Reports of Cases

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 21 July 2016[1]

Case C-128/15

Kingdom of Spain
v

Council of the European Union

(Actions for annulment — Fisheries — Regulation (EU) No 1367/2014 fixing the fishing opportunities for certain deep-sea fish stocks — Roundnose grenadier and roughhead grenadier — Risk of misreporting — Fishing opportunities covering two species — Allocation formula — National quotas — Validity — Regulation (EU) No 1380/2013 on the Common Fisheries Policy — Article 2, paragraph 2 — Precautionary approach — Article 16, paragraph 1, first sentence — Principle of relative stability of fishing activities — Infringement)

I – Introduction

1. By its action, the Kingdom of Spain seeks the annulment of Regulation (EU) No 1367/2014 ('the contested regulation')[2] on the ground that the Council of the European Union exceeded the bounds of its discretion by establishing and allocating total allowable catches (TACs) covering both roundnose grenadier (*coryphaenoides rupestris*) and roughhead grenadier (*macrourus berglax*), in breach of the principles of relative stability, proportionality and equal treatment.

2. For the reasons which I shall set out below, I think that the first plea in law in support of the application for annulment, alleging infringement of the principle of relative stability, should be upheld, and so I shall restrict my analysis in this Opinion to that first plea.

II – Legal framework

3. The relevant legal framework comprises Regulation (EU) No 1380/2013 on the Common Fisheries Policy (CFP),[3] as amended by Regulation (EU) No 1385/2013,[4] ('the CFP Regulation') and the contested regulation.

1 — Original language: French.

2 — Council Regulation of 15 December 2014 fixing for 2015 and 2016 the fishing opportunities for Union fishing vessels for certain deep-sea fish stocks (OJ 2014 L 366, p. 1).

3 — Regulation 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).

4 — Council Regulation of 17 December 2013 amending Council Regulations (EC) No 850/98 and (EC) No 1224/2009, and Regulations (EC) No 1069/2009, (EU) No 1379/2013 and (EU) No 1380/2013 of the European Parliament and of the Council, following the amendment of the status of Mayotte with regard to the European Union (OJ 2013 L 354, p. 86).

A – *The CFP Regulation*

4. Recitals 35 to 37 of the CFP Regulation are worded as follows:

‘(35) In view of the precarious economic state of the fishing industry and the dependence of certain coastal communities on fishing activities, it is necessary to ensure the relative stability of fishing activities by allocating fishing opportunities among Member States, based on a predictable share of stocks for each Member State.

(36) Such relative stability of fishing activities, given the temporary biological situation of stocks, should safeguard and take full account of the particular needs of regions where local communities are especially dependent on fisheries and related activities, as decided by the Council in its Resolution of 3 November 1976, and in particular Annex VII thereto.

(37) Therefore, it is in this sense that the concept of relative stability should be understood.’

5. Article 2 of the CFP Regulation, which identifies the objectives of the CFP, is worded as follows:

‘1. The CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies.

2. The CFP shall apply the precautionary approach to fisheries management, and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield.

…’

6. Article 4(1), point 8, of the CFP Regulation defines the precautionary approach to fisheries management as ‘an approach according to which the absence of adequate scientific information should not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment’.

7. Falling within Part III of the CFP Regulation, which is entitled ‘Measures for the conservation and sustainable exploitation of marine biological resources’, Article 6 provides:

‘1. For the purpose of achieving the objectives of the CFP in respect of the conservation and sustainable exploitation of marine biological resources as set out in Article 2, the Union shall adopt conservation measures as set out in Article 7.

2. When applying this Regulation, the [European] Commission shall consult the relevant advisory bodies and the relevant scientific bodies. Conservation measures shall be adopted taking into account available scientific, technical and economic advice, including, where relevant, reports drawn up by [the Scientific, Technical and Economic Committee for Fisheries (STECF)] and other advisory bodies, advice received from Advisory Councils and joint recommendations made by Member States pursuant to Article 18.

…’

8. Article 7 of the CFP Regulation, entitled 'Types of conservation measures', states:

'1. Measures for the conservation and sustainable exploitation of marine biological resources may include, inter alia, the following:

…

(e) measures on the fixing and allocation of fishing opportunities;

…'

9. Article 16 of the CFP Regulation, entitled 'Fishing opportunities' states:

'1. Fishing opportunities allocated to Member States shall ensure relative stability of fishing activities of each Member State for each fish stock or fishery. The interests of each Member State shall be taken into account when new fishing opportunities are allocated.

…

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

…'

B – *The contested regulation*

10. Recitals 1 to 4 and 7 of the contested regulation are worded as follows:

'(1) Article 43(3) [TFEU] provides that the Council, on a proposal from the Commission, is to adopt measures on the fixing and allocation of fishing opportunities.

