishing, on the other hand, is a leisure activity, even though it may affect businesses indirectly, particularly those which sell equipment used in recreational fishing.
- 121 Thus, it is clear that the difference in treatment of the two activities in question, as contained in the contested provisions, is linked to their respective nature and is in line with the objectives pursued under the common fisheries policy. As stated in Article 2(1) of the CFP Regulation, the European Union's policy in this area aims, in particular, to 'ensure that fishing and aquaculture activities 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'.
- 122 The economic nature of commercial fishing may thus explain the attention paid by the EU legislature to the impact that the limits it plans to adopt will have on each form of commercial fishing and the adaptation of those limits by tolerating, in certain cases, only by-catches that are unavoidable and by allowing, in other cases, a certain proportion of targeted catches of European seabass.
- 123 It should also be noted that, in accordance with the case-law cited in paragraphs 111 to 112 above, the difference in treatment of the two activities in question is not manifestly inappropriate or arbitrary for a leisure activity when the aim of the legislation in question is to preserve marine biological resources and, ultimately, to ensure that that activity can be resumed freely once stocks have been replenished.
- 124 The first part of the third plea must therefore be rejected.

– *The second part of the third plea: discrimination between various forms of recreational fishing*

- 125 The applicant takes the view that, within the area of recreational fishing, the contested provisions discriminate between underwater fishing and other recreational fishing activities.
- 126 In that context, the applicant submits, in essence, that the rules concerning commercial fishing take account of the various methods used to fish in the fish farming industry and allocate the mortality rate tolerated by the EU legislature in such a way as to ensure that no particular method is placed at a particular disadvantage by the limits imposed by Article 9(1) to (3) of the contested regulation.
- 127 It is different in the case of recreational fishing, since, by authorising only catch-and-release, which involves taking fish and then discarding them back into the sea, the legislature has, in practice, prohibited underwater fishing, which, by its nature, involves the use of a rifle or, in any event, projectiles which cause the death of the fish and prevent them from being discarded back into the sea alive.

- 128 Thus, the authorisation of catch-and-release fishing gives rise to discrimination between the various methods used for recreational fishing, which is all the less justified since the impact of underwater fishing on fish stocks is limited and that form of recreational fishing is, by its nature, particularly selective.
- 129 The applicant states that it is apparent from a study produced by it that underwater fishing in fact generates fewer catches than other forms of recreational fishing, being responsible for only about 5.5% of the total catch by recreational fishing in respect of European seabass.
- 130 Furthermore, underwater fishing requires the fisherman to aim at his target before shooting, the consequence of which is that the fisherman first determines whether the specimen belongs to the target species and whether it meets the minimum legal size requirements.
- 131 In that regard, it should be noted that, as the Council rightly states, underwater fishing, by its very nature, almost inevitably leads to the death of the fish, since it involves the fish being hit by a projectile that immobilises it, whereas, by contrast, catch-and-release entails only a risk for the fish — the probability of death in such a case being limited to 15% according to the estimate made by ICES in its opinion of 24 October 2017.
- 132 Thus, it should be held that, since objectively they are different in terms of their lethal effect on fish stocks, it was permissible for underwater fishing and other forms of recreational fishing in which catch-and-release may be engaged in to be treated differently.
- 133 Consequently, the two situations in question cannot be objectively comparable in the light of the objective pursued by the contested provisions, with the result that the applicant's arguments cannot succeed.
- 134 Accordingly, the second part of the third plea and, consequently, the third plea in its entirety must be rejected.

The fourth plea: infringement of the principle of proportionality and of the freedom of association and the freedom to conduct a business

- 135 The fourth plea in this action is divided into two parts. First, the applicant submits that Article 9(4) of the contested regulation infringes the principle of proportionality. Second, it argues that that provision infringes the freedom of association and the freedom to conduct a business.
- 136 The Council, supported by the Commission, disputes the applicant's arguments.

– The first part of the fourth plea: breach of the principle of proportionality and of the precautionary principle

- 137 The applicant submits that the measures provided for in Article 9(4) of the contested regulation are not proportionate in the light of the precautionary principle which should be applied in the present case.
- 138 In that regard, it should be borne in mind that, according to case-law, the principle of proportionality, which is one of the general principles of EU law, requires that the EU institutions, first, do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, second, have recourse to the least onerous measures to attain the objective sought without, third, the disadvantages caused being disproportionate to the aims pursued (see, to that effect, judgment of 11 January 2017, *Spain v Council*, C-128/15, EU:C:2017:3, paragraph 71 and the case-law cited).

139 Also, the legality of measures adopted in areas where the EU legislature enjoys a wide discretion, as is the case in matters concerning the common fisheries policy, can be affected only where the measure adopted is manifestly inappropriate or arbitrary having regard to the objective pursued, irrespective of whether that measure was the only or the best possible measure (see, to that effect, judgments of 23 March 2006, *Unifarm and North Sea Fishermen's Organisation*, C-535/03, EU:C:2006:193, paragraphs 57 and 58 and the case-law cited, and of 11 January 2017, *Spain v Council*, C-128/15, EU:C:2017:3, paragraph 72 and the case-law cited).

140 In its arguments, the applicant does not dispute that European seabass was under threat in the areas covered by the contested provisions before the contested regulation was adopted or that it was necessary to adopt measures in order to reduce fish mortality and to increase fish biomass in those areas.

