OPINION OF ADVOCATE GENERAL

BOT

delivered on 31 January 2008 [1]

1. In the present action, the Kingdom of Spain is seeking the annulment of Articles 1 to 6 of Council Regulation (EC) No 1415/2004 of 19 July 2004 fixing the maximum annual fishing effort for certain fishing areas and fisheries. [2]

2. This action follows that brought by the Kingdom of Spain against 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. [3] The Court dismissed the latter action by judgment of 30 March 2006 in *Spain* v *Council.* [4]

3. In that judgment, the Court decided that the contested provisions were not severable from the rest of Regulation No 1954/2003, that the claim submitted by the Kingdom of Spain for partial annulment of that regulation was inadmissible and that the action had consequently to be dismissed. [5]

4. On 2 March 2005, pending judgment in that case, the Court decided to stay proceedings in the present case. Following delivery of judgment in *Spain* v *Council*, the Kingdom of Spain applied to have the stay of proceedings lifted.

5. In support of its action in the present case, the Kingdom of Spain has raised a plea of illegality, pursuant to Article 241 EC, in regard of Regulation No 1954/2003.

6. In this Opinion, I will explain, first, why that plea of illegality should, in my opinion,

1 — Original language: French.

2 — OJ 2004 L 258, p. 1.

3 — OJ 2003 L 289, p. 1.

4 — Case C-36/04, [2006] ECR I-2981.

5 — *Spain* v *Council*, paragraph 21.

be declared admissible. Secondly, I will set out the reasons why I consider that the submissions put forward by the Kingdom of Spain in support of that plea of illegality cannot be accepted and that, consequently, the present action should be dismissed as unfounded.

I — Legal background

A — *Regulation No 1954/2003*

7. Under 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,[6] 'the Council shall establish Community measures governing access to waters and resources and the sustainable pursuit of fishing activities'. Specifically, Article 4(2)(f) of that regulation mentions measures 'limiting fishing effort'.

8. Regulation No 1954/2003 is one such measure. According to Article 1 thereof, that 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'.

9. Under Article 2(b) of Regulation No 1954/2003, '"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'.

10. 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[7] has expired on 31 December 2002. Consequently, certain provisions of Council Regulation (EC) No 685/95 … on the management of the fishing effort relating to certain Community fishing areas and resources[8] and Council Regulation (EC) No 2027/95 … establishing a system for the management of fishing effort

6 — OJ 2002 L 358, p. 59.

7 — 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, in particular, p. 69 *et seq.*; 'the Act of Accession').

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

relating to certain Community fishing areas and resources [9] need to be adapted to the new legal situation'.

11. In addition, the third recital in the preamble to Regulation No 1954/2003 states that '[o]ther provisions laid down in Regulations … No 685/95 and … 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]. Those provisions are important for fisheries management and should be maintained'.

12. In that perspective, 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 set out in Article 1 of the regulation]. This regime shall limit fishing effort on the basis of the fishing effort deployed in these fisheries during the period 1998 to 2002'.

13. Chapter II of Regulation No 1954/2003 concerns the fishing effort management regime thus put in place. Within that chapter, Article 3 of the regulation, entitled 'Measures concerning the catching of demersal species and certain molluscs and crustaceans', is drafted in the following terms:

'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 [10] 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);

9 — 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).

10 — OJ 2002 L 351, p. 6.

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

…'

14. In addition, Regulation No 1954/2003 lays down a specific effort regime for a biologically sensitive area situated off the Irish coast. The seventh recital in the preamble to the regulation states 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 …'.

15. The specific effort regime which applies in that biologically sensitive area — which is precisely deflimited 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 … 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'.

16. Finally, Article 11(1) of Regulation No 1954/2003 provides that on the basis of the information to be communicated to the Commission of the European Communities, 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'.

17. Under the first subparagraph of Article 11(2) of Regulation No 1954/2003, '[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'.

18. On the basis of that provision, the Council adopted Regulation No 1415/2004, which is the subject of the present action for annulment.

B — *Regulation No 1415/2004*

19. According to the final recital in the preamble to Regulation No 1415/2004, '[t]he maximum annual fishing effort, to be fixed for the vessels flying the flag of a Member State, by group of species, area and fishery, should be equal to the global fishing effort exerted over the five-year period 1998 to 2002 by those vessels, divided by five'.