(2) [The CFP] Regulation … requires that conservation measures be adopted taking into account available scientific, technical and economic advice, including, where relevant, reports drawn up by the Scientific, Technical and Economic Committee for Fisheries …

(3) It is incumbent upon the Council to adopt measures on the fixing and allocation of fishing opportunities, including certain conditions functionally linked thereto, as appropriate. Fishing opportunities should be distributed among Member States in such a way as to assure each Member State relative stability of fishing activities for each stock or fishery and having due regard to the objectives of the [CFP] established by [the CFP] Regulation …

(4) The [TACs] should be established on the basis of available scientific advice, taking into account biological and socioeconomic aspects whilst ensuring fair treatment between fishing sectors, as well as in the light of the opinions expressed during the consultation of stakeholders, and in particular the Regional Advisory Councils concerned.

…

(7) As regards the four stocks of roundnose grenadier, scientific advice and recent discussions in the North East Atlantic Fisheries Commission (NEAFC) indicate that catches of this species may be misreported as catches of roughhead grenadier. In this context, it is appropriate to establish a TAC covering both species while enabling a separate reporting for each of them.'

11. According to Article 1 thereof, the contested regulation 'fixes for the years 2015 and 2016 the annual fishing opportunities available to Union fishing vessels for fish stocks of certain deep-sea species in Union waters and in certain non-Union waters where catch limits are required'.

12. Article 2(1) of the contested regulation establishes the following definitions, amongst others, for the purposes of the regulation:

'(c) ["TAC"] means the quantity that can be taken and landed from each fish stock each year;

(d) "quota" means a proportion of the TAC allocated to the Union or a Member State'.

13. Article 3 of the contested regulation is worded as follows:

'The TACs for deep-sea species caught by Union fishing vessels in Union waters or in certain non-Union waters, the allocation of such TACs among Member States and the conditions functionally linked thereto, where appropriate, are set out in the Annex to this regulation.'

14. Article 5 of the contested regulation states:

'Fish from stocks for which TACs are established shall be retained on board or landed only if the catches have been taken by fishing vessels flying the flag of a Member State having a quota and that quota is not exhausted.'

15. Part 2 of the annex to the contested regulation is entitled 'Annual fishing opportunities applicable for Union fishing vessels in areas where TACs exist by species and by area (in tonnes live weight)'.

16. In so far as concerns the species roundnose grenadier and roughhead grenadier in Union and international waters of Division Vb and Subareas VI and VII ('the first management zone'), Part 2 of the annex to the contested regulation establishes a TAC of 4 010 tonnes for 2015 and 4 078 tonnes for 2016. Of those, the Kingdom of Spain was allocated quotas of 65 tonnes for 2015 and 66 tonnes for 2016.

17. It is also specified that landings of roundnose grenadier must not exceed 95% of each Member State's quota.

18. In so far as concerns the species roundnose grenadier and roughhead grenadier in Union and international waters of Subareas VIII, IX, X, XII and XIV ('the second management zone'), Part 2 of the annex to the contested regulation establishes a TAC of 3 644 tonnes for 2015 and 3 279 tonnes for 2016. Of those, the Kingdom of Spain was allocated quotas of 2 617 tonnes for 2015 and 2 354 for 2016.

19. It is also specified that landings of roundnose grenadier must not exceed 80% of each Member State's quota.

III – Background to the dispute

20. It is apparent from the observations submitted by the Council and the Commission that roundnose grenadier and roughhead grenadier are two deep-sea species which, to the naked eye, are distinguishable one from the other only by the shape of the head. Once the head has been removed from fish of these species and they have been frozen, it is practically impossible to tell them apart.

21. The Commission states that roundnose grenadier is a target species in the two management zones in question and that fishing of that species in those areas has been regulated since 2003 by a TAC established at Union level.[5] It adds that roughhead grenadier is less common in those areas and that its fishing was not regulated by any European Union TAC prior to the adoption of the contested regulation.

22. According to the Council and the Commission, the working group on biology and assessment of deep-sea fisheries within the International Council for the Exploration of the Sea (ICES), which met on 4 and 11 April 2014, stated in its report for 2014 ('the WGDEEP 2014 report') that it had learned of substantial catches of roughhead grenadier in recent years on the Hatton Bank, in particular by Spanish trawlers. Those institutions also state that the WGDEEP 2014 report mentioned substantial mismatches between observer and official Spanish data on landings of roundnose grenadier, raising concerns regarding possible misreporting of the various species of grenadier.