141 The applicant submits, however, that the limits provided for in Article 9(4) of the contested regulation could not be adopted in the absence of conclusive scientific data on the impact of recreational fishing on European seabass stocks.

142 In that regard, it should be noted that, according to the ICES opinion of 24 October 2017, catches of seabass by recreational fisheries in the first area were estimated, for 2016, at 1 627 tonnes, thereby exceeding catches of seabass by commercial fisheries, which were estimated at 1 295 tonnes.

143 Even after that estimate was updated in 2018, taking into account the effect of the limits on catch imposed by the Council and assuming full compliance with those limits, the impact of recreational fishing on the mortality of European seabass in the first area remained significant, accounting for approximately 14% of the catches of European seabass, as shown by the data contained in the ICES opinion of 29 June 2018.

144 Article 2(2) of the CFP Regulation requires that the precautionary principle be applied in setting fishing opportunities.

145 In those circumstances, the Council considered it necessary to adopt the limits in question in order to counteract mortality due to recreational fishing. First, it allowed catch-and-release fishing, thus allowing recreational fishermen to continue to engage in most forms of recreational fishing despite the ICES recommendation to prohibit all catches. Second, it prescribed a rule — catch-and-release — which it is not unreasonable to confine to a recreational activity.

146 Such measures cannot be regarded as manifestly inappropriate or arbitrary in the light of the objective to be achieved, with the result that it cannot be held that, by adopting them, the legislature exceeded the limits of its discretion and infringed the principle of proportionality. Consequently, the first part of the fourth plea must be rejected.

– *The second part of the fourth plea: infringement of the freedom of association and the freedom to conduct a business*

147 The applicant claims that the prohibition of underwater fishing infringes the freedom of association and the freedom to conduct a business enshrined in Articles 12 and 16 of the Charter in so far as it affects the infrastructure in marinas, the manufacture of specialist equipment for marinas and the related tourist services.

148 At the outset, it must be noted that the applicant does not adduce anything to support its contention that freedom of association has been infringed. According to case-law, the mere abstract statement of a plea does not satisfy the requirements laid down by Article 76(d) of the Rules of Procedure (judgment

of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 59). Accordingly, the second part of the fourth plea must be rejected as inadmissible, in so far as it alleges infringement of freedom of association.

- 149 As regards freedom to conduct a business, recognised by Article 16 of the Charter, that freedom includes the right to engage in an economic or commercial activity, freedom of contract and free competition.
- 150 In the present case, it must be noted that an infringement of the freedom to conduct a business could affect undertakings engaged in a commercial activity related to the practice of underwater fishing, such as the sale of equipment. Such an infringement cannot, however, affect recreational fishermen themselves since, as is clear from Article 3(b) of the contested regulation, they are not engaged in a commercial activity because they cannot sell the fish they catch.
- 151 With regard to undertakings engaged in a commercial activity related to the practice of underwater fishing, it should be observed that the measure at issue could indeed have economic consequences for their activities capable of influencing their decision to continue those activities, and could therefore potentially constitute a limitation on their freedom to conduct a business.
- 152 In that connection, the applicant produced surveys which appear to show that European seabass is the most sought-after species among recreational fishermen engaged in underwater fishing and, for some, the one species that justifies practising this activity. If that reflects reality, it necessarily has consequences for the turnover of companies operating in the sector.
- 153 However, Article 52(1) of the Charter accepts that limitations may be imposed on the exercise of rights and freedoms as long as the limitations are provided for by law, respect the essence of those rights and freedoms, and, in compliance with the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.
- 154 That is the case here, since, first, the measure at issue is provided for by the contested regulation. Second, it does not contain any prohibition directed at undertakings engaged in a commercial activity related to underwater fishing, with the result that it respects the essence of the freedom to conduct a business. Third, as is apparent from the assessment of the first part of the fourth plea, it complies with the principle of proportionality, the objective pursued being the preservation of marine biological resources, which is in the general interest.
- 155 That conclusion is challenged by the applicant, who submits that no provision was made to the effect that the contested regulation was to apply temporarily or non-systematically, which would have mitigated its implementation. On the contrary, according to the applicant, the contested regulation entered into force immediately, without ‘any variation’.
- 156 In that regard, it should be noted that the fact, alleged by the applicant, that the measure at issue is not temporary is contradicted by the nature of the contested regulation, which is intended to be applied for a single year, in this instance in 2018.
- 157 Furthermore, contrary to the applicant’s submission, the measure at issue was not, in practice, imposed immediately and for the first time, since an identical measure was already applicable in the first area under Article 9(4) of the regulation that previously applied, namely Regulation 2017/127.
- 158 Consequently, the fourth plea must be rejected and the action must therefore be dismissed in its entirety.

Costs

- ¹⁵⁹ Under Article 134(1) 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.
- ¹⁶⁰ Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Council, including those relating to the application for interim measures, in accordance with the form of order sought by the Council.
- ¹⁶¹ In accordance with Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders the International Forum for Sustainable Underwater Activities (IFSUA) to bear its own costs and to pay those incurred by the Council of the European Union, including those relating to the proceedings for interim measures;**
- 3. Orders the European Commission to bear its own costs.**

Valančius

Nihoul

Svenningsen

Delivered in open court in Luxembourg on 10 March 2020.

[Signatures]