Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 19 January 2016 [1]

Case C-361/14 P

European Commission
v

Peter McBride and Others

(Appeal — Interpretation of Article 266 TFEU — Article 4(2) of Council Decision 97/413/EC — Resource conservation measures and restructuring of the fisheries sector — Requests for increased safety tonnage — Annulment by the General Court of Commission Decision 2003/245/EC rejecting requests for increased safety tonnage — Competence and legal basis to adopt new decisions — Annulment by the General Court of new decisions rejecting requests for increased safety tonnage)

1. The European Commission appeals against the judgment of the General Court [2] annulling 11 decisions adopted on 13 July 2010 ('the 2010 decisions') by which the Commission had (again) rejected requests submitted by Ireland on 14 December 2001 ('the original applications') on behalf of individual vessel owners seeking increases in the permitted capacity of their fishing vessels for safety improvements ('safety tonnage increases'). The requests had been made pursuant to Article 4(2) of Council Decision 97/413/EC. [3]

2. The present case is the continuation of a long and complex saga. [4] On 4 April 2003 the Commission adopted Decision 2003/245/EC [5] ('the initial decision') in response to Ireland's original applications. The vessel owners whose requests for safety tonnage increases had been rejected brought annulment proceedings in the General Court challenging that decision in *Boyle and Others*. [6] The General Court annulled the initial decision in so far as it concerned a number of vessels, but dismissed four of the applications as inadmissible. Three of those vessels' owners successfully appealed against that decision: in *Flaherty and Others*, [7] the Court set aside the General Court's judgment on admissibility and extended the annulment of the initial decision to the vessels at issue in those proceedings.

1 — Original language: English.

2 — Judgment in *McBride and Others* v *Commission*, Cases T-458/10 to T-467/10 and T-471/10, EU:T:2014:249 ('the judgment under appeal' or '*McBride and Others*').

3 — Decision of 26 June 1997 concerning the objectives and detailed rules for restructuring the Community fisheries sector for the period from 1 January 1997 to 31 December 2001 with a view to achieving a balance on a sustainable basis between resources and their exploitation (OJ 1997 L 175, p. 27).

4 — For a fuller account see points 33 to 44 below.

5 — Commission Decision of 4 April 2003 on the requests received by the Commission to increase MAGP IV objectives to take into account improvements on safety, navigation at sea, hygiene, product quality and working conditions for vessels of more than 12 m in length overall (OJ 2003 L 90, p. 48). By Article 2 of that decision the Commission accepted 29 requests for an increase in capacity resulting exclusively from safety improvements pursuant to Article 4(2) of Decision 97/413 and rejected 80 other such requests, including those giving rise to the subsequent litigation.

6 — Judgment in *Boyle and Others* v *Commission*, T-218/03 to T-240/03, EU:T:2006:159 ('*Boyle and Others*').

7 — Judgment in *Flaherty and Others* v *Commission*, C-373/06 P, C-379/06 P and C-382/06 P, EU:C:2008:230 ('*Flaherty and Others*').

3. On 13 July 2010 the Commission adopted the 2010 decisions in order to comply with its obligations under Article 266 TFEU to give effect to the judgments in *Boyle and Others* and *Flaherty and Others*. Since in the meantime the legal base for the initial decision had disappeared,[8] the 2010 decisions were adopted on an *ad hoc* legal basis. They were challenged before the General Court in *McBride and Others*, the proceedings that led to the judgment under appeal.

4. The General Court has annulled the 2010 decisions. In so doing it drew a distinction between the Commission's obligation under Article 266 TFEU and that institution's competence to adopt the 2010 decisions. The General Court ruled that the Commission lacked the necessary competence. It should therefore have rejected the original applications in so far as it concerned the respondents to this appeal.

5. The General Court's judgment raises important questions which extend beyond the fisheries sector. What are an EU institution's obligations under Article 266 TFEU? In assessing the legal basis of the 2010 decisions, should the Court apply principles derived from case-law concerning the European Coal and Steel Community ('ECSC'), in particular *SP and Others*[9] and *ArcelorMittal*[10]? If not, how should the question of appropriate legal basis be approached?

Legal background

Treaty on European Union

6. Pursuant to Article 5(1) TEU, the limits of Union competences are governed by the principle of conferral. Under that principle the Union must act only within the limits of the competences conferred in the Treaties in order to attain the objectives set out therein, as set out in Article 5(2).

7. Article 13(2) TEU likewise requires each institution to act within the limits of the powers conferred on it in the Treaties and in conformity with the procedures, conditions and objectives set out therein.

Treaty on the Functioning of the European Union

8. Article 263 TFEU makes provision for the Court of Justice of the European Union to review the legality of legislative acts and acts of the institutions including the Commission.

9. The first paragraph of Article 264 TFEU states that, where an action for judicial review is well founded, the Court is to declare the act concerned to be void.

10. Article 266 TFEU provides that an institution whose act has been declared void must take the necessary measures to comply with the Court's judgment. That obligation does not affect any non-contractual obligation of the Union to make good any damage caused by its institutions or by its servants in the performance of their duties.

8 — See points 25 and 26 below.

9 — Judgment in *SP and Others* v *Commission*, T-27/03, T-46/03, T-58/03, T-79/03, T-80/03, T-97/03 and T-98/03, EU:T:2007:317 ('*SP and Others*').

10 — Judgment in *ArcelorMittal Luxembourg* v *Commission and Commission* v *ArcelorMittal Luxembourg and Others*, C-201/09 P and C-216/09 P, EU:C:2011:190 ('*ArcelorMittal*').

Overview of the common fisheries policy

11. The regulatory regime governing fisheries in EU waters is intricate and extensive.[11] What follows is a brief and non-exhaustive summary whose sole purpose is to convey the legislative context.

12. In 1970 the Council adopted legislation establishing a common organisation of the market in fisheries products.[12] The common fisheries policy ('CFP') itself was established in 1983.[13] It has subsequently been amended on a number of occasions.

13. When Ireland submitted the original applications on 14 December 2001, the relevant provisions were to be found in Council Regulation (EEC) No 3760/92.[14] That regulation attempted to address what had emerged as a serious imbalance between the fishing capacity of Member States' fleets and available fishing opportunities.

14. The then Community structural policy in the fisheries sector was organised on the basis of multiannual guidance programmes ('MAGPs') as defined in Article 2 of Council Regulation (EEC) No 4028/86.[15] These fixed objectives for reducing the size of the fishing fleet.[16] In order to facilitate structural change in the fisheries sector within the guidelines of the CFP, the Commission was empowered to grant financial aid for measures including restructuring, renewal and modernisation of the fishing fleet.[17] It was under the aegis of that policy that Decision 97/413, on which the original applications were based, was promulgated.

15. By the late 1990s, however, it had become clear that the reformed CFP had failed to stem the decline in fish stocks in Community waters.[18] The Commission decided that the objectives of MAGP IV were too modest. It proposed that Decision 97/413 (and MAGP IV) should be extended by one year to 31 December 2002 in order to allow time to reflect on the future of fleet policy. At the same time the Commission suggested that measures should be introduced to ensure that MAGP IV was more effective during the extended period of its application. One such measure was removing the possibility of obtaining safety tonnage increases.[19]

11 — See the foreword to the House of Lords European Committee 21st Report of Session 2007-08: 'The progress of the common fisheries policy', Volume I (HL Paper 146-I).

12 — Council Regulation (EEC) No 101/76 of 19 January 1976 laying down a common structural policy for the fishing industry (OJ 1976 L 20, p. 19).

13 — 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).

14 — Regulation of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1).

15 — Regulation of 18 December 1986 on Community measures to improve and adapt structures in the fisheries and aquaculture sector (OJ 1986 L 376, p. 7).

16 — As to the limited success of these measures, see Commission press release IP-96-444.

17 — Article 1(1)(a) of Regulation No 4028/86.

18 — See, for example, the Report of the Group of independent experts to advise the European Commission on the fourth generation of multiannual guidance programmes dated 28 March 1996, known as the 'Lassen Report'.

19 — For a fuller picture, see the Commission's Proposal for a Council Decision amending Council Decision 97/413/EC concerning the objectives and detailed rules for restructuring the Community fisheries sector for the period from 1 January 1997 to 31 December 2001 with a view to achieving a balance on a sustainable basis between resources and their exploitation, COM(2001) 322 final (OJ 2001 C 270 E, p. 80). Article 4(2) of Decision 97/413 was repealed by Council Decision 2002/70/EC; see point 25 below.

16. Council Regulation (EC) No 2371/2002,[20] which repealed and replaced Regulation No 101/76 and Regulation No 3760/92, gave effect to the change in policy. The current position is governed by Regulation (EU) 2015/812[21] and Regulation (EU) No 1380/2013.[22]

Regulation No 3760/92

17. The purpose of Regulation No 3760/92 was described as being to establish a framework for the conservation and protection of living aquatic resources and of aquaculture.[23]

18. Title I covered rules for access to waters and resources. Article 11 was the sole provision in Title II ('Management and monitoring of fishing activity'). It stated: 'Having regard to Title I, on a multiannual basis and for the first time not later than 1 January 1994, the Council, acting in accordance with the procedure laid down in Article 43 of the Treaty, shall set the objectives and detailed rules for restructuring the Community fisheries sector with a view to achieving a balance on a sustainable basis between resources and their exploitation. Such restructuring shall also take account on a case-by-case basis of possible economic and social consequences and of the specificities of the fisheries regions.' Within Title III ('General provisions'), Article 17 established a Management Committee for Fisheries and Aquaculture, whilst Article 18 laid down a procedure for the Commission to submit draft implementing measures to that committee for scrutiny prior to adoption.

Council Regulation (EC) No 2792/99

19. Council Regulation (EC) No 2792/99[24] introduced a framework for all structural measures in the fisheries sector. Provision was made for financial assistance under the CFP through the Financial Instrument for Fisheries Guidance ('the FIFG').[25] Article 6 concerned fleet renewal and the modernisation of fishing vessels. Within the context of MAGPs Member States were able, under Article 6(2), to request an increase in capacity objectives, inter alia, for measures to improve safety, provided that such measures did not lead to an increased exploitation of resources.

20. Under Article 9, aid through the FIFG for fleet renewal and modernisation could be granted only where certain conditions were met, including those laid down in Article 6(2).

Decision 97/413

21. Decision 97/413 was introduced to ensure, inter alia, the restructuring of the Community fishing fleet and the survival of a sector seriously under threat from chronic overexploitation. Detailed rules were set in MAGP IV for the period 1 January 1997 to 31 December 2002.[26]

20 — Regulation of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy (OJ 2002 L 358, p. 59).

21 — Regulation (EU) 2015/812 of the European Parliament and of the Council of 20 May 2015 amending Council Regulations (EC) No 850/98, (EC) No 2187/2005, (EC) No 1967/2006, (EC) No 1098/2007, (EC) No 254/2002, (EC) No 2347/2002 and (EC) No 1224/2009, and Regulations (EU) No 1379/2013 and (EU) No 1380/2013 of the European Parliament and of the Council, as regards the landing obligation, and repealing Council Regulation (EC) No 1434/98 (OJ 2015 L 133, p. 1).

22 — 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).

23 — Article 2(2); see also the first to the third recitals in the preamble thereto.

24 — Regulation of 17 December 1999 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector (OJ 1999 L 337, p. 10).

25 — See Articles 1 and 2 of Regulation No 2792/99.

26 — See Articles 1(1) and 2(1) of Decision 97/413.

22. Article 4 provided:

‘1. The segmentation of the fleet of each Member State shall be determined in relation to the stocks defined in Annex I and to the fishing techniques, taking account of the segmentation adopted as part of MAGP III as well as the differing situations in Member States.

2. In the multiannual guidance programmes for Member States, increases in capacity resulting exclusively from safety improvements shall justify, on a cases by case basis, an increase by the same amount of the objectives for fleet segments where they do not increase the fishing effort of the vessels concerned.’

23. Article 9(1) required the Commission to adopt MAGPs for the fishing fleets of individual Member States in accordance with Council Regulation (EC) No 3699/93 [27] no later than 30 November 1997 for the period 1997 to 2001.

24. Pursuant to Article 10, the procedures under Article 18 of Regulation No 3760/92 applied for the purposes of implementing the provisions of Decision 97/413. When Regulation No 3760/92 was repealed and replaced by Regulation No 2371/2002, [28] the Management Committee which the Commission was thereby required to consult was (crucially) abolished. [29]

Council Decision 2002/70/EC

25. Council Decision 2002/70 [30] was adopted in order to buy time to reflect on fleet policy. It amended Decision 97/413 and extended the date by which the fishing effort of each Member State had to be reduced to 31 December 2002. [31] Crucially, Article 4(2) of Decision 97/413 was deleted with effect from 1 January 2002. [32]

26. Article 9 of Decision 97/413 was also amended. The Commission remained responsible for implementing the objectives and the detailed rules of that decision, but the procedures were to be carried out in accordance with Article 4 of Regulation No 2792/99. [33]

Case-law

27. Since *SP and Others* and *ArcelorMittal* are referred to extensively in the grounds of appeal and the parties’ submissions, it is helpful to recall them briefly here.

27 — Regulation of 21 December 1993 laying down the criteria and arrangements regarding Community structural assistance in the fisheries and aquaculture sector and the processing and marketing of its products (OJ 1993 L 346, p. 1).

28 — See point 16 above.

29 — See Articles 34 and 36 of Regulation No 2371/2002. As a result, part of the essential procedural mechanism for the Commission to deal with the original applications had, quite simply, disappeared by the time it sought to comply with *Boyle and Others* and *Flaherty and Others*.

30 — Council Decision of 28 January 2002 amending Decision 97/413/EC concerning the objectives and detailed rules for restructuring the Community fisheries sector for the period from 1 January 1997 to 31 December 2001 with a view to achieving a balance on a sustainable basis between resources and their exploitation (OJ 2002 L 31, p. 77) (‘Decision 2002/70’).

31 — Article 1(1).

32 — Articles 1(3) and 2. Given the date on which Decision 2002/70 was adopted (28 January 2002), the deletion was therefore slightly retroactive.

33 — Regulation No 2792/99 itself remained in force until 31 December 2006 (see Article 104 of Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund (OJ 2006 L 223, p. 1)). However, Article 4 of Regulation No 2792/99 was repealed by Article 1(4) of Council Regulation (EC) No 2369/2002 amending Regulation (EC) No 2792/99 laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector, from 1 January 2003 (OJ 2002 L 358, p. 49).

28. In *SP and Others* the applicants sought to have a Commission decision adopted on 17 December 2002 annulled for lack of competence. The decision in question sanctioned infringements of the ECSC Treaty committed before that treaty expired on 23 July 2002. Its preamble referred only to Article 65 ECSC.[34] In its ruling the General Court drew a distinction between the provisions governing the procedural steps to be taken before the Commission adopted its decision and the substantive provision in the ECSC Treaty.

29. With regard to the succession of laws, the General Court recalled the case-law to the effect that substantive rules of Community law must be interpreted, in order to ensure observance of the principles of legal certainty and of legitimate expectations, as not applying, in principle, to situations existing before their entry into force, whereas procedural rules are of immediate application.[35] First, it is necessary to ascertain whether an institution is competent to adopt a measure on the basis of a specific provision of the Treaty or of secondary legislation. The next step is to determine the applicable substantive and procedural rules, in conformity with the principles governing the succession of legal rules. Thus, the provision constituting the legal basis for a measure and empowering the Community institution to enact it must be in force at the moment of adoption. By contrast, those principles may lead to the application of substantive provisions which are no longer in force at the time when a Community institution adopts the measure in question. The Commission had inferred that it had competence to act on the basis of the substantive rule in Article 65(1) ECSC. It erred in so doing because the legal basis in Article 65(4) and (5) ECSC had expired when the Commission adopted its decision. The General Court accordingly annulled the decision at issue in that case.[36]

30. *ArcelorMittal* concerned a Commission decision adopted on the basis of Article 65(1) and (5) ECSC, but after the expiry of the ECSC Treaty on 23 July 2002. Pursuant to an earlier decision, the Commission had imposed fines on 14 undertakings for participating in a price-fixing cartel in the steel sector. On 11 March 1999, the General Court dismissed the application for annulment brought against that decision but reduced the fine imposed.[37] On 2 October 2003, the Court set aside the General Court's judgment and annulled the Commission's decision in so far as it concerned one of the undertakings.[38] The Commission then decided to initiate a new procedure in respect of the same anticompetitive conduct as had formed the subject-matter of the earlier decision. On 8 November 2006, the Commission adopted a new decision that was challenged first, unsuccessfully, before the General Court[39] and then, on appeal, in *ArcelorMittal*.

31. The Court held that the General Court's ruling was not vitiated by any error of law. The EU legislator did not intend that infringements of the competition rules under the ECSC Treaty should escape the application of penalties after that Treaty had expired. Also, the succession of Treaties (ECSC, EC and TFEU) ensured, in order to guarantee free competition, that the Commission should still be able to penalise any conduct corresponding to the factual elements set out in Article 65(1) ECSC, whether taking place before or after 23 July 2002. It would therefore have been contrary to the

34 — The structure of Article 65 ECSC foreshadowed the equivalent, well-known provision in the EEC Treaty (Article 85 EEC, now Article 101 TFEU). Thus, Article 65(1) ECSC prohibited concerted practices between undertakings which tended to prevent, restrict or distort normal competition in the coal and steel sector within the common market. Under Article 65(4) such agreements were automatically void and pursuant to Article 65(5) the Commission was empowered to impose penalties for infringements of the ECSC competition rules.

35 — See, for example, judgment in *Toshiba Corporation and Others*, C-17/10, EU:C:2012:72, paragraph 47 and the case-law cited. For a recent illustration of this well-established principle, see judgment in *Commission* v *Moravia Gas Storage*, C-596/13 P, EU:C:2015:203, paragraph 33.

36 — *SP and Others*, paragraphs 116 to 119 and 123.

37 — Judgment in *ARBED* v *Commission*, T-137/94, EU:T:1999:46.

38 — Judgment in *ARBED* v *Commission*, C-176/99 P, EU:C:2003:524.

39 — Judgment in *ArcelorMittal Luxembourg and Others* v *Commission*, T-405/06, EU:T:2009:90.

objectives and the coherence of the Treaties and irreconcilable with the continuity of the legal order of the European Union if the Commission did not have jurisdiction to ensure the uniform application of the rules deriving from the ECSC Treaty which continued to produce effects even after the expiry of that treaty. [40]

32. The Court therefore upheld the General Court's judgment, ruling that the Commission's power to impose the fine in question in 2006 derived from Article 23(2) of Regulation No 1/2003 [41] and that the procedure had to be carried out in accordance with that regulation. A provision which forms the legal basis of an act and empowers the Union institution to adopt the act in question must be in force at the time when the act is adopted. Furthermore, the Commission's use of Regulation No 1/2003 did not restrict, but rather tended to extend, the procedural guarantees provided by the legal framework of the ECSC Treaty for undertakings which were the target of proceedings for infringing the competition rules. [42]

Background to the current proceedings

The initial decision

33. On 14 December 2001 the Irish authorities submitted the original applications to the Commission under Article 4(2) of Decision 97/413, seeking increased capacity for the polyvalent segment [43] and the pelagic segment [44] of its fleet.

34. On 4 April 2003 the Commission adopted the initial decision, citing both Article 4 of Decision 97/413 and Article 6 of Regulation No 2792/99 as legal bases. By Article 2 of the initial decision, the Commission accepted 29 requests for safety tonnage increases pursuant to Article 4(2) of Decision 97/413. However, it also rejected 80 such requests including those of the respondents in the present appeal.

Proceedings before the EU courts concerning the initial decision

35. A number of vessel owners lodged applications for annulment before the General Court on 13 June 2003, challenging the validity of the initial decision. On 13 June 2006 the General Court dismissed four applications as inadmissible: those brought by Mr Thomas Flaherty, Ocean Trawlers, Mr Larry Murphy and O'Neill Fishing Co Ltd. It annulled the initial decision in so far as it applied to the vessels belonging to the other applicants on the grounds that, in adopting the initial decision, the Commission had applied criteria not provided for in the relevant rules and had exceeded its powers. [45]

36. Exchanges of correspondence ensued between the owners of those vessels and the Commission, exploring what steps the Commission intended to take in order to implement the General Court's decision in *Boyle and Others*. During that period the Commission also requested information from the Irish authorities concerning the technical characteristics of the vessels at issue.

40 — *ArcelorMittal*, paragraphs 63 to 66.

41 — Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

42 — *ArcelorMittal*, paragraphs 74 to 76.

43 — This segment comprises multi-purpose vessels and includes small inshore vessels, and medium and large offshore vessels targeting whitefish, pelagic fish and bivalve molluscs: see the 2005 Annual Report of the Licensing Authority for Sea-fishing Boats of the Irish Department of Communications, Marine and Natural Resources ('the 2005 Annual Report'), at p. 7.

44 — This segment comprises vessels engaged predominantly in fishing for pelagic species (primarily herring, mackerel, horse mackerel and blue whiting): see the 2005 Annual Report, also at p. 7.

45 — Paragraphs 100 to 134 of the judgment in *Boyle and Others*.

37. Meanwhile on 5 September 2006 Mr Thomas Flaherty, Mr Larry Murphy and Ocean Trawlers appealed against the General Court's judgment. On 17 April 2008, in *Flaherty and Others*, the Court allowed their appeal and annulled the initial decision also in so far as it applied to those parties and their vessels.

38. On 3 April 2008 most of the vessel owners instituted proceedings against the Commission for damages arising from the annulment of the initial decision.[46] The General Court initially suspended those proceedings on 12 May 2009 (until the Commission notified the General Court that replacement decisions had been taken); again on 14 June 2011 (pending the judgment of the General Court in the case under appeal) and then again on 22 October 2014 (pending the outcome of the present appeal).

The contested decisions

39. In order to comply with its obligations under Article 266 TFEU, the Commission adopted a number of decisions on 13 July 2010. In these it again rejected Ireland's request, on behalf of that group of vessel owners, to increase the MAGP IV objectives for the period from 1 January 1997 to 31 December 2001.[47] Decision C(2010) 4758 concerning Mr Peter McBride is a representative example of the 2010 decisions and I shall describe the process in relation to that particular decision.

40. In brief: the Commission first asked Ireland for additional technical information (which it did not apparently get) about the *Peadar Elaine II* and the smaller vessels that it replaced. The Commission then made a provisional finding, based on information that Ireland supplied about new vessels funded under the Whitefish Fleet Renewal Scheme, that it was unclear that the increase in tonnage was indeed attributable exclusively to safety improvements. That provisional finding was communicated to Mr McBride's solicitors, who made representations.

41. In Decision C(2010) 4758 itself, the Commission first set out the legal background. It explained that in the light of the Court's judgment annulling the initial decision it was required to adopt a new decision in relation to the vessel *Peader Elaine II*, adding: 'Since Article 4(2) of Council Decision 97/413/EC was deleted by Article 1(3) of Council Decision 2002/70 and was not replaced by a corresponding provision, there is no longer a specific legal basis for this new decision. The Commission has therefore to take an [*ad hoc*] decision, applying the substantive legal rules which were in force at the time the application was received.' The Commission then confirmed its provisional finding, stating that in consequence it had 'decided to refuse the application for an increase in [the MAGP IV] objective for the polyvalent segment of the Irish fleet with reference to the vessel the *Peadar Elaine II*'.

46 — Case T-138/08 *Cavankee Fishing and Others*. Only four of the applicants in *Boyle and Others* (Mr Edward Kelly, Mr Adrian McClennaghan, Mr Gerard Minihane and O'Neill Fishing Co Ltd) are not involved in this damages action.

47 — The Decisions are as follows: C(2010) 4758, C(2010) 4748, C(2010) 4757, C(2010) 4751, C(2010) 4764, C(2010) 4750, C(2010) 4761, C(2010) 4767, C(2010) 4754, C(2010) 4753 and C(2010) 4752 of 13 July 2010 (together the 'contested decisions'). The Commission adopted one positive decision relating to a vessel that is not owned by any of the respondents in the present appeal.

Summary of the judgment under appeal

42. On 27 and 28 September 2010 the vessel owners initiated proceedings pursuant to Article 263 TFEU in the General Court.[48] They asked the General Court to annul the 2010 decisions and to order the Commission to pay the costs.

43. Six pleas in law were made in support of the applications for annulment: (i) the Commission had express powers to adopt the initial decision under Article 4(2) of Decision 97/413 rather than on an *ad hoc* basis; (ii) infringement of essential procedural requirements; (iii) misinterpretation of Article 4(2) of Decision 97/413; (iv) manifest error in the application of that provision; (v) infringement of the principle of good administration; and (vi) infringement of the principle of equal treatment.

44. The General Court examined only the first plea, which it considered necessarily raised the question of the Commission's competence to assess the original applications for increased safety tonnage and to adopt the 2010 decisions. It concluded that at the material time there was no extant legal basis for adopting those decisions and that the Commission was therefore not competent to act. Accordingly the application was upheld on the first plea and the 2010 decisions were annulled.

45. The Commission appealed against that judgment on 25 July 2014. Both it and the respondents made oral submissions at the hearing on 1 September 2015.

The Commission's appeal

46. The Commission puts forward two grounds of appeal. First, it submits that the General Court misinterpreted and misapplied Article 266 TFEU read together with Article 263 TFEU. The Commission asserts that Article 4(2) of Decision 97/413 should be interpreted as still providing it with the power to decide on the substance of the original applications. The General Court made the following errors of law: (i) it failed to apply the principles underlying the judgments in *SP and Others* and *ArcelorMittal*; and (ii) it misapplied the principle of effectiveness, the principle of conferral of powers and the principles of continuity of the legal order, temporal application of the law, legal certainty, legitimate expectations and the principles governing the succession of legal rules.

47. Second, the General Court breached Article 36 of the Statute and Article 81 of its own Rules of Procedure. It failed to give proper reasons for its judgment, in particular in relation to the Commission's argument, based on *SP and Others* and *ArcelorMittal*, that it was possible to apply the substantive rules in Article 4(2) of Decision 97/413, even though that measure had been repealed.

48 — The vessel owners in question were: Mr Peter McBride (T-458/10), Mr Hugh McBride (T-459/10), Mullglen Ltd (T-460/10), Mr Cathal Boyle (T-461/10), Mr Thomas Flaherty (T-462/10), Ocean Trawlers Ltd (T-463/10), Mr Patrick Fitzpatrick (T-464/10), Mr Eamon McHugh (T-465/10), Mr Eugene Hannigan (T-466/10), Mr Larry Murphy (T-467/10), and Mr Brendan Gill (T-471/10). Five more vessel owners lodged applications at that time: Mr Joseph Doherty (T-468/10), Mr Padraigh Conneely (T-469/10), Ms Eileen Oglesby (T-470/10), Cavankee Fishing Co Ltd (T-472/10), and Mr Noel McGing (T-473/10). However, the General Court declared those applications inadmissible. See further points 105 and 106 below.