23. The content of the WGDEEP 2014 report was discussed within the NEAFC Permanent Committee on management and science in September 2014. The Permanent Committee emphasised, in particular, that the level of reported roughhead grenadier fisheries compared to roundnose grenadier was 'surprising', as roughhead catches had traditionally been small in comparison. ICES was asked to provide clarification, as far as possible, regarding those fisheries. In particular, ICES was asked to consider whether there were possible errors in the catch reporting or whether there was a new and/or rapidly growing fishery in roughhead grenadier.

24. In parallel, the European Union, represented by Unit C2 of the Commission's Directorate-General for Maritime Affairs and Fisheries also asked ICES about this matter, in September 2014.

25. On 3 October 2014, the Commission submitted to the Council a proposal for a Council regulation fixing for 2015 and 2016 the fishing opportunities for Union fishing vessels for certain deep-sea fish stocks. In particular, the Commission proposed that, in each of the management zones in question, a TAC should be fixed covering both roundnose grenadier and roughhead grenadier. The TAC level fixed for both species together was based on scientific advice provided by ICES in relation to roundnose grenadier, there being no such advice in relation to roughhead grenadier. Similarly, national quotas distributing the common TACs were determined in accordance with the principle of relative stability in relation to roundnose grenadier alone.

26. On 7 November 2014, ICES produced a scientific advice responding to the requests made by NEAFC and the Union ('the ICES advice'). It is apparent from that advice that uncertainties existed in the species composition of reported grenadier catches. In so far as concerned the distribution and abundance of the two species of grenadier, ICES indicated that they occurred in different hydrological environments, the roughhead grenadier being associated with colder, more boreal waters.

27. The ICES advice emphasised that substantial catches of roughhead grenadier had been reported in the second management zone and in part of the first management zone. On average, observed commercial catches of roundnose grenadier in Subareas VI and XII were three orders of magnitude larger than those of roughhead grenadier. However, ICES emphasised that there were considerable differences, of more than one order of magnitude, between the relative proportions of roundnose and roughhead grenadier reported in the official landings, on the one hand, and the observed catches and scientific surveys in the areas where roughhead grenadier fishing was currently occurring, on the other.

5 — See Council Regulation (EC) No 2340/2002 of 16 December 2002 fixing for 2003 and 2004 the fishing opportunities for deep-sea fish stocks (OJ 2002 L 356, p. 1).

28. The ICES advice nevertheless stated that the available survey and observer data both provided inconclusive information, with limited spatial and temporal coverage. ICES thus concluded that there was a need for more comprehensive catch and effort data relating to roughhead grenadier if NEAFC and the Union wished to regulate that fishery.

29. On Monday 10 November 2014, the Council discussed the proposal for a regulation submitted by the Commission on 3 October 2014. On the basis of the Council's discussions and with the agreement of the Commission, the Presidency proposed a compromise text. In substance, the compromise consisted in increasing the TACs originally established for roundnose grenadier to allow for the inclusion of roughhead grenadier.

30. It is apparent from the observations submitted by the Council that, in practice, the additional amount was calculated on the basis of the average proportion of roughhead grenadier landings to roundnose grenadier landings. Accordingly, for the first management zone, since the ICES scientific advice suggested a TAC of 3 794 tonnes for roundnose grenadier and the average annual landings of roughhead grenadier in that zone represented 5.7% of the average estimated annual landings of roundnose grenadier, the figure of 3 794 tonnes was increased by 216 tonnes (5.7% of 3 794 tonnes), giving a final quantity of 4 040 tonnes. The same method was followed for the second management zone, where the average estimated annual landings of roughhead grenadier represented 25.6% of the average estimated annual landings of roundnose grenadier.

31. The TACs thus established were distributed among the Member States concerned in accordance with the allocation formula corresponding to relative stability for roundnose grenadier. As a result, the quotas for the Kingdom of Spain represented 1.62% and 71.8% respectively of the common TACs fixed for the first and second management zones.

32. On 15 December 2014, political agreement was reached on the basis of the Presidency compromise, with slight alterations. All the delegates expressed their approval of the political agreement, with the exception of the Spanish and Portuguese delegates, which submitted a statement for inclusion in the Council's minutes. In that statement the Kingdom of Spain argued that the allocation of the common TACs established for roundnose grenadier and roughhead grenadier did not comply with the principle of relative stability on the basis of the historic catches of each Member State.

33. The contested regulation was adopted in the terms resulting from the political agreement and was published in the *Official Journal* on 20 December 2014. It entered into force on the day following its publication.

IV – Forms of order sought by the parties

34. The Kingdom of Spain requests the Court to:

— annul the contested regulation, and

— order the Council to pay the costs.