20. Regulation No 1415/2004 provides as follows:

'*Article 1*

Subject matter

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

Article 2

Maximum levels

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

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

Article 3

Transiting through an area

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

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

Article 4

Methodology

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

Article 5

Compliance with other fishing effort limitation schemes

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

Article 6

Entry into force

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

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

II — The action

21. In its application initiating proceedings, the Kingdom of Spain claims that the Court should annul Articles 1 to 6 of Regulation No 1415/2004, pleading infringement of the principle of non-discrimination on grounds of nationality and maintaining that the Council misused its powers in adopting Article 6 of Regulation No 1954/2003 and Regulation No 1415/2004.

22. In its reply, lodged on 22 June 2006, the Kingdom of Spain expressly raised a plea of illegality under Article 241 EC in regard to Regulation No 1954/2003. It asked the Court to declare that regulation illegal.

23. By order of the President of the Court of 9 March 2005, the Commission was granted leave to intervene in support of the form of order sought by the Council.

III — Assessment

24. I would first like to express my position on the plea of illegality raised by the Kingdom of Spain.

A — *Admissibility of the Kingdom of Spain's plea of illegality*

25. In its application, the Kingdom of Spain alleges, first of all, infringement of the principle of non-discrimination on grounds of nationality with regard, on the one hand, to the reference period used to fix the maximum annual fishing effort and, on the other, the delimitation of the sensitive area.

26. The arguments put forward by Spain in support of that submission are identical to those which it put forward in *Spain* v *Council*.

27. The Kingdom of Spain points out in point 36 of its application that it considers that Articles 3, 4 and 6 of Regulation No 1954/2003 infringe the principle of non-discrimination and should be annulled. It is for that reason that it brought an action for annulment in *Spain* v *Council*.

28. The Kingdom of Spain goes on to point out that it is also challenging Regulation No 1415/2004 inasmuch as that regulation implements Articles 3 and 6 of Regulation No 1954/2003.

29. Similarly, with regard to the second submission — alleging misuse of powers on the part of the Council — the Kingdom of Spain reiterates in its application the arguments it put forward in *Spain* v *Council*. It considers that the Court should annul Regulation No 1415/2004, which implements Article 6 of Regulation No 1954/2003, because, in adopting Article 6 of that implementing regulation, the Council misused its powers.

30. It its reply, lodged after the delivery of judgment in *Spain* v *Council*, the Kingdom of Spain argued that a plea of illegality under Article 241 EC should be raised in regard to Regulation No 1954/2003. It advances a number of reasons which, in its view, demonstrate the need to ascertain, incidentally, whether Regulation No 1954/2003 is in conformity with Community law.

31. Among those reasons, the Kingdom of Spain argues, in particular, that the plea of illegality is a means of removing, where necessary, provisions which, albeit contrary to Community law, constitute the legal basis for a measure which is the subject of an action for annulment. It points out that there is a direct legal link between the implementing measure (Regulation No 1415/2004) and the basic measure (Regulation No 1954/2003). The levels specified in the annexes to Regulation No 1415/2004 could be fixed and calculated only on the basis of the measures and conditions defined in Articles 3 and 6 of Regulation No 1954/2003.

32. In addition, the Kingdom of Spain considers that the present case is different from the situation in which a plea of illegality raised by a Member State is inadmissible on the ground that the time-limits for bringing an action for annulment have expired.[11] It maintains that it, the Kingdom of Spain, complied with that requirement in the action it brought against the basic regulation in *Spain* v *Council*.

33. Finally, the Kingdom of Spain points out that the judgment in that case did not address the substance of its main submissions, which, in essence, apply equally to the implementing regulation and show that, in the circumstances, Regulation No 1954/2003 is inapplicable. In its view, the absence of a decision on the substance of the case and the existence of a direct legal link between the two relevant regulations requires the Court to rule in the present case on the question whether Regulation No 1954/2003 is applicable. Otherwise, according to the Kingdom of Spain, the Court's judgment would be deprived of useful effect.