First ground of appeal

Summary of the relevant passages of the judgment under appeal

48. According to Article 5 TEU, the limits of Union competences are governed by the principle of conferral. Article 13(2) TEU states that each institution is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out therein. The institutions have conferred powers only. That is why EU acts refer in their preamble to the legal basis which enables the institution concerned to act in the sphere in question. The choice of the appropriate legal basis thus has constitutional significance.[49] Furthermore, the question whether the author of a contested act is competent is a matter of public policy that must be raised by the EU judicature of its own motion even where none of the parties raises it.[50]

49. The principle of legal certainty implies that the binding nature of any act intended to have legal effects must be derived from a provision of EU law which prescribes the legal form to be taken, and that provision must be cited expressly in the act in question as its legal basis. It follows that the legal basis must be in force at the time when the act is adopted.[51]

50. Since both Decision 97/413 and Regulation No 2792/99 had been repealed before the 2010 decisions were adopted, the procedure for consulting the management committee for the fisheries sector could not be applied. No provision, not even any transitional arrangement, was in place enabling the Commission to re-examine the original applications. There was therefore no legal basis and the Commission was not empowered to adopt those decisions.[52]

51. While the vessel owners were right in submitting that the Commission was not competent to adopt the 2010 decisions on an *ad hoc* basis, they were wrong in submitting that an appropriate legal basis existed. First, the principles contained in *ArcelorMittal* and *SP and Others* were of general application. Second, the provisions that applied on 14 December 2001, when the Irish authorities lodged the original applications, were not in force when the 2010 decisions were adopted. Third, the fact that the Commission had acted unlawfully when the initial decision was adopted could not justify it continuing to exceed its powers by adopting the 2010 decisions. Fourth, having regard to the number of vessels concerned by the original applications and to the Commission's duty to exercise due care, that institution could not be criticised for failing to adopt a decision before the expiry of MAGP IV on 31 December 2001.[53]

52. In that regard, the EU legislator had not provided for any transitional arrangements which would have permitted the Commission to examine and decide on the requests for increased capacity which it had received before the expiry or the repeal of the provisions granting it that power. Whilst it was true that the absence of such transitional arrangements might be unsatisfactory for individuals, that finding could not have the effect of setting aside the principle of conferral of powers, which was expressly laid down in the Treaty. The General Court would otherwise go beyond the powers conferred on it by the Treaty.[54]

49 — Paragraphs 22 to 25 of the judgment under appeal.

50 — Paragraph 28 of the judgment under appeal.

51 — Paragraphs 26 and 27 of the judgment under appeal.

52 — Paragraphs 30 to 36 of the judgment under appeal.

53 — Paragraphs 37 to 42 of the judgment under appeal.

54 — Paragraph 43 of the judgment under appeal.

53. Finally, where the act of an institution has been annulled by the Court, although Article 266 TFEU imposes an obligation on the institution concerned to act, that provision is not itself a source of competence. In the present case, the Commission was required, under Article 266 TFEU, to take the necessary measures to comply with the judgments in *Boyle and Others* and *Flaherty and Others*, but did not have the competence to do so. In such a situation, it was for the Commission to dismiss the requests on the ground of lack of competence. Such an outcome was, however, without prejudice to the vessel owners' right to bring an action for damages against the European Union on the basis of the absence of transitional arrangements which would have permitted the Commission to reach a decision on the original request of the Irish authorities. [55]

Summary of the Commission's ground of appeal

54. The Commission complains that the judgment under appeal creates difficulties for the EU institutions, for the vessel owners and for the effectiveness of the EU legal order.

55. The Commission makes seven points in support of its first ground of appeal: (i) Article 266 TFEU imposes a duty on the institution whose act is annulled; (ii) that duty must be balanced against other principles, such as legal certainty; (iii) it applied the principles in *SP and Others* and *ArcelorMittal* to the present matter; (iv) that case-law is based on the general principles of EU law; (v) the General Court erred in applying the principle of legal certainty and it failed to recognise that a legal basis can be implicit; (vi) Article 266 TFEU does not revive a legal basis; and (vii) by misinterpreting Article 266 TFEU, the General Court undermined the effectiveness of the annulment remedy under Article 263 TFEU and failed to apply other principles of law correctly.

Summary of the response

56. The respondents accept that Article 266 TFEU imposed an obligation on the Commission to act; and that that duty may have to be balanced against other principles of EU law, such as legal certainty. However, those principles cannot be relied upon to revive a legal basis which has been repealed. The General Court was correct in stating that the legal basis of an act must be in force at the time that the act is adopted and that procedural rules are generally held to apply when they enter into force. The position here is not the same as in *SP and Others* and *ArcelorMittal*.

57. Indeed, the Commission's position casts doubt on the validity of the initial decision. That has adverse implications for those applications that were approved. The principle of legitimate expectations precludes the Commission from revoking those positive decisions for safety tonnage increases.

58. The respondents therefore submit that this ground of appeal should be rejected. Before the General Court they had argued that Article 4(2) of Decision 97/413 provides a specific legal basis for the Commission to act; and that argument is made in the alternative in the present appeal. In the further alternative, if this Court considers that the Commission was able to adopt *ad hoc* decisions without providing the procedural guarantees laid down by Decision 97/413, the actions for annulment should be remitted to the General Court to decide upon pleas (ii) to (vi) at first instance, since those pleas have not yet been considered and no findings of fact have been made. [56] By adopting *ad hoc* decisions the Commission breached the respondents' legitimate expectation that their applications would be considered on the basis of the substantive rules together with the benefit of the procedural guarantees provided by Decision 97/413.

55 — Paragraphs 44 and 45 of the judgment under appeal.

56 — See points 43 and 44 above.

Assessment: first ground of appeal

Preliminary remarks

59. At the time that the original applications were submitted by the Irish authorities the Commission was competent to act on the basis of Article 4(2) *and* Article 9 of Decision 97/413.[57]

60. Once Decision 2002/70 entered into force on 1 January 2002, the Commission was no longer competent to deal with such requests. Even though the substantive effects of MAGP IV were extended to 31 December 2002 and the Commission's duties under Article 9 remained intact,[58] the provision under which *safety tonnage increases* could be granted (Article 4(2)) had been deleted. No new rules conferring competence on the Commission to take such decisions were enacted and there were no transitional provisions in place empowering it to deal with pending applications.

61. Those vessel owners who benefited from positive decisions or for whom the decisions became definitive were not affected by the repeal of Article 4(2) of Decision 97/413.[59] Only those unsuccessful vessel owners who challenged the initial decision in annulment proceedings are affected by the deletion of the legal basis.

62. The possible absence of legal basis was not raised in *Boyle and Others* or *Flaherty and Others*. It is nevertheless common ground that no provision providing an express legal basis for the Commission was in force to decide on the original applications when either the original decision or the 2010 decisions were adopted.

Article 266 TFEU

63. Within the context of the Treaty provisions governing judicial review, Articles 264 and 266 TFEU establish the consequences of a successful application. The General Court declared the initial decision to be void *ab initio* in accordance with Article 264 TFEU, thus placing the vessel owners and the Commission in the positions they were in before that decision was adopted.

64. In order to comply with the judgments in *Boyle and Others* and *Flaherty and Others*, the Commission had to have regard not only to the operative part of the judgment but also to the grounds which led to that judgment and constituted its essential basis, in so far as they were necessary to determine the exact meaning of what is stated in the operative part. It is those grounds which, on the one hand, identify the precise provision held to be illegal and, on the other, indicate the specific reasons which underlie the finding of illegality contained in the operative part and which the institution concerned must take into account when replacing the annulled measure.[60]

65. In paragraph 28 of the judgment under appeal the General Court correctly points out that a question which touches upon competence must be raised by that court of its own motion even though none of the parties has asked it to do so.[61] The General Court went on to hold that no provisions of primary or secondary law in force from 1 January 2003 empowered the Commission to

57 — The preamble to the initial decision cites Article 6(2) of Regulation No 2792/99 as a legal basis. However, that provision contained the conditions applicable when Member States requested financial assistance pursuant to the FIFG under Article 9(1) for fleet renewal and modernisation of fishing vessels. The original applications concerned *individual* requests for safety tonnage increases. As I understand it, Ireland essentially collated those requests and transmitted them to the Commission. Against that background, I do not see the relevance of Article 6(2) of Regulation No 2792/99.

58 — The text of Article 9 of Decision 97/413 was amended by Article 1(5) of Decision 2002/70. The amended provision did not require the Commission to implement rules concerning safety tonnage increases on the basis of Article 4(2) of Decision 97/413. See point 26 above.

59 — See, by analogy, judgment in *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 57.

60 — Judgment in *Asteris and Others* v *Commission*, 97/86, 99/86, 193/86 and 215/86, EU:C:1988:199, paragraph 27.

61 — Judgment in *Salzgitter* v *Commission*, C-210/98 P, EU:C:2000:397, paragraph 56.

decide on the original applications or on the requests submitted following the judgments in *Boyle and Others* and *Flaherty and Others*.[62] It is clear that the General Court was right in concluding that Decision 97/413 had expired and that no transitional measures were put in place. The Commission therefore did not have the power, under the EU legislation governing fisheries at the time, to adopt the contested decisions.

66. The General Court then considered whether Article 266 TFEU itself empowers the Commission to adopt a decision when assessing the vessel owner's submissions. It stated that Article 266 TFEU was not itself a source of competence for the Commission. Any other interpretation would be contrary to the principle of conferral of powers in Article 13(2) TEU: the obligation to act should be distinguished from competence to act and those two notions are not contradictory. I agree with that position. It also seems to me that the General Court implicitly concluded that Article 266 TFEU does not revive Article 4(2) of Decision 97/413 as a legal basis.

67. However, in the penultimate and last sentences of paragraph 44 of its judgment the General Court states:

'In the present case, the Commission was required, under Article 266 TFEU, to take the necessary measures to comply with the judgments in *Boyle and Others* and *Flaherty and Others*, but did not, however, have the competence to do so. In such a situation, it is for the Commission to dismiss the applicants' request on the ground of lack of competence.'

68. That wording is both ambiguous and in certain respects inaccurate.

69. The phrase '… but did not, however, have the competence to do so' lacks clarity and precision. It can be read as meaning that the Commission was not competent to take any necessary measures in order to comply with its obligations under Article 266 TFEU. That would clearly be erroneous.

70. The words 'required to take the necessary measures' in Article 266 TFEU do not mean that the institution concerned is restricted to considering whether it should adopt an act in order to comply with a judgment.[63] That would be inconsistent with the Court's case-law; under Article 266 TFEU the institution concerned has a discretion to choose the measures possible and where compliance with a judgment annulling a measure presents particular difficulties, the institution concerned may satisfy that obligation by assessing whether it can offer due compensation for the damage which the person concerned has suffered as a result of the decision which has been annulled.[64] Whilst the annulment of an illegal act often prompts the institution concerned to adopt a new act that does not repeat the illegality identified by the Court, that is not the only possible method of compliance.

71. It seems to me that by stating that 'it was for the Commission to dismiss the applicants' request' the General Court also committed an error. First, the Commission was under an obligation to exercise its discretion when appraising the original applications in the light of the judgments in *Boyle and Others* and *Flaherty and Others*. Second, because the original applications were made by the Irish authorities on behalf of the vessel owners, it is formally incorrect to describe that application as 'the applicants' request'.

62 — Paragraphs 30 to 37 in the judgment under appeal.

63 — Furthermore, Article 266 TFEU has been interpreted broadly. Thus, it covers a duty to end an infringement within a reasonable time: see judgment in *Parliament* v *Council*, C-21/94, EU:C:1995:220, paragraph 33. It may require the eradication of an act held to be void. It may require the institution concerned to refrain from adopting an identical measure; see judgment in *Interporc* v *Commission*, C-41/00 P, EU:C:2003:125, paragraph 29.

64 — Judgment in *Könecke Fleischwarenfabrik* v *Commission*, 76/79, EU:C:1980:68, paragraphs 13 to 15; see further judgment in *Parliament* v *Meskens*, C-412/92 P, EU:C:1994:308, paragraph 28. The General Court has followed this approach in its judgment in *Commission* v *Moschonaki*, T-476/11 P, EU:T:2013:557, paragraph 39.

72. In paragraph 45 of the judgment under appeal the General Court went on to state that the vessel owners had the right to bring an action for damages against the European Union because, had there been transitional measures, the Commission would have been able to adopt a decision. That seems to me to be irrelevant to determining the nature of the Commission's obligations under Article 266 TFEU.

73. I add that an action for damages would not be without difficulties. The burden is on the applicant (here the vessel owners) to establish: (i) unlawful conduct; (ii) loss; and (iii) causation. [65] Whilst the lack of transitional provisions might amount to unlawful conduct, that is not necessarily the sole ground on which an application for damages could be based. Furthermore, it would still be necessary to establish that such conduct caused loss. [66]

74. However, it seems possible to read paragraph 44 of the judgment under appeal in a manner that renders it compatible with Article 266 TFEU. The words '… but did not, however, have the competence to do so' in the penultimate sentence can also be understood as meaning that the Commission *was not empowered to adopt the contested decisions*. I think that that reflects what the General Court probably intended to say; and it is a correct statement of the legal position.

75. Does the ambiguity in paragraph 44 of the General Court's judgment amount to an error of law that should lead to it being set aside?

76. In my view it does not.

77. The General Court did not rule out the possibility that the Commission might take measures other than adopting fresh decisions in order to comply with the judgments in *Boyle and Others*. Nor has the Commission argued in its appeal that the General Court's judgment should be interpreted in that way. I do not therefore consider that the judgment under appeal is inconsistent with Article 263 TFEU because it leads to a gap in the remedies that are available.

78. Finally, even though the final sentence of paragraph 44 is wrong in law, it follows from settled case-law that where the grounds of a judgment of the General Court disclose an infringement of EU law, but the operative part of the judgment is well founded for other legal reasons, the appeal must be dismissed. [67] It seems to me that that principle applies by analogy here.

79. Since (i) the General Court's reasoning in paragraph 44 of the judgment under appeal can be interpreted in a manner that is consistent with the Treaty and (ii) its decision is well founded on the ground that in adopting the 2010 decisions the Commission exceeded its powers, I conclude that the General Court did not err in interpreting Article 266 TFEU.

65 — Opinion of Advocate General Jacobs in *Commission* v *Jégo-Quéré*, C-263/02 P, EU:C:2003:410, point 44. An action for damages provides access to justice, but it is not part of the system of judicial review; and the fact that it might not be successful does not mean that the individual concerned is denied effective judicial protection. See, for example, judgment in *Reynolds Tobacco and Others* v *Commission*, C-131/03 P, EU:C:2006:541, paragraphs 82 to 84.

66 — The application for damages in Case T-138/08 *Cavankee Fishing and Others* v *Commission* is based upon Article 2 of the initial decision. The applicants submit that the error of law is established by the General Court's judgment in *Boyle and Others*. They claim to have sustained loss, (i) because they have been obliged to purchase safety tonnage on the market to replace the tonnage not granted by the Commission; and (ii) certain applicants lost fishing days at sea. The applicants claim that a direct causal link exists between the Commission's refusal and the losses that they have sustained.

67 — Judgment in *Salzgitter* v *Commission*, C-210/98 P, EU:C:2000:397, paragraph 58; see also judgment in *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2011:191, paragraph 136.

Obligations under Article 266 TFEU and the general principles of law

80. The Commission submits that it was competent to adopt the 2010 decisions, as it had sufficient powers to do so. As neither Decision 97/413 nor Article 6 of Regulation No 2792/99 was in force on 13 July 2010 when those decisions were adopted, it could not consult the fisheries management committee. The General Court erred in failing to balance the obligation to act under Article 266 TFEU against the general principles of EU law, in particular the principle of legal certainty.

81. The Commission argues that it follows from *SP and Others* and *ArcelorMittal* that past substantive rules apply to past situations, whereas procedural rules apply only whilst they are in force. The Commission was therefore entitled to use an *ad hoc* procedure; and it was not necessary for the 2010 decisions to be considered by the fisheries management committee. The respondents disagree with that view.

82. I do not accept the Commission's submissions.

83. *SP and Others* seems to me to highlight the difficulties with the Commission's approach.

84. There, the expiry of the ECSC Treaty was followed by a seamless transition to the competition rules of the EC Treaty (and subsequently to those of the TFEU). That occurred automatically under the succession of legal rules.[68] In contrast, here Regulation No 2371/2002 simply abolished the MAGP IV regime following a significant change of direction in the CFP.[69] There were therefore no equivalent substantive rules that replaced Article 4(2) of Decision 97/413 that would have allowed the Commission to grant safety tonnage increases.

85. In *SP and Others* the General Court followed established case-law that distinguishes between substantive rules (which are normally not applicable retroactively, so as to respect the principles of legal certainty and legitimate expectations) and procedural rules (which are immediately applicable).[70] But it also — importantly — emphasised that an EU institution must first have the necessary *vires* to act at all. It stated: '[i]t should be noted in that regard that the provision constituting the legal basis of a measure and empowering the Community institution to adopt the measure in question must be in force at the moment of its adoption … By contrast, the principles governing the succession of legal rules may lead to the application of substantive provisions which are no longer in force at the time of the adoption of a measure by a Community institution'.[71]

86. The first step is therefore to determine whether an EU institution is competent to act and, if so, on the basis of what specific provision of EU law. Only then does one establish the precise substantive and procedural rules that govern that institution's action. However, if there is no valid legal base in force at the moment when an EU institution seeks to take a particular decision, it is not possible to rely on the principles governing the succession of legal rules to apply substantive provisions that had previously governed past acts.[72] That is the classic approach.

87. Applying that analysis here, had Article 4(2) of Decision 97/413 remained in force *or* been replaced by an analogous provision (or had there been a transitional regime providing continuing *vires* to deal with pending applications), the Commission would have remained competent to decide on the original applications and then, following the annulment of the initial decision as a result of *Boyle and Others* and *Flaherty and Others*, to adopt the 2010 decisions in order to give effect to those judgments.

68 — *SP and Others*, paragraph 109.
69 — See point 16 above.
70 — *SP and Others*, paragraph 116.
71 — *SP and Others*, paragraph 118.
72 — *SP and Others*, paragraphs 117 and 119.

But the Commission's competence to grant safety tonnage increases ceased with the repeal of Article 4(2) of Decision 97/413. A provision that has been repealed cannot, it seems to me, be resurrected. Nor, by necessary implication, can it somehow provide a valid legal basis for *ad hoc* action.

88. I have similar difficulties in following the Commission's reading of *ArcelorMittal*.

89. There, anticompetitive conduct that could be punished under the ECSC Treaty continued to be punishable, after the expiry of the latter, under the EC Treaty (and later, indeed, under the TFEU). The Commission therefore had continuing competence to sanction anticompetitive conduct. After its initial decision based on the ECSC Treaty was annulled in respect of one undertaking, the Commission initiated a new procedure under the EC rules that had become applicable (Regulation No 1/2003) [73] and imposed a new fine. The undertaking challenged the new decision before the General Court and, on appeal, before the Court. The Court dismissed the appeal.

90. In so ruling, the Court accepted that in the light of the principle of legal certainty, it was particularly important that the undertakings concerned should be aware of the extent of their rights and obligations and the legal basis upon which the Commission could impose penalties upon them. [74] That said, the Court proceeded on the basis that, since the Commission still had competence to act, it could and should apply the available procedures under the EC Treaty (which, indeed, offered more extensive procedural guarantees for the undertakings concerned). Specifically, Article 23(2) of Regulation No 1/2003 provided a legal basis for acting (adopting a new decision imposing a new fine). [75] The Commission was therefore competent to act and the new decision, which cited that valid legal basis, was lawful even though it then applied past substantive rules and current procedural rules to past acts.

91. In contrast, here the Commission had no continuing competence after 31 December 2001 to take the decision sought. There was, as it were, no equivalent provision to Article 23(2) of Regulation No 1/2003 which empowered the Commission to act and which would have enabled it to apply the past substantive rules in Article 4(2) of Decision 97/413 together with current procedural rules so as to take a decision on the pending application. (There is also no question here of applying sanctions to the vessel owners. The issue is simply whether they do or do not get the increased safety tonnage which they have requested.)

92. I do not therefore accept that *ArcelorMittal* should be read as nuancing settled case-law and making it possible for an expired legal base to be revived by application of the general principles of law where a substantive provision governs past acts. As I see it, the case-law has not changed. The provision which forms the legal basis of an act and empowers the Union institution to adopt the act in question must be in force at the time when the act is adopted. [76] A provision which has been repealed is repealed. It can no longer provide a valid legal basis for action. [77] Nor, in default of an extant legal basis, can an *ad hoc* legal basis be improvised so as to enable a substantive rule to be applied to a past act.

73 — See footnote 41 above.

74 — *ArcelorMittal*, paragraphs 68 to 72.

75 — *ArcelorMittal*, paragraph 74.

76 — *ArcelorMittal*, paragraph 75.

77 — See my Opinion in Joined Cases *Zuckerfabrik Jülich*, C-113/10, C-147/10 and C-234/10, EU:C:2011:701, point 64. The Court did not address that point in its judgment. The Commission has recently put forward a proposal explaining that pursuant to Article 266 TFEU, where an act which constituted a legal basis has been declared void it is no longer empowered to adopt the corrective legal act necessary to implement a judgment of the Court: Proposal for a Council Regulation fixing the production levies in the sugar sector for the marketing years 2001/02, 2002/03, 2003/04, 2004/05, 2005/06, the coefficient required for calculating the additional levy for the marketing years 2001/02 and 2004/05 and the amounts to be paid by sugar manufacturers to beet sellers in respect of the difference between the maximum amount of the levies and the amount of these levies to be charged for the marketing years 2002/03, 2003/04 and 2005/06/* COM(2013) 527 final, paragraph 3, p. 3.

93. When Ireland lodged the original applications on 14 December 2001, Decision 97/413 was fully in force. It seems to me that in reality *two* provisions in that decision together provided the necessary legal basis for the Commission to act. Article 4(2) was the substantive provision dealing with safety tonnage increases. However, it was Article 9(1) that empowered the Commission to implement the objectives and detailed rules of that decision. The combination of the two provisions was therefore required to provide the *vires* to decide on the original applications. Once one or other provision was repealed, the Commission's specific competence to take the necessary decision disappeared.

94. I add that the obligation to indicate the legal basis of a measure is related to the duty to state reasons.[78] Although a legal basis can be inferred where it may be determined from other parts of the measure at issue, an explicit reference is necessary where in its absence the parties concerned and the Court are left uncertain as to the precise legal basis.[79] Here, I again take Decision C(2010) 4758 concerning Mr Peter McBride as an example.[80] That decision states expressly that 'Article 4(2) of Council Decision 97/413 was deleted by Article 1(3) of Council Decision 2002/70 and was not replaced by a corresponding provision[;] there is no longer a specific legal basis for this new decision'. In the absence of any other mention of provisions of primary or secondary legislation conferring the necessary competence on the Commission, it seems to me impossible to read any implied legal basis into that text (or its brethren).

95. I therefore consider that the General Court was correct in ruling that the Commission did not have the necessary competence to adopt the 2010 decisions.

96. If the Commission was no longer competent to act following the repeal of Article 4(2) of Decision 97/413, what then was it to do following the judgments in *Boyle and Others* and *Flaherty and Others* in order to comply with its obligations under Article 266 TFEU?

97. Whilst it is not for the Court to give directions, it may offer guidance. In making the comments that follow, I am also conscious that it is perhaps easier to be wise after the event than to see one's way clear when confronted by an apparently intractable problem.

98. The Commission does not itself have legislative competence under the CFP; but it does have the right to submit proposals to the EU legislator.[81] Moreover, Article 290(1) TFEU states that the Commission may be afforded delegated powers to adopt implementing rules. In abstract terms, it would therefore seem possible for the Commission to propose to the EU legislator to introduce the missing transitional provisions that would empower it to decide upon requests for increased safety tonnage that were pending on 31 December 2001 (i.e., when that element of MAGP IV was repealed). However, it should be borne in mind that the regime that existed when the original applications were made has long since been superseded by a policy that places more emphasis on the conservation of fish stocks.[82] In order truly to put the applicants back in the position that they would have been in had there been transitional measures, the Commission would therefore need to approach the original applications from the perspective of the CFP as it stood in 2001, rather than the CFP as it now is; take the relevant decisions; and then evaluate whether any increases in safety tonnage granted in consequence needed to be counterbalanced by some other measure(s) in order not to undermine the current focus of the CFP. That would be a significant intellectual and practical challenge.

78 — Judgment in *Commission* v *Council*, C-370/07, EU:C:2009:590, paragraphs 38, 39 and 46.

79 — Judgments in *Commission* v *Council*, C-370/07, EU:C:2009:590, paragraph 56, and *Council* v *Commission*, C-409/13, EU:C:2015:217, paragraph 79.

80 — See point 39 above.

81 — Pursuant to Article 43(1) TFEU.

82 — Points 13 to 16 above.

99. The procedural guarantees afforded under Article 10 of Decision 97/413 read together with Articles 17 and 18 of Regulation No 3760/92 have also been repealed. The Commission would therefore also need to consider to what extent the current provisions regarding supervision by Member States of the Commission's implementing measures for the CFP give equivalent or enhanced protection. [83]

100. As I have already indicated, [84] I do not consider that such a course of action would jeopardise the position of others who benefited from the grant of increased safety tonnage or have any incidence upon the position of others who received negative decisions that they did not challenge in proceedings before the General Court and that have therefore since become definitive.

101. For the reasons that I have set out above, I conclude that the first ground of appeal should be dismissed.

Second ground of appeal

102. The Commission argues that the General Court's reasoning is deficient. First, it distorted the points made in the Commission's defence. The Commission acknowledged that it could not use the procedures in Article 4(2) of Decision 97/413, but it explained that it therefore used an *ad hoc* procedure whilst retaining the power to apply that provision in substance. The judgment under appeal gives the impression that the Commission simply decided to use a legal basis that had expired without attempting to justify its position in law. Second, the Commission complains that the General Court did not address the question of admissibility which arose in Case T-471/10 *Gill*.

103. The obligation to state the reasons on which a judgment is based arises under Article 36 of the Statute of the Court of Justice, which applies to the General Court by virtue of the first paragraph of Article 53 of the Statute and Article 81 of the Rules of Procedure of the General Court. It has consistently been held that the statement of the reasons on which a judgment of the General Court is based must clearly and unequivocally disclose that court's reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review. [85]

104. First, it seems to me that the Commission in essence repeats arguments that it made in relation to the first ground of appeal. Second, while it is true that the examination of the Commission's observations in the judgment under appeal is brief, the reasons on which that judgment is based are clear and unequivocal. The General Court concluded that no provisions of primary or secondary law empowered the Commission to adopt a decision in relation to the original applications — it therefore lacked competence and had no legal basis to adopt the 2010 decisions. The General Court's reasoning is expressed with sufficient detail to enable the Commission to lodge its appeal and for the Court to make a ruling on appeal.

83 — Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

84 — Point 61 above.

85 — Judgment in *Mindo* v *Commission*, C-652/11 P, EU:C:2013:229, paragraph 29.

105. So far as Case T-471/10 *Gill* is concerned, the background is that 16 vessel owners sought to institute annulment proceedings in the General Court.[86] There was an issue as to whether, in six of those applications, the deadline for submitting an application under Article 263 TFEU had been met.[87] The General Court dismissed five of those six applications by orders of 1 April 2011 as out of time and therefore manifestly inadmissible.[88]

106. Time for lodging those proceedings began to run on 17 July 2010 and expired at midnight on 27 September 2010. The solicitors had encountered difficulties when attempting to send the applications through to the fax machine in the General Court's Registry during the night of 27 September. Initially that fax machine was not responding when the solicitors tried to transmit the application in Case T-471/10 at 23.53 and again at 23.57 Luxembourg time. The General Court therefore concluded that, taking into account the average transmission time, even if the Registry's fax machine had functioned normally only the first of the six applications (Case T-471/10 *Gill*) could have been sent by midnight when the time-limit for bringing all of the actions expired. In my view that identifies sufficiently the grounds on which the General Court accepted that Mr Gill's application was lodged within time and was therefore admissible.

107. I therefore conclude that the General Court gave sufficient reasons for its decision and that the second ground of appeal is also unfounded.

Costs

108. In accordance with Articles 138 and 184 of the Rules of Procedure, read together, where an appeal is unfounded the Court makes the decision as to costs. Under Article 138(1), the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. I consider that the appeal should be dismissed and the respondents have applied for costs. The European Commission should therefore be ordered to pay the respondents' costs.

Conclusion

109. I therefore consider that the Court should:

— dismiss the appeal;

— order the European Commission to pay the respondents' costs.

86 — See point 42 and footnote 48 above.

87 — The relevant cases were: T-468/10, T-469/10, T-470/10, T-471/10, T-472/10 and T-473/10.

88 — Order in *Doherty* v *Commission*, T-468/10, EU:T:2011:133, paragraphs 13 to 17.