OPINION OF ADVOCATE GENERAL LÉGER

delivered on 19 January 2006 [1]

1. By the present action the Kingdom of Spain is seeking annulment of Articles 3, 4 and 6 of Council Regulation (EC) No 1954/2003 of 4 November 2003 on the management of the fishing effort relating to certain Community fishing areas and resources and modifying Regulation (EEC) No 2847/93 and repealing Regulations (EC) No 685/95 and (EC) No 2027/95. [2]

I — Regulation No 1954/2003

2. Article 4(1) of Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the common fisheries policy [3] provides that 'the Council shall establish Community measures governing access to waters and resources and the sustainable pursuit of fishing activities'. In particular, Article 4(2)(f) refers to measures 'limiting fishing effort'.

3. Regulation No 1954/2003 is one such measure. Article 1 of that regulation provides that the regulation 'establishes the criteria and procedures for a system relating to the management of fishing effort in ICES areas V, VI, VII, VIII, IX and X and CECAF divisions 34.1.1, 34.1.2 and 34.2.0'.

4. Article 2(b) of that regulation provides that '"fishing effort" means the product of the capacity and the activity of a fishing vessel; for a group of vessels it means the sum of fishing effort exerted by each vessel of the group'.

5. The second recital in the preamble to Regulation No 1954/2003 states that '[t]he regime of access to certain areas and resources defined in Articles 156 to 166 and Articles 347 to 353 of the Act of Accession of Spain and Portugal [4] ... expired on 31 December 2002. Consequently, certain provisions of Council Regulation (EC) No 685/95 on the management of the fishing

1 — Original language: French.

2 — OJ 2003 L 289, p. 1.

3 — OJ 2002 L 358, p. 59.

4 — Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, particularly p. 69 et seq., hereinafter 'the Accession Treaty').

effort relating to certain Community fishing areas and resources, [5] and Council Regulation (EC) No 2027/95 establishing a system for the management of fishing effort relating to certain Community fishing areas and resources [6] need to be adapted to the new legal situation'.

6. Furthermore, the third recital in the preamble to Regulation No 1954/2003 states that '[o]ther provisions laid down in Regulations (EC) No 685/95 and (EC) No 2027/95 are designed to establish a general system for the management of fishing effort in order to prevent an increase in fishing effort and are not related to the Act of Accession of Spain and Portugal. Those provisions are important for fisheries management and should be maintained'.

7. To that end, the fourth recital in the preamble to Regulation No 1954/2003 states that '[i]n order to ensure that there is no increase in the overall levels of existing fishing effort, it is necessary to establish a new fishing effort management regime in [the] areas [listed in Article 1 of that regulation]. This regime shall limit fishing effort on grounds of the fishing effort deployed in these fisheries during the period 1998 to 2002'.

8. Chapter II of Regulation No 1954/2003 relates to the fishing effort management regime thus established. In that chapter, Article 3 of that regulation, entitled 'Measures concerning the catching of demersal [7] species and certain molluscs and crustaceans', provides:

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

(a) assess the levels of fishing effort exerted by vessels equal to or more than 15 metres in length overall, as an annual average of the period 1998 to 2002, in each of the ICES areas and CECAF divisions referred to in Article 1 for demersal fisheries, excluding demersal fisheries, those covered by Council Regulation (EC) No 2347/2002 of 16 December 2002 establishing specific access requirements and associated conditions applicable to fishing for deep-sea stocks [8] and fisheries for scallops, edible crab and spider crab, as laid down in the Annex to this Regulation. For the calculation of fishing effort the fishing capacity of a vessel shall be measured as the installed power expressed in kilowatts (kW);

5 — Regulation of 27 March 1995 (OJ 1995 L 71, p. 5).

6 — Regulation of 15 June 1995 (OJ 1995 L 199, p. 1), as amended by Council Regulation (EC) No 149/1999 of 19 January 1999 (OJ 1999 L 18, p. 3).

7 — This adjective describes species which live on or near the sea floor.

8 — OJ 2002 L 351, p. 6.

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

2. The effort regime laid down in paragraph 1 shall be without prejudice to the regimes laid down in the recovery plans which may be adopted by the Council.