35. The Council claims that the Court should:

— dismiss the action in its entirety, and

— order the Kingdom of Spain to pay the costs.

36. By decision of the President of the Court of 1 July 2015, the Commission was granted leave to intervene in support of the form of order sought by the Council.

V – The action

37. At the outset, it is necessary to clarify the precise scope of the action brought by the Kingdom of Spain.

38. Although, in the application which it has lodged, the Kingdom of Spain formally seeks the annulment of the contested regulation in its entirety, the pleas in law which it has put forward in support of its application for annulment relate solely to the provisions of the annex to the regulation which establish and allocate common TACs for the species roundnose grenadier and roughhead grenadier[6] ('the contested provisions'), as the Council has rightly pointed out. The Kingdom of Spain confirmed at the hearing that the scope of its action was limited to those provisions.

39. The Kingdom of Spain raises three pleas in law in support of its application for annulment, alleging breach of the principle of relative stability, breach of the principle of proportionality and breach of the principle of non-discrimination.

40. In the context of its first plea in support of its application for annulment, the Kingdom of Spain alleges that the Council made two mistakes when it established the fishing possibilities for roundnose grenadier and roughhead grenadier.

41. By the first part of this plea, it alleges that the Council's decision to establish common TACs for roundnose grenadier and roughhead grenadier was based on evidence that was materially incorrect.

42. By the second part of its first plea, it alleges that the allocation formula which the Council applied to the common TACs for roundnose grenadier and roughhead grenadier did not comply with the principle of relative stability. For the reasons which I shall set out below, I suggest that the Court should uphold the second part of the first plea and consequently annul the contested provisions.

43. Before commencing my examination of the two parts of the first plea, I would like to clarify the nature of the relationship between the CFP Regulation and the contested regulation. The CFP regulation establishes the general regime of the CFP, including the objectives and the obligations to which the EU legislature must adhere in this field. As for the contested regulation, it constitutes a specific measure adopted by the legislature for the purpose of attaining the objectives laid down in the CFP Regulation and consists in the definition of the fishing possibilities for certain stocks of deep-sea fish for the years 2015 and 2016.[7]

44. There is, therefore, a hierarchy between these two instruments, in the sense that the contested regulation must conform to the objectives and obligations established by the CFP Regulation, as is confirmed by recital 3 of the contested regulation. The Council was therefore bound to observe the principle of relative stability, laid down in the first sentence of Article 16(1) of the CFP Regulation, when it adopted the contested regulation, a point which none of the parties has disputed.

A – *The first part of the first plea, alleging that the Council's decision to establish common TACs for roundnose grenadier and roughhead grenadier was based on evidence that was materially incorrect*

45. The Kingdom of Spain argues that, contrary to what is asserted in recital 7 of the contested decision, the scientific advice available to NEAFC was inconclusive as to whether it was necessary to fix a common TAC for roundnose grenadier and roughhead grenadier.

6 — See points 15 to 19 of this Opinion.

7 — For the sake of completeness, I would observe that the contested regulation falls within the scope of the CFP as defined in Article 1 of the CFP Regulation.

46. The Kingdom of Spain points out that the European Union and NEAFC asked ICES to advise as to whether those two species of grenadier might occur together in the management zones in question and whether catches of roundnose grenadier might have been misreported as catches of roughhead grenadier.

47. According to the Kingdom of Spain, the ICES advice emphasised that, on the basis of the available data, it was impossible to reach a conclusion regarding the existence of a roughhead grenadier fishery.

48. The Kingdom of Spain infers from that that the Council exceeded the bounds of its discretion by establishing common TACs for roundnose grenadier and roughhead grenadier, given that the ICES advice indicated that the available data did not prove that those two species occurred in the management zones in question and were therefore liable to be caught together.

49. I consider that this argument should be rejected as irrelevant, for the following reasons.

50. First of all, I would recall the settled case-law according to which, when it is fixing TACs and allocating fishing opportunities among the Member States, the Council has to evaluate a complex economic situation. In such circumstances, the Council's discretion is not limited to the nature and scope of the measures to be taken but extends, to some degree, to the finding of the basic facts. In reviewing the exercise of such a power, the Court must confine itself to examining whether there has been a manifest error or misuse of power or whether the authority in question has clearly exceeded the bounds of its discretion. [8]

51. Secondly, Article 2(2) of the CFP Regulation provides that 'the CFP shall apply the precautionary approach to fisheries management'. According to the definition thereof given in point 8 of Article 4(1) of the regulation, that approach implies that the absence of adequate scientific information should not justify postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment. Moreover, Article 16(4) of the regulation states that fishing opportunities are to be fixed in accordance with the objectives set out in Article 2(2) of the same regulation.