34. In its defence, the Council points out that the Kingdom of Spain does not claim that Regulation No 1415/2004 fails to comply with the provisions of Regulation No 1954/2003 but maintains, on the contrary, that the contested regulation is illegal because it followed the criteria laid down in Articles 3 and 6 of Regulation No 1954/2003. The Council also notes that in *Spain* v *Council*, the Kingdom of Spain asked the Court to annul Articles 3 and 6 of the latter regulation for the same reasons as those put forward in the present case, that is to say, infringement of the principle of non-discrimination and misuse of powers. It then sets out its position on the substance of the case.

35. In its rejoinder, the Council points out that the present action against Regulation No 1415/2004 was brought as part of proceedings which are distinct and separate from the action in *Spain* v *Council*,

11 — The Kingdom of Spain refers, on that subject, to Case C-135/93 *Spain* v *Commission* [1995] ECR I-1651, paragraph 17.

although the two cases are obviously linked. It points out that compliance with the maximum annual fishing effort for each Member State, fixed by Regulation No 1415/2004, is an obligation which is additional to, but distinct from, the obligations laid down in Articles 3, 4 and 6 to 8 of Regulation No 1954/2003.

36. The Council considers that the plea of illegality raised in the reply is out of time and therefore inadmissible. It considers that, having regard to the provisions of the first subparagraph of Article 42(2) of the Rules of Procedure of the Court, [12] dismissal of the Kingdom of Spain's action in *Spain* v *Council* cannot be regarded as a new fact.

37. In that regard, the Council points out, *inter alia*, that measures adopted by the Community institutions enjoy a presumption of validity, with the result that a judgment of the Court confirming the validity of a measure does not change the applicant's legal position and, consequently, cannot constitute a factor permitting the introduction of a new plea in law.

38. In any event, the Council maintains that the Kingdom of Spain cannot challenge the validity of Regulation No 1954/2003 once the time-limits laid down in the last paragraph of Article 230 EC have expired. It argues that if a Member State were entitled to challenge a Community measure by means of a plea of illegality every time an institution adopted a measure implementing that Community measure, it would be possible to call into question indefinitely Community measures producing legal effects and that would, in its view, be contrary to the objective which the procedural time-limits seek to achieve, namely to ensure legal certainty.

39. The Council refers to the Court's case-law to the effect that the addressee of a decision adopted by a Community institution which has not been challenged within the time-limits laid down in the last paragraph of Article 230 EC cannot invoke the illegality of such a decision, which has become definitive as against him. [13]

40. The Council maintains that that case-law should be applied here, even though the present case differs in two respects: first, the Kingdom of Spain challenged the measure whose lawfulness it is now calling into question, but its action was dismissed; and,

12 — Under that provision, '[n]o new plea in law may be introduced in the course of the proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure'.

13 — The Council refers to Case 52/83 *Commission* v *France* [1983] ECR 3707, paragraph 10; Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECRI-833, paragraph 13; and Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 29.

secondly, the measure being challenged in the present proceedings is a regulation.

41. The Commission, for its part, points out first that the link between Regulation No 1954/2003 and Regulation No 1415/2004 is so close that the present action is no more than an almost literal repetition of the action in *Spain* v *Council*. In its view, the present action has not really been brought against Regulation No 1415/2004 but against Articles 3, 4 and 6 of Regulation No 1954/2003. None of the pleas in law in the present action mentions Regulation No 1415/2004 specifically or directly. For that reason, the Commission considers that in applying to continue the present proceedings, the Kingdom of Spain is seeking to escape the effects of the judgment dismissing its action in *Spain* v *Council*.

42. Furthermore, according to the Commission, the plea of illegality — whether tacit or implicit — has not been correctly presented because, on the one hand, such a plea is subordinate to the action for annulment under Article 230 EC, with the effect that the Kingdom of Spain cannot invoke the illegality of a measure against which it was able to bring an action for annulment. [14] On the other hand, a plea of illegality is not a matter of public policy and should therefore have been expressly raised in the application. [15]

43. In the Commission's view, a plea of illegality raised in the reply should be regarded as being out of time. In addition, it implies the introduction of a new plea in law and an amendment of the initial application, which the first subparagraph of Article 42(2) of the Rules of Procedure of the Court does not permit.

44. For those reasons, the Commission contends that the present action should be dismissed without it being necessary to consider the substance of the case.

45. In its reply to the Commission's statement in intervention, the Kingdom of Spain points out that, in its view, the judgment in *Spain* v *Council*, is a new matter of fact and law which came to light in the course of the proceedings and which permits the introduction of a new plea in law in accordance with the first subparagraph of Article 42(2) of the Rules of Procedure of the Court. Finally, a plea of illegality does not contravene the principle of legal certainty or the principle of *res judicata*.