3. When a recovery plan which involves management of fishing effort in all or part of the areas or divisions referred to in Article 1 is adopted by the Council, this plan shall at the same time make any necessary adjustment to this Regulation.

4. By 31 December 2006 the Commission shall present to the European Parliament and the Council a report assessing the implementation of the effort regime laid down in paragraph 1. On the basis of this report the Council shall decide on any necessary adjustment to be made to the regime.'

9. Furthermore, Article 4 of Regulation No 1954/2003, entitled 'Fishing vessels equal to or less than 15 metres', provides:

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

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

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

10. In addition, Regulation No 1954/2003 establishes a specific regime for managing fishing effort in a defined biologically sensitive area off the Irish coast. The seventh recital in the preamble to the regulation states in that regard that '[a]n area to the South and West of Ireland has been identified as an area of high concentration of

juvenile hake. This area has been made subject to special restrictions on the use of demersal gear. For the same conservation purpose it should also be subject to specific effort limitation requirements within the general system described above ...'.

11. The specific regime for managing fishing effort which is applied in this biologically sensitive area, precisely delimited in Article 6 (1) of Regulation No 1954/2003, is laid down in Article 6(2), which provides that 'Member States shall assess the levels of fishing effort exerted by vessels equal to or more than 10 metres in length overall, as an annual average of the period 1998 to 2002, for demersal fisheries, excluding those covered by Regulation (EC) No 2347/2002, and fisheries for scallops, edible crab and spider crab, and allocate the level of fishing effort thus assessed for each of those fisheries'.

12. In addition, Article 11(1) of Regulation No 1954/2003 provides that, on the basis of the information notified by Member States to the Commission, the latter 'shall submit to the Council ... a proposal for a Regulation fixing the maximum annual fishing effort for each Member State and for each area and fishery defined in Articles 3 and 6'.

13. The first subparagraph of Article 11(2) of that regulation provides that '[t]he Council, acting by qualified majority on the proposal from the Commission, shall ... decide on the maximum annual fishing effort referred to in paragraph 1'.

14. In order to implement those provisions, the Council adopted Council Regulation (EC) No 1415/2004 of 19 July 2004 fixing the maximum annual fishing effort for certain fishing areas and fisheries. [9]

15. That regulation is also the subject of an action for annulment brought by the Kingdom of Spain in Case C-442/04, which has been suspended until judgment is delivered in the present case. [10]

9 — OJ 2004 L 258, p. 1.

10 — For information, I would like to mention also the existence of an action for annulment brought before the Court of First Instance of the European Communities relating to Regulation No 1954/2003, concerning Articles 3, 5(1), 11, 13(b) and 15 of that regulation (Case T-37/04 *Região autónoma dos Açores* v *Council*, currently pending).

II — Pleas for annulment

16. The Kingdom of Spain raises two pleas against Articles 3, 4 and 6 of Regulation No 1954/2003.

17. The first plea alleges infringement of the principle of non-discrimination on grounds of nationality.

18. In its second plea, the Kingdom of Spain contends that the Council *misused its powers* in adopting Article 6 of Regulation No 1954/2003.

19. The Commission was granted leave to intervene in the present case. [11]

11 — Order of the President of the Court of 19 May 2004. I would also point out that the Court decided, by an Order of 30 September 2004, to remove from the file in the present case the opinion of the Legal Service of the Council of the European Union dated 29 October 2002, produced by the Kingdom of Spain as Annex 1 to its statement in reply.

III — Assessment

20. Since the action for annulment brought by the Kingdom of Spain relates to only three articles of Regulation No 1954/2003, the question arises whether that action is admissible.

A — *The admissibility of the action*

21. At the hearing the Court asked the parties to state their views on the admissibility of the action in the light of its case-law according to which 'partial annulment of a Community act is possible only if the elements whose annulment is sought may be severed from the remainder of the act'. [12]

22. The Kingdom of Spain considers that its action is admissible. It contends in particular that its interest in the present case is limited to the contested articles and that, generally, the Community courts should only rule on what is sought by the applicant.

12 — Case C-239/01 *Germany* v *Commission* [2003] ECR I-10333, paragraph 33, and Case C-244/03 *France* v *European Parliament and Council* [2005] ECR I-4021, paragraph 12. See also to this effect Case 17/74 *Transocean Marine Paint* v *Commission* [1974] ECR 1063, paragraph 21; Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 256; Case C-29/99 *Commission* v *Council* [2002] ECR I-11221, paragraph 45 and Case C-378/00 *Commission* v *European Parliament and Council* [2003] ECR I-937, paragraph 30.

23. For its part, the Council expresses doubts regarding the admissibility of the action. It contends in particular that it is necessary to take into consideration the relationship between the contested articles, namely Articles 3, 4 and 6 of Regulation No 1954/2003, and the other articles of that regulation. By way of example, it cites Articles 7 to 14, which contain measures for implementing the rules laid down in the contested articles. It considers that if the Court were to annul Articles 3, 4 and 6 of Regulation No 1954/2003, Articles 7 to 14 of the regulation would not make sense since they would relate to the implementation of control measures for a fishing regime that no longer existed.

24. For these reasons, the Council considers that the application was incorrectly worded and that the Kingdom of Spain should also have requested the Court to annul Articles 7 to 14 of Regulation No 1954/2003.

25. Lastly, the Commission considers that the present action is inadmissible since Articles 3, 4 and 6 of Regulation No 1954/2003 constitute the core of the new regime for managing fishing effort and cannot be separated from the rest of that regulation.

26. I share the view expressed by the Council and the Commission at the hearing.

27. I consider that Articles 3, 4 and 6 of Regulation No 1954/2003 are inseparable from the rest of that regulation.

28. As the Court has repeatedly held, the 'requirement of severability' of the elements whose annulment is sought is not satisfied 'where the partial annulment of an act would have the effect of altering its substance'. [13]

29. As regards the method of assessment which should be adopted in this regard, the Court has held that 'whether partial annulment would alter the substance of the contested measure is an objective criterion, and not a subjective criterion linked to the political intention of the authority which adopted the measure at issue'. [14]

30. In the present case indeed this method of analysis leads me to consider that annlument of Articles 3, 4 and 6 of Regulation No 1954/2003 would alter the actual substance of that regulation. Both the title of Chapter II ('Fishing Effort Management Regime') and its content, including those three articles, show that they are the main provisions of

13 — *France* v *European Parliament and Council*, cited above, paragraph 13. See also to this effect, the following cases cited above: *France and Others* v *Commission*, paragraph 257; *Commission* v *Council*, paragraph 46, and *Germany* v *Commission*, paragraph 34.

14 — See in particular, *Germany* v *Commission*, cited above, paragraph 37.

that regulation, without which the latter would have no *raison d'être*.

31. In support of that view, it should be noted that, according to the fourth recital in the preamble to Regulation No 1954/2003, the purpose of the latter is to establish 'a new fishing effort management regime' in the ICES areas and CECAF divisions concerned.

32. That regime is based in essence on the assessment by the Member States of the fishing effort exerted by vessels equal to or more than 15 metres in length overall (Article 3), by vessels equal to or less than 15 metres in length overall (Article 4) and, as regards the biologically sensitive fishing area off the Irish coast, by vessels equal to or more than 10 metres in length overall (Article 6).

33. The criteria to be followed by the Member States in order to carry out that assessment are laid down in Articles 3, 4 and 6 of Regulation No 1954/2003. They consist mainly in assessing the levels of fishing effort as an annual average of the period 1998 to 2002 in each of the areas concerned for demersal fisheries and fisheries for scallops, edible crab and spider crab [Article 3(1)(a) and Article 6(2)] and assessing globally the fishing effort 'for each fishery and area or division referred to in Article 3(1) during the period 1998 to 2002' (Article 4(1) and (2)).

34. It is clear therefore from reading the contested articles that the latter lay down the method for assessing levels of fishing effort, and the reference period to be used, namely, the period 1998-2002, which constitutes the essence of Regulation No 1954/2003 since it is intended to introduce a new regime for managing fishing effort.

35. This view is confirmed by the numerous references to the contested articles in other articles of that regulation.

36. I note, for example, that Article 7(1) and (2), Article 8(3) and Article 11(1) and (3) of Regulation No 1954/2003 refer to the 'fishing activities in the fisheries defined [or referred to] in Articles 3 and 6' of that regulation.

37. Moreover, within Chapter III, entitled 'Control Regime', Article 13 of Regulation

No 1954/2003, which contains '[s]pecial control provisions' refers in paragraph (a) to 'the area defined in Article 6(1)' of that regulation.

38. Lastly, I note that several of the amendments to Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy [15] that are provided for in Article 14 of Regulation No 1954/2003 would be devoid of purpose if Articles 3, 4 and 6 of Regulation No 1954/2003 were annulled.

39. In the light of all these considerations, in my view the present action for annulment is inadmissible in so far as it relates to Articles 3, 4 and 6 of Regulation No 1954/2003, which constitutes the core of the new regime introduced by that regulation.

40. In case the Court does not share that view, I shall, however, consider in the alternative the two pleas raised by the Kingdom of Spain.

15 — OJ 1993 L 261, p. 1.

B — *The plea alleging infringement of the principle of non-discrimination on grounds of nationality*

1. Arguments of the parties

41. In support of this first plea, alleging infringement of the principle of non-discrimination on grounds of nationality, the Kingdom of Spain contends:

— on the one hand, that the reference period 1998-2002 used in Regulation No 1954/2003 as the basis for calculating the fishing effort corresponds to a period during which that State, unlike the other Member States, was subject to a restrictive regime by reason of its accession to the Community; and,

— on the other hand, the delimitation of the biologically sensitive area, where a specific fishing effort regime applies, coincides with an earlier area known as the 'Irish Box', in which the Kingdom of Spain was also subject to a restrictive regime.

42. More generally, the Kingdom of Spain considers that the transitional regime to which it was subject by reason of its accession to the Community expired on 31 December 2002 and that the new regulation should not have taken 1998-2002 as the reference period. By using that period in Regulation No 1954/2003 for purposes of assessing fishing effort, the Council continued the discrimination which existed in the legislation preceding that regulation.

43. The Kingdom of Spain also considers that the Council failed to take into account the specific situation of the Spanish fleet under the rules of the Act of Accession, which constitutes an infringement of the principle of non-discrimination on grounds of nationality.

44. The Council, supported by the Commission, considers, on the contrary, that the regime provided for by Regulation No 1954/2003 is not discriminatory. It points out in that regard that the restriction on fishing effort assessed on the basis of the effort exerted by each of the national fleets, in each area and for each fishery during the period 1998-2002 applies to all Community fishing vessels, irrespective of their nationality.

45. Moreover, the time criterion used by the Council in that regulation is justified, appropriate and proportionate to the objective sought, which is to contribute to the sustainability of fisheries resources by reducing the fishing activities of Community vessels in the western waters.

46. Lastly, with regard to the specific regime for managing fishing effort within the biologically sensitive area defined in Article 6(1) of Regulation No 1954/2003, the Council notes that the area concerned should not be confused with the Irish Box referred to in Regulations Nos 685/95 and 2027/95 since the biologically sensitive area represents less than a quarter of the extent of the Irish Box, and a significant part of that area is situated outside the area covered by the Irish Box. Moreover, the fact that there are other sensitive areas needing protection does not mean that there is no point in protecting the area referred to in Article 6(1) of Regulation No 1954/2003.

2. Assessment

47. I am of the view that, in adopting Regulation No 1954/2003, and in particular Articles 3, 4 and 6 of that regulation, the Council did not infringe the principle of equal treatment or non-discrimination on grounds of nationality, as generally secured by Article 12 EC and, in the context of the common agricultural policy, by the second subparagraph of Article 34(2) EC.

48. According to the settled case-law of the Court, discrimination is defined as treating differently situations which are identical, or treating in the same way situations which are different. [16]

49. However, where treating comparable situations differently and treating different situations in the same way is objectively justified it cannot be classed as discrimination. [17]

50. The Kingdom of Spain contends that it is in a special situation in relation to the other Member States and that it should not therefore have been subjected to the same regime for managing fishing effort as those other Member States.

51. It is correct that the Kingdom of Spain has been subject, since its accession to the Community, to a regime involving certain restrictions on access to Community waters and their resources. In order to fully understand the essential features of that regime and the gradual integration of the Kingdom of Spain into the general system for managing fishing effort it is important to describe how the rules thus applied to that Member State have evolved.

52. Articles 156 to 166 of the Act of Accession lay down the system governing access by vessels flying the flag of Spain to Community waters and their resources. That system limits the fishing opportunities open to such vessels in certain areas of Community waters. For example, Article 157 of the Act of Accession provides that '[o]nly those vessels referred to in Articles 158, 159 and 160 may engage in fishing activities and may do so solely in the zones and under the conditions that are specified in those Articles'. Article 158 provides in that regard for a list to be drawn up of 300 vessels authorised to fish in ICES divisions V b, VI, VII, VIII a, b and d, and lays down the conditions governing the number of ships on that list that may be present in the areas concerned at any one time. Article 158(1) *in fine* of that article also contains a prohibition on access to the area known as the 'Irish Box'.

53. Article 166 of the Act of Accession provides that the regime defined in Articles 156 to 164 of that Act, including the adjustments which the Council will be able to adopt pursuant to Article 162 of the Act, shall remain in force until the date of expiry of the period laid down in Article 8(3) of Regulation (EEC) No 170/83'. [18] That provi-

16 — See, in particular, Case 8/82 *Wagner* [1983] ECR 371, paragraph 18; Case 283/83 *Racke* [1984] ECR 3791, paragraph 7; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 26, and Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 80.

17 — Case C-304/01 *Spain* v *Commission* [2004] ECR I-7655, paragraph 31 et seq.

18 — Council Regulation of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1).

sion, subsequently repeated in Article 14(2) of Regulation (EEC) No 3760/92, [19] refers to the period expiring on 31 December 2002.

54. Under Article 162 of the Act of Accession, the Council adopted, with regard to the Kingdom of Spain, Regulation (EC) No 1275/94 of 30 May 1994 on adjustments to the arrangements in the fisheries chapters of the Act of Accession of Spain and Portugal. [20]

55. The third recital in the preamble to that regulation provides that the new provisions adjusting the regime provided for by the Act of Accession 'must make possible the full integration of Spain and Portugal into the general scheme of the common fisheries policy and must fully comply with the "acquis communautaire", particularly with regard to the principle of relative stability and the exceptions to the principle of free access to waters as laid down by [Regulation No 3760/92]'. To the same effect, the fourth and fifth recitals in the preamble to Regulation No 1275/94 state that 'free access to waters must be accompanied by supervision of the fishing capacity deployed, in order to ensure that the means in question are appropriate to the resources available', on the understanding that 'these adjustments must not entail an increase in the overall levels of existing fishing effort per ICES and CECAF division nor adversely affect resources subject to quantitative catch restrictions'.

56. Thus, Article 1 of Regulation No 1275/94 provides that '[w]ith effect from 1 January 1996, the arrangements regarding access to waters and resources laid down in Articles 156 to 166 and 347 to 353 of the Act of Accession of Spain and Portugal shall be adjusted and incorporated into the Community measures provided for in Articles 3 and 4 of this Regulation, which are applicable to all Community vessels'. In addition, Article 3 (1) of that regulation provides that '[t]he Council shall ... adopt the Community measures laying down the conditions of access to the zones and resources subject to specific rules pursuant to Articles 156 to 166 and 347 to 353 of the Act of Accession [and that] [s]uch measures shall include restrictions on exploitation'. Lastly, Article 3(3) of the same regulation provides that such measures 'must comply with the principle of no increase in fishing effort ...'.

57. In accordance with the provisions of Article 3 of Regulation No 1275/94, the Council adopted Regulation No 685/95 on the management of the fishing effort relating to certain Community fishing areas and

19 — Council Regulation of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1). That regulation repeals and replaces Regulation No 170/83. It was itself repealed and replaced by Regulation No 2371/2002.

20 — OJ 1994 L 140, p. 1.

resources. Article 1 of Regulation No 685/95 'establishes, with effect from 1 January 1996, the criteria and procedures for the introduction of a system for the management of fishing effort in ICES divisions V b, VI, VII, VIII, IX and X and CECAF areas 34.1.1, 34.1.2, and 34.2.0'.

58. Article 3(1) of Regulation No 685/95 provides that '[w]ith regard to each fishery for the catching of demersal species as defined in Annex I, the Member States shall assess the fishing effort necessary, on the basis of Community criteria for assessing the fishing efforts defined in Annex II'. As regards the Irish Box, Article 3(5) provides that the Member States concerned are to assess the fishing effort in that area on the basis of the level of existing activity for their respective vessels except, however, for those flying the flag of Spain. Moreover, the last sentence of that articles states that in the Irish Box 'the number of vessels flying the flag of Spain ... may not exceed 40'.

59. Furthermore, under Article 6 of Regulation No 685/95, the Council adopted Regulation No 2027/95, which lays down the maximum annual fishing effort for each Member State and for each fishery.

60. Finally, as the regime of access to certain areas and resources defined in the Act of Accession expired on 31 December 2002, the Council adopted Regulation No 1954/2003, Article 15 of which provides for the repeal of Regulations Nos 685/95 and 2027/95.

61. This description of the fishing effort management regime applying to the Kingdom of Spain confirms that that Member State was subject from the time of its accession until 31 December 2002 to certain restrictions relating to access to certain fishing areas and resources.

62. It also shows that the situation of the Kingdom of Spain gradually came into line with that of the other Member States, mainly following the adoption of Regulations Nos 1275/94 and 685/95, whilst retaining certain particular features until the end of the transition period.

63. Thus, during the reference period 1998-2002, which is taken into account in Regulation No 1954/2003, the situation of the Kingdom of Spain had certain special features as compared with the other Member States, such as the limit of 40 Spanish vessels being able to be present in the Irish Box at any one time.

64. It is therefore necessary to ascertain whether it is objectively justified to apply to the Kingdom of Spain, under Articles 3, 4 and 6 of Regulation No 1954/2003, the same regime for managing fishing effort as applied to the other Member States, based mainly on the levels of fishing effort during the period 1998 to 2002.

65. I note, first of all, that that regulation uses a method for assessing fishing effort which is based on an objective criterion, namely the fishing effort actually exerted during a recent, representative period. That reference period is the same for all the Member States. As the Council has shown, the restriction on fishing effort based on the effort exerted by each country's fleet, in each area and for each fishery, during the period 1998 to 2002, which is provided for in Articles 3, 4 and 6 of Regulation No 1954/2003, applies to all Community fishing vessels, irrespective of their nationality.

66. In my view, the criterion used by the Council to restrict fishing effort on the basis of the effort deployed in a recent earlier period, besides being objective, is justified in order to ensure the sustainability of fisheries resources.

67. It should be pointed out that the objective of the new regime for managing fishing effort laid down in Regulation No 1954/2003 is 'to ensure that there is no increase in the overall levels of existing fishing effort.' [21] Moreover, the need to respect in particular the principle of the relative stability of fishing activities has been expressed on a number of occasions by the Community legislature. [22]

68. The objective of the 'general fishing effort limitation' [23] requires maximum levels of annual fishing efforts to be maintained by each group of species, area and fishery, and by each Member State. I note in that regard that the fifth recital in the preamble to Regulation No 1415/2004, the purpose of which is to lay down the maximum annual fishing effort for each Member State, each area and fishery as defined in Articles 3 and 6 of Regulation No 1954/2003, provides that that level 'should be equal to the global fishing effort exerted over the five-year period 1998 to 2002 by [vessels flying the flag of a Member State], divided by five'.

69. In those circumstances, it is objectively justified in my view, in the light of the objective of preventing an increase in fishing effort, to make provision in 2003, in respect

21 — Fourth recital in the preamble to Regulation No 1954/2003.

22 — See in particular, third recital in the preamble to, and Article 3(2) of, Regulation No 1275/94, and the third recital in the preamble to, and Article 3(2)(iii) of, Regulation No 685/95.

23 — Fifth recital in the preamble to Regulation No 1954/2003.

of all Member States, for a regime restricting that effort on the basis of the effort exerted by each Member State, in the fisheries concerned, during the period 1998 to 2002.

70. In the light of these considerations, I am of the view that the general system for managing fishing effort provided for in Articles 3 and 4 of Regulation No 1954/2003 cannot be classed as discriminatory.

71. Lastly, regarding the biologically sensitive area defined in Article 6(1) of Regulation No 1954/2003, it is clear from the documents in the case that that area overlaps with the Irish Box only to a limited extent, since the biologically sensitive area covers less than half of the Irish Box.[24] In those circumstances, it is hard to maintain that the system of restrictions applying to the Kingdom of Spain within the Irish Box under Regulation No 685/95 during the period 1998 to 2002 is extended, to the detriment of that Member State, by Article 6(1) of Regulation No 1954/2003. Moreover, the method for assessing fishing effort in the biologically sensitive area referred to in that article is based also on an objective criterion, namely the fishing effort actually exerted by vessels equal to or more than 10 metres in length overall, as an annual average of the period 1998 to 2002, which also seems to me justified in the light of the objective of restricting fishing effort in an area of high concentration of juvenile hake.

72. I therefore consider that the first plea, alleging infringement of the principle of non-discrimination on grounds of nationality, is unfounded and must therefore be rejected.

C — *The plea alleging that the Council misused its powers in adopting Article 6 of Regulation No 1954/2003*

1. Arguments of the parties

73. In this second plea, the Kingdom of Spain contends that the Council misused its powers in adopting Article 6 of Regulation No 1954/2003, since the real objective of delimiting the biologically sensitive area is not to protect juvenile hake but to extend the restrictions already applying to its fleet in the Irish Box.

74. The Kingdom of Spain considers that if the objective sought had really been to

24 — See charts annexed to the Council rejoinder and the Commission's statement in intervention.

protect juvenile hake the same measures as those provided for in Article 6 of Regulation No 1954/2003 should have been applied to other areas of the western waters. It also contends that the adoption of this type of technical measure is governed by Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms. [25]

75. The Council, however, considers, first, that the possibility of deciding on measures to prohibit or temporarily close fishing to a particular species under Regulation No 850/98 has no effect on whether the contested measures are legal or appropriate and, secondly, that the legal basis of Regulation No 1954/2003 is Article 37 EC, which is the same as that which would have been used if a technical measure for the protection of juvenile hake had been included under Regulation No 850/98. The Council did not therefore evade any special procedure.

76. The Commission, for its part, contends that the Community legislature has wide discretion when called upon to assess a complex economic situation, as is the case in common fisheries policy matters. It also makes clear that the specific regime for managing fishing effort in the biologically sensitive area takes into account the high concentration of juvenile hake in that area and that the purpose of that regime is to protect that area by ensuring that the maximum fishing effort laid down for the western waters cannot be deployed within that area. Lastly, according to the Commission, the fact that there may be other biologically sensitive areas or that other measures might be contemplated does not demonstrate that the Council misused its powers or that it manifestly exceeded the limits of its discretion.

2. Assessment

77. The Court has consistently held that 'a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case'. [26]

78. Like the Council and the Commission, I do not think that the adoption of Article 6 of

25 — OJ 1998 L 125, p. 1.

26 — See in particular Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 24 and Case C-110/97 *Netherlands* v *Council* [2001] ECR I-8763, paragraph 137.

Regulation No 1954/2003 constitutes a misuse of powers on the part of the Council.

79. On one hand, the Kingdom of Spain does not show that the specific regime for managing fishing effort which is applied to the biologically sensitive area was adopted mainly for a purpose other than that of promoting the protection of juvenile hake.

80. On the other hand, I consider that neither the fact that technical measures for the protection of juveniles of marine organisms may also fall within another regulation nor the fact that there may be other biologically sensitive areas shows that there has been a misuse of powers on the part of the Council in the present case.

81. The second plea raised by the Kingdom of Spain should therefore in my view also be rejected as unfounded.

IV — Conclusion

82. In the light of the above considerations, I suggest that the Court should declare the Kingdom of Spain's action for annulment inadmissible and order the applicant to pay the costs, with the Commission of the European Communities bearing its own costs.

83. In the alternative, I suggest that the Court should dismiss the Kingdom of Spain's action for annulment and order the applicant to pay the costs, with the Commission of the European Communities bearing its own costs.