52. I infer from those provisions that the Council, acting on a proposal from the Commission, [9] has power, even in the absence of adequate scientific data, to adopt such management measures as are necessary for the conservation of a species and, in particular, measures restricting fishing opportunities.

53. Consequently, contrary to the Kingdom of Spain's submission, the Council does have power to adopt a common TAC for roundnose grenadier and roughhead grenadier even in the absence of 'conclusive' scientific evidence that those two species occur in and are captured in the management zones in question.

54. Thirdly, I find confirmation for that interpretation in the wording of Article 6(2) of the CFP Regulation, according to which conservation measures are to be adopted *taking into account* available scientific, technical and economic advice. That obligation to take such advice 'into account' does not, in my view, imply an obligation to refrain from acting where the advice is not conclusive.

8 — Judgments of 19 February 1998 in *NIFPO and Northern Ireland Fishermen's Federation* (C-4/96, EU:C:1998:67, paragraphs 41 and 42), of 5 October 1999 in *Spain* v *Council* (C-179/95, EU:C:1999:476, paragraph 29), of 25 October 2001 in *Italy* v *Council* (C-120/99, EU:C:2001:567, paragraph 44) and of 30 March 2006 in *Spain* v *Council* (C-87/03 and C-100/03, EU:C:2006:207, paragraph 38).

9 — See Article 43 TFEU: 'The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities'.

55. The Court has already held, in a similar context, that conservation measures need not be completely consistent with the scientific advice, and the absence of such advice or the fact that it is inconclusive cannot prevent the Council from adopting such measures as it deems necessary for achieving the objectives of the CFP. [10]

56. Fourthly, I would emphasise that the Council and the Commission were in possession of scientific advice, namely the WGDEEP 2014 report and the ICES advice, according to which substantial catches of roughhead grenadier had been reported in the management zones in question. [11]

57. That advice did not settle the question of whether those reports reflected the emergence of a new fishery for roughhead grenadier or a practice of misreporting catches of roundnose grenadier. Any such practice of reporting roundnose grenadier as roughhead grenadier entailed a risk of rendering the TACs established for roundnose grenadier wholly ineffective and that risk was all the greater since, as the Council and the Commission have emphasised without being contradicted on the point by the Kingdom of Spain, it is impossible to distinguish between roundnose grenadier and roughhead grenadier visually once the head has been removed from the fish and it has been frozen. [12]

58. As the Council and the Commission have argued, it was in order to counter that risk that the contested regulation established a common TAC for roundnose grenadier and roughhead grenadier. That intention is clearly apparent from recital 7 of that regulation.

59. Given those circumstances, and having regard to the broad discretion which the EU legislature enjoys in the sphere of the CFP and its obligation to apply the precautionary approach, [13] I do not think that the Council exceeded the bounds of its discretion by adopting common TACs for roundnose grenadier and roughhead grenadier, as the Kingdom of Spain asserts.

60. Consequently, the first part of the first plea should, in my view, be dismissed as unfounded.

B – *The second part of the first plea, alleging that the allocation formula which the Council applied to the common TACs for roundnose grenadier and roughhead grenadier did not comply with the principle of relative stability*

61. In the second part of its first plea, the Kingdom of Spain argues that neither the Council nor the Commission took historic catches of roughhead grenadier into consideration when defining the allocation formula to be applied to the common TACs established for roughhead and roundhead grenadier. The national quotas established in the contested provisions therefore breach the principle of relative stability, in accordance with which account must be taken of the historic distribution of catches among the Member States' fishing fleets for each species concerned.

62. In effect, the Kingdom of Spain considers that the common fishing quotas which it was allotted for roundnose grenadier and roughhead grenadier should have been higher, since the Spanish fishing fleet took a significant proportion of roughhead grenadier catches over the period from 2009 to 2013. The loss sustained by the Spanish fishing fleet as a result of that alleged breach of the principle of relative stability amounts to EUR 346 926.

10 — See, by analogy, the judgment of 24 November 1993 in *Mondiet* (C-405/92, EU:C:1993:906, paragraphs 30 and 31).

11 — See points 22 to 28 of this Opinion.

12 — See point 20 of this Opinion.

13 — See points 50 and 51 of this Opinion.

63. Neither the Council nor the Commission has disputed the fact that no account was taken of historic catches of roughhead grenadier when the common TACs at issue were established. Indeed, it is not disputed that the common TACs were allocated among the Member States in accordance with an allocation formula that reflected relative stability for roundnose grenadier alone. [14]

64. Thus, it remains to be determined whether, as the Kingdom of Spain alleges, the principle of relative stability required the EU legislature to take account of historic catches of roughhead grenadier when allocating the common TACs.

65. I would observe in this connection that the CFP Regulation contains no definition of the concept of relative stability. However, according to recital 36 of that regulation, the relative stability of fishing activities 'should safeguard and take full account of the particular needs of regions where local communities are especially dependent on fisheries and related activities'.

66. Moreover, the Court has been called upon a number of times to interpret the concept of relative stability. On those occasions it has held that the aim of national quotas is to assure to each Member State a share of the TACs established that is determined essentially on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of that Member State benefited before the quota system was established. [15]

67. In my opinion, it follows from the foregoing that the principle of relative stability requires the EU legislature to take account of the historic catches of the Member States when determining the quotas to be allocated to each Member State once a TAC has been established. Furthermore, when a TAC covering several species is established, it is incumbent upon the EU legislature to take account of the historic catches of *each* of the species concerned. That obligation arises from the wording of the first sentence of Article 16(1) of the CFP Regulation, [16] from the case-law of the Court [17] and from the reasoning upon which the principle of relative stability is founded. [18]

68. Consequently, by failing to take historic catches of roughhead grenadier into account when determining the quotas to be allocated to each Member State once the common TACS for that species and for roundnose grenadier had been established, the Council breached the principle of relative stability.

69. I would emphasise that the Council and the Commission have expressly admitted that historic catches are one of the factors that must be taken into account when establishing the formulas for allocating a TAC among the Member States. Those two institutions nevertheless put forward several arguments by which they seek to prove that the contested provisions do not breach the principle of relative stability or, at least, that any such breach is justified.

70. First of all, they allege that the objective of conserving roundnose grenadier justifies the allocation of the common TAC for that species and for roughhead grenadier in a way that complies with the principle of relative stability in relation to roundnose grenadier alone.

14 — See points 25 and 31 of this Opinion.

15 — Judgments of 14 December 1989 in *Agegate* (C-3/87, EU:C:1989:650, paragraph 24), of 14 December 1989 in *Jaderow and Others* (C-216/87, EU:C:1989:651, paragraph 23) and of 19 February 1998 in *NIFPO and Northern Ireland Fishermen's Federation* (C-4/96, EU:C:1998:67, paragraph 47).

16 — 'Fishing opportunities allocated to Member States shall ensure relative stability of fishing activities of each Member State *for each fish stock or fishery*' (my italics).

17 — Judgment of 18 April 2002 in *Spain* v *Council* (C-61/96, C-132/97, C-45/98, C-27/99, C-81/00 and C-22/01, EU:C:2002:230, paragraph 39): 'For the purposes of applying the principle of relative stability, the fishing opportunities for each fish stock, defined as fish of a particular species located within a specified geographical area … must be assessed separately. It follows from Article 8(4)(ii) of Regulation No 3760/92 that relative stability of fishing activities must be assured to each Member State for each of the stocks concerned.'

18 — Since the distribution of historic catches among the Member States is different for each species, merely taking into account the historic catches of one of the two species covered by a common TAC is not sufficient to ensure the relative stability of fishing activities relating to the other species.

71. That argument is, in my view, unfounded, for the following reasons. First, the relevant provisions of the CFP Regulation preclude such an interpretation. In accordance with Article 16(4) of that regulation, the objective of conservation must be observed when fishing opportunities are *fixed*.[19] By contrast, that objective is not relevant when fishing opportunities are *allocated*. Indeed, Article 16(1) of the CFP Regulation provides that the principle of relative stability must be observed when fishing opportunities are allocated among Member States, but does not mention the objective of conservation in that context.[20]

72. Secondly, and from a practical point of view, the conservation of a species such as roundnose grenadier is ensured when a TAC for that species is established, not when that TAC is allocated among the Member States. In so far as the conservation of the species is concerned, it matters little whether roundnose grenadier are fished by a vessel flying the Spanish flag or by a vessel flying any other flag.

73. To summarise, the two objectives apply at two different stages, when fishing opportunities are fixed and when those opportunities are allocated, and consequently the objective of conservation cannot justify a breach of the principle of relative stability when fishing opportunities are allocated.

74. I would also note that the Council addressed the risk of roundnose grenadier being overfished as a result of the increase in the TACs at issue[21] by restricting landings of roundnose grenadier to 95% and 80% of the quotas allocated to each Member State.[22]

75. Secondly, the Council argues that it was not required to revise the allocation formula established for roundnose grenadier when it extended the TACs at issue to include roughhead grenadier, because that extension did not lead to the establishment of new fishing opportunities, within the meaning of the second sentence of Article 16(1) of the CFP Regulation, but instead maintained existing fishing opportunities.

76. I would recall, in this connection, that the second sentence of Article 16(1) of the CFP Regulation provides that the interests of each Member State are to be taken into account when new fishing opportunities are allocated.[23] Accordingly, that obligation to take the interests of each Member State into account applies solely to *new* fishing opportunities.

77. By contrast, the wording of the first sentence of Article 16(1) of the CFP Regulation draws no distinction between new and existing fishing possibilities. Therefore, the obligation to comply with the principle of relative stability applies to both *new* fishing opportunities and *existing* fishing opportunities.[24]

19 — The adoption, pursuant to Article 6(1) of the CFP Regulation, of conservation measures as set out in Article 7 of that regulation must also be guided by the objective of conservation.

20 — See, by analogy, the judgment of 24 November 1993 in Mondiet (C-405/92, EU:C:1993:906, paragraph 50). In that judgment, the Court held that a measure prohibiting the use of driftnets could not be regarded as contrary to the principle of relative stability because that principle related only to the distribution among the Member States of the volume of catches available to the Community for each of the stocks of fish considered.

21 — See points 29 and 30 of this Opinion.

22 — See points 17 and 19 of this Opinion.

23 — On the obligation to take the interests of each Member State into account when allocating new fishing opportunities, see the judgment of 8 November 2007 in *Spain* v *Council* (C-141/05, EU:C:2007:653, paragraph 87 et seq.)

24 — In other words, the obligation to take the interests of each Member State into account when allocating *new* fishing possibilities accompanies, but does not replace the obligation to ensure the relative stability of fishing activities when allocating any fishing possibilities. An interpretation according to which the principle of relative stability did not apply to the allocation of *new* fishing possibilities, but only to the allocation of *existing* fishing opportunities would lead to the illogical situation in which an allocation formula that was contrary to the principle of relative stability could be annulled only if the fishing opportunities in question ceased to be new opportunities and became existing opportunities.

78. It follows from the foregoing that the Council was in any event required to observe the principle of relative stability when it established the TACS at issue for roundnose grenadier and roughhead grenadier, irrespectively of whether those TACs might be classified as new or existing fishing opportunities. [25]

79. In this connection, the Council also refers to the case-law of the Court according to which the requirement of relative stability must be understood as meaning that each Member State is to retain a fixed percentage and that the allocation formula originally laid down will continue to apply *until such time as an amending regulation is adopted*. [26]

80. In the circumstances of the present case, it can hardly be disputed, in my view, that an 'amending regulation' has been adopted, within the meaning of the case-law mentioned, since the Council adopted a regulation amending the TACs established for roundnose grenadier so as to include roughhead grenadier. The Council cannot, therefore, rely on that case-law in order to allege that the allocation formula originally laid down for roundnose grenadier must continue to apply even though it amended the TACs at issue so as to include roughhead grenadier.

81. In this respect the circumstances of the present case are fundamentally different from those of the cases in which the Court held the Council's practice of not amending the allocation formula originally laid down to be valid with regard to the principle of relative stability. Indeed, none of those cases concerned the Council's amendment of an existing TAC so as to include a different species of fish. [27]

82. Thirdly, both the Council and the Commission argue that they were constrained to use the allocation formula established for roundnose grenadier because there was no reliable data on catches of roughhead grenadier in the management zones in question.

83. I am unconvinced by that argument, for the following reasons.

84. First of all, it is common ground that the Council and the Commission were in possession of data relating to catches of roughhead grenadier in the management zones in question, that data appearing in the WGDEEP 2014 report and in the ICES advice, [28] as the Council expressly admitted at the hearing.

85. That fact is even less open to dispute since the Council calculated the additional amount added to the TACs originally established for roundnose grenadier alone so as to allow for the inclusion of roughhead grenadier on the basis of the average proportion of roughhead grenadier landings to roundnose grenadier landings. [29]

25 — I would add, for the sake of completeness, that it seems to me that the Council's argument that the TACs at issue do no more than maintain existing fishing opportunities is contradicted by the fact that those TACs include for the first time the species roughhead grenadier. In my view they therefore constitute new fishing opportunities. That, however, does not affect the Council's obligation to comply with the principle of relative stability established in the first sentence of Article 16(1) of the CFP Regulation, for the reasons which I have already given.

26 — See, in particular, the judgments of 16 June 1987 in *Romkes* (46/86, EU:C:1987:287, paragraph 17), of 13 October 1992 in *Portugal and Spain* v *Council* (C-63/90 and C-67/90, EU:C:1992:381, paragraph 26), of 30 March 2006 in *Spain* v *Council* (C-87/03 and C-100/03, EU:C:2006:207, paragraph 27) and of 8 November 2007 in *Spain* v *Council* (C-141/05, EU:C:2007:653, paragraph 86).

27 — In those cases, the Court held that the Council was under no obligation to revise an allocation formula when other Member States had not exhausted their quotas (see the judgments of 16 June 1987 in *Romkes* 46/86, EU:C:1987:287, paragraph 14, and of 13 October 1992 in *Portugal and Spain* v *Council*, C-63/90 and C-67/90, EU:C:1992:381, paragraph 38), when new Member States acceded to the European Union (see the judgments of 13 October 1992 in *Portugal and Spain* v *Council*, C-63/90 and C-67/90, EU:C:1992:381, paragraphs 31 to 35, and of 30 March 2006 in *Spain* v *Council*, C-87/03 and C-100/03, EU:C:2006:207, paragraphs 28 to 32) or when there is an increase in fishing possibilities (see the judgments of 13 October 1992 in *Portugal and Spain* v *Council*, C-63/90 and C-67/90, EU:C:1992:381, paragraphs 27 to 30, and of 13 October 1992 in *Spain* v *Council*, C-73/90, EU:C:1992:384, paragraphs 27 to 29).

28 — See points 22 to 28 and 56 to 58 of this Opinion.

29 — See points 29 and 30 of this Opinion.

86. I would add that, in any event, the Council was entitled, in the exercise of its discretion, referred to in point 50 of this Opinion, to interpret the data in its possession on historic catches of roughhead grenadier. In particular, it could have assessed the reliability of that data and questioned the Kingdom of Spain on the matter, if necessary. Having completed that assessment, it would also have been entitled to disregard any data that it might legitimately have suspected to be the result of fraudulent or erroneous reporting.

87. However, I do not think that that discretion, which is limited by the obligation to observe the principle of relative stability, permitted the Council completely to ignore the data on historic catches of roughhead grenadier that was in its possession when it defined the allocation formula for the common TACs established for roughhead and roundhead grenadier.

88. Having regard to the foregoing considerations, I think that the contested provisions must be annulled in so far as they allocated the common TACs established for roughhead grenadier and roundhead grenadier in breach of the principle of relative stability.

89. Since the second part of the first plea should be upheld, it is unnecessary to consider the merits of the other two pleas in law put forward by the Kingdom of Spain in support of its action.

C – *Maintaining the effects of the contested provisions*

90. Although the Council has not requested it, I think it necessary, in the event the Court should decide to annul the contested provisions, for the effects of those provisions to be maintained. [30]

91. Under the second paragraph of Article 264 TFEU, the Court may, if it considers it necessary, state which of the effects of the act which it has declared void are to be considered as definitive.

92. In the present case, the annulment of the contested provisions, which establish and allocate common TACs for roundnose grenadier and roughhead grenadier, could have significant adverse repercussions for the conservation of those species, inasmuch as, between the delivery of the Court's judgment and the entry into force of new provisions establishing the relevant fishing opportunities, the fishing of those two species would be unregulated.

93. Consequently, I consider that the effects of those provisions should be maintained until the entry into force, within a reasonable period of time not exceeding six months from the date of delivery of the Court's judgment, of new provisions establishing and allocating fishing opportunities for roundnose grenadier and roughhead grenadier in accordance with the principle of relative stability.

VI – Conclusion

94. In light of all the foregoing considerations, I propose that the Court should:

— uphold the action and consequently annul the provisions of the annex to Council Regulation (EU) No 1367/2014 of 15 December 2014 fixing for 2015 and 2016 the fishing opportunities for Union fishing vessels for certain deep-sea fish stocks which establish and allocate annual fishing opportunities for the species roundnose grenadier (*coryphaenoides rupestris*) and roughhead grenadier (*macrourus berglax*) in Union and international waters of Division Vb and Subareas VI and VII and in Union and international waters of Subareas VIII, IX, X, XII and XIV;

30 — The Court considered, of its own motion, the necessity of maintaining the effects of the provisions which it annulled in its judgments of 7 September 2006 in *Spain* v *Council* (C-310/04, EU:C:2006:521, paragraphs 138 to 141) and of 22 October 2013 in *Commission* v *Council* (C-137/12, EU:C:2013:675, paragraphs 78 to 81).

— maintain the effects of those provisions until the entry into force, within a reasonable period of time not exceeding six months from the date of delivery of the Court's judgment, of new provisions establishing and allocating fishing opportunities for roundnose grenadier and roughhead grenadier in accordance with the principle of relative stability; and

— order the Council of the European Union to pay the costs and the European Commission to bear its own costs.