14 — The Commission refers to Joined Cases T-244/93 and T-486/93 *TWD* v *Commission* [1995] ECR II-2265, paragraph 103.

15 — The Commission mentions Case 14/59 [1959] ECR 215.

46. I do not agree with the position adopted by the Council and the Commission in so far as they argue that a plea of illegality such as that put forward by the Kingdom of Spain in the present action is inadmissible.

47. In support of their point of view, the Council and the Commission put forward two arguments: first, they defend a position of principle, arguing, essentially, that a Member State cannot raise a plea of illegality in respect of a Community measure which it was able to challenge earlier, even if it is a regulation. On the other hand, they consider that the plea of illegality in the case at hand is out of time.

48. I take the contrary view that the terms of Article 241 EC give a Member State a great deal of leeway to invoke the inapplicability of a regulation, even, in my opinion, where that Member State has already brought an action for the partial annulment of the regulation but that action has been declared inadmissible.

49. I also consider that the plea of illegality raised by the Kingdom of Spain cannot be regarded as out of time inasmuch as it was impliedly contained in the application presented by the Kingdom of Spain.

1. The right of privileged applicants to raise a plea of illegality in regard to a regulation

50. It should be pointed out, first of all, that, according to the terms of Article 241 EC, '[n]otwithstanding the expiry of the period laid down in the fifth paragraph of Article 230, any party may, in proceedings in which a regulation adopted jointly by the European Parliament and the Council, or a regulation of the Council, of the Commission, or of the [European Central Bank] is at issue, plead the grounds specified in the second paragraph of Article 230 in order to invoke before the Court of Justice the inapplicability of that regulation'.

51. The Court has dealt on numerous occasions with the question of the admissibility of pleas of illegality raised under Article 241 EC by ordinary applicants or privileged applicants. That has given rise to a complex line of authority, the main strands of which are as follows.

52. In its judgment of 6 March 1979, *Simmenthal* v *Commission*,[16] the Court decided that 'Article [241 EC] gives expression to a general principle conferring upon

16 — Case 92/78 [1979] ECR 777.

any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is under challenge, if that party was not entitled under Article [230 EC] to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void'. [17]

53. That judgment introduced into the relationship between the action for annulment and the plea of illegality a rationale based on the principle that legal remedies should be mutually compensatory. [18]y making the admissibility of a plea of illegality dependent upon the lack of an alternative legal remedy, the Court gave that plea a subordinate character. [19]

54. By thus making the admissibility of a plea of illegality conditional upon the direct route to the Community Courts being closed, the Community judicature seeks to prevent that remedy from offering negligent applicants a second chance. That has given rise to a principle of the unity of judicial protection, by virtue of which a litigant should not, in principle, be able to have access to the Community Courts more than once. [20]

55. According to that line of reasoning, the fact of considering an incidental challenge to be out of time is designed to penalise the negligent conduct of applicants who have failed to make use of the action for annulment in order to challenge a decision, even though they have certainly had the possibility of doing so. [21]

56. Thus, like ordinary applicants, the privileged applicants cannot, in an action for annulment of a decision, raise a plea of illegality in respect of an earlier measure of the same kind, annulment of which they could have sought directly. In the Court's view, the contrary approach would permit the time-limits for bringing proceedings laid down in the fifth paragraph of Article 230 EC to be circumvented. [22] That principle of the inviolability of decisions which have not been challenged within those time-limits is set aside only where the allegedly unlawful measure contains such serious and manifest defects that it could be deemed non-existent. [23]

17 — Paragraph 39.

18 — According to the expression used by L. Coutron, *La contestation incidente des actes de l'Union européenne,* a thesis defended on 10 December 2005 at the University of Montpellier I. B

19 — See J. Molinier, 'Exception d'illégalité', *Jurisclasseur Europe,* 2007, fascicule 350, p. 7, point 22.

20 — See L. Coutron, *op. cit.*, pp. 113 and 383.

21 — That time bar was first raised against a negligent applicant in the context of a reference for a preliminary ruling on validity (*TWD Textilwerke Deggendorf*, paragraphs 23 to 25). The following year, the Court of First Instance transposed that reasoning to the plea of illegality (*TWD* v *Commission*, paragraph 103).

22 — See, in particular, *Spain* v *Commission* (paragraph 17).

23 — Case 226/87 *Commission* v *Greece* [1988] ECR 3611, paragraph 16). See also, to that effect, Joined Cases 6/69 and 11/69 *Commission* v *France* 1969] ECR 523, paragraphs 11 to 13.

57. Is that reasoning, based on the principle that legal remedies should be mutually compensatory, also relevant where a plea of illegality is raised in regard to a regulation?

58. An affirmative answer can be given where such a plea of illegality is raised by an ordinary applicant. In that situation, the possibility of an incidental challenge compensates for the restricted access which non-privileged applicants have to the action for annulment of legislative measures. In regard to a measure which is truly of general application, the annulment of which they cannot, in principle, directly apply for, ordinary applicants cannot be accused of a lack of care and in consequence they have a right to challenge the measure incidentally. [24]

59. That reasoning seems to me to be consistent with the logic informing the system of legal remedies in Community law and compatible with the terms of Article 241 EC, which permits any party to raise incidentally the inapplicability of a regulation. By thus confirming that an ordinary applicant may challenge, incidentally, a measure of general application, the Court's case-law reconciles with the terms of Article 241 EC the logic of the principle that legal remedies should be mutually compensatory.

60. However, once a plea of illegality is raised by a privileged applicant in regard to a regulation, a line of reasoning in terms of the above principle becomes irrelevant in so far as it infringes the terms of Article 241 EC.

61. Indeed, since the Member States and the Community institutions have almost unlimited access to the action for annulment, such a line of reasoning — which makes the admissibility of a plea of illegality conditional upon it being impossible to bring an action directly before the Community Courts — would inevitably have the effect of denying privileged applicants any right to challenge a measure incidentally. [25] That would constitute an obvious infringement of the terms of Article 241 EC which, it should not be forgotten, gives any party the right to invoke the inapplicability of a regulation before the Court, notwithstanding the fact that the time-limits laid down in the fifth paragraph of Article 230 EC have expired. [26]

62. It is certainly because of the 'insuperable' nature of the wording of that provision [27] that the Court, prompted by a number

24 — See, to that effect, Case C-241/95 *Accrington Beef and Others* [1996] ECR I-6699, paragraphs 15 and 16).

25 — See L. Coutron, *op. cit.*, p. 393.

26 — See the Opinion of Advocate General Slynn in Case 181/85 *France* v *Commission* [1987] ECR 689. In his view, '[d]espite the "privileged" position of Member States under Article [230 EC], I consider that "any party" in Article 184 means "any party" and not "any party other than a Member State"' (p. 703).

27 — To adopt the expression used by Advocate General Mancini at p. 5343 of his Opinion in Case 204/86 *Greece* v *Council* [1988] ECR 5323.

of its Advocates General, [28] has progressively accepted that a privileged applicant may, in the course of an action for annulment, raise an objection of illegality in regard to a regulation. [29]

63. It is thus irrelevant to argue, as the Council and the Commission do, that the plea of illegality raised by the Kingdom of Spain in regard to Regulation No 1954/2003 is inadmissible inasmuch as that Member State could have brought a direct action for the annulment of that regulation.

64. In my view, that argument must be rejected all the more forcefully where a privileged applicant has exercised its right of action, but the action has been dismissed on the ground that the claim for partial annulment was inadmissible.

65. If the terms of Article 241 EC prevent the lack of care of a privileged applicant, which has not brought an action for the annulment of a regulation within the time-limits, from being relied on against it in order to declare inadmissible a plea of illegality raised in regard to the same measure, I think that the same must, *a fortiori,* apply where a Member State has brought an action within the time-limits but that action has been dismissed on the ground that its claim for partial annulment was inadmissible.

66. In short, I do not find it consistent with the Court's case-law on the admissibility of pleas of illegality to penalise more severely — that is to say, by declaring its action out of time — a privileged applicant which has exercised a degree of care that could be described as imperfect (as is the case of the Kingdom of Spain in the present proceedings) than one whose conduct could be characterised as evincing a lack of care.

67. I conclude from those considerations that the terms of Article 241 EC permit, to a very large degree, a Member State to invoke the inapplicability of a regulation, even, in my opinion, where it has already brought an action for the partial annulment of the regulation, but that action has been declared inadmissible.

28 — See, in particular, p. 414 of the Opinion of Advocate General Roemer in Case 32/65 *Italy* v *Council and Commission* [1966] ECR 389; p. 703 of the Opinion of Advocate General Sir Gordon Slynn in *France* v *Commission*; and pp. 5343 to 5345 of the Opinion of Advocate General Mancini in *Greece* v *Council*. See also the same line of reasoning in paragraphs 36 to 54 of the Opinion of Advocate General Mengozzi in Case C-91/05 *Commission* v *Council,* still pending before the Court.

29 — Several judgments only implicitly recognise the right of privileged applicants to challenge a regulation indirectly in the course of an action for annulment (see *Italy* v *Council and Commission*, *France* v *Commission* and *Greece* v *Council*). More recently, the Court has accepted more openly that a privileged applicant may contest a regulation indirectly (see, in particular, Case C-11/00 *Commission* v *ECB* [2003] ECR I-7147, paragraphs 74 to 78, and Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraphs 76 to 81).

2. Whether or not the plea of illegality raised by the Kingdom of Spain was out of time

68. With regard to this question, it must first be pointed out that one of the conditions for the admissibility of a plea of illegality is that the applicant must make his incidental challenge in a clear and reasoned manner. [30]

69. Thus, a plea of illegality which is not accompanied by a summary of the plea and which does not include a statement of reasons must be declared inadmissible. [31]

70. The 'essential arguments in law' must therefore be mentioned in the application and may thus, where appropriate, be developed in the reply. [32]

71. Moreover, the prohibition on introducing new pleas in law in the course of proceedings prevents an applicant from raising a plea of illegality for the first time in his reply, [33] unless it is based on matters of law or of fact which come to light in the course of the procedure, in accordance with the first subparagraph of Article 42(2) of the Rules of Procedure of the Court. [34]

72. It should also be pointed out that the Court has decided that although that provision allows an applicant, in exceptional circumstances, to introduce new pleas in law in support of the form of order sought in the application, it does not in any way provide for the possibility of an applicant's changing the form of order sought. [35]

73. In the light of those requirements, the Community judicature has already accepted that a plea of illegality may be raised implicitly.

74. It should be pointed out that such recognition in no way detracts from the obligation to state reasons for a plea of illegality once

30 — See, on that subject, L. Coutron, *op. cit.*, pp. 102 to 104.

31 — See, in particular, Case T-333/99 *X* v *ECB* [2001] ECR II-3021, paragraphs 115 to 117, and Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraphs 179 and 180. See also Case F-59/05 *De Smedt* v *Commission* [2006] ECR-SC I-A-0 and II-0, paragraph 77).

32 — See *X* v *ECB,* paragraphs 115 *et seq*.

33 — The Court has also decided that the subject-matter of the dispute is to be stated in the application and a plea of illegality is inadmissible at the stage of the reply (Joined Cases 87/77, 130/77, 22/83, 9/84 and 10/84 *Salerno and Others* v *Commission and Council* [1985] ECR 2523, paragraph 37). See also Joined Cases T-134/03 and T-135/03 *Common Market Fertilizers* v *Commission* [2005] ECR II-3923, paragraph 51, confirmed in Case C-443/05 P *Common Market Fertilizers* v *Commission* [2007] ECR I-7209, paragraphs 106 to 110).

34 — See, in particular, Case C-135/92 *Fiskano* v *Commission* [1994] ECR I-2885, paragraphs 31 to 33).

35 — Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, paragraph 26).

the plea appears to be clearly evident from the arguments put forward in the application, even if the applicant has not expressly indicated that it is raising a plea of illegality under Article 241 EC. [36]

75. In short, the Community Courts can accept an implicit plea of illegality only if the legal arguments on which it is based appear in the application in a clear and precise manner so that the Court can be certain that a plea of illegality under Article 241 EC has been raised before it. [37] Where that condition is fulfilled, the defendant is in a position to ensure his defence in regard to the incidental challenge. [38]

76. Applying those requirements to the present case, it is clear that, as the Council and the Commission substantially accept, the two main grounds relied upon by the Kingdom of Spain in its application and the arguments on which they are based are intended, in the first place, to challenge, in a precise manner, the legality of Articles 3, 4 and 6 of Regulation No 1954/2003 and then, secondly, to obtain the annulment of Regulation No 1415/2004 *in so far as it implements Articles 3 and 6 of the former regulation*.

77. In my view, therefore, the incidental challenge to Articles 3 and 6 of Regulation No 1954/2003, implemented by Regulation No 1415/2004, is certainly present in the Kingdom of Spain's application, which contains clear and precise legal arguments to that effect.

78. It should also be noted that it is clear from the Council's defence that the Council understood that the main thrust of the argument put forward by the Kingdom of Spain in its application was to challenge the legality of Articles 3 and 6 of Regulation No 1954/2003. [39] Both parties were thus certain that an implicit plea of illegality had been raised.

79. It follows that, even if the Kingdom of Spain did not, at the stage of the application,

36 — Case T-262/94 *Baiwir* v *Commission* [1996] ECR-SC I-A-257 and II-739, paragraph 37). In the view of the Court of First Instance, 'the case-law makes it possible to consider that a plea of illegality may be raised implicitly in so far as it is relatively clear from the application that the applicant is in fact raising such a plea'.

37 — See, to that effect, Case T-171/00 *Spruyt* v *Commission* [2001] ECR-SC I-A-187 and II-855, paragraph 53, and Case T-59/01 *Nardone* v *Commission* [2003] ECR I-A-55 and II-323, paragraph 27. See also L. Coutron, *op. cit.*, p. 103. For another example of the implicit plea of illegality, see Case T-173/04 *Carius* v *Commission* [2006] ECR-SC I-A-0 and II-0, paragraphs 44 to 60).

38 — Thus, in *Spruyt* v *Commission* the Court of First Instance ascertained whether the Commission had been able to defend its position in regard to the implicit plea of illegality during the written procedure (paragraphs 54 to 61).

39 — See paragraph 34 of this Opinion.

expressly indicate that it was raising a plea under Article 241 EC alleging the illegality of Articles 3 and 6 of Regulation No 1954/2003, the plea of illegality may be regarded as implicitly contained in the application.

80. In my opinion, that circumstance prevents the plea of illegality from being regarded as out of time and declared inadmissible on that ground.

81. Nor do I consider that its admissibility should be precluded by the fact that it is an incidental partial challenge to Regulation No 1954/2003.

82. With regard to the requirement that there should be a direct legal link between the measure being principally challenged and the one being incidentally challenged, I do not consider that an applicant can be criticised for establishing the existence of such a link by focusing its submissions in support of a plea of illegality on the precise provisions of the basic legislation which has been implemented by the implementing rules.

83. I would add that the principal reason underlying the case-law to the effect that partial annulment of a Community act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act [40] — that is to say, the fact that the Community Courts may not rule *ultra petita partem* where the form of order sought is the partial annulment of a Community act and they find that the contested provisions cannot be severed from the remainder of the act — does not apply in the case of pleas of illegality. In the context of such a remedy, it is possible to claim only that the act incidentally contested is inapplicable, not that it should be annulled.

84. I do not therefore consider it appropriate to apply that case-law by analogy to the plea of illegality.

85. Finally, I consider that the fact that, in its reply, the Kingdom of Spain formally raised a plea of illegality under Article 241 EC in regard to Regulation No 1954/2003 does not signify that it is challenging all the provisions of that regulation. Consistent with the arguments put forward in its application, its submissions remain focused on Articles 3 and 6 of the regulation.

40 — See, in particular, *Spain* v *Council* (paragraph 9 and the case-law cited therein).

86. With those circumstances in mind, I regard as admissible the Kingdom of Spain's claim, in support of the present action for annulment, that Articles 3 and 6 of Regulation No 1954/2003 are inapplicable.

87. In my opinion, the present action must consequently be regarded as based on a single plea in law, namely, the plea of illegality in regard to Articles 3 and 6 of Regulation No 1954/2003, in support of which the Kingdom of Spain has put forward two principal submissions, namely, infringement of the principle of non-discrimination on grounds of nationality, and misuse of powers.

B — *Whether the plea of illegality raised by the Kingdom of Spain is well founded*

88. As I pointed out earlier, the Kingdom of Spain puts forward in support of its claims of infringement of the principle of non-discrimination on grounds of nationality and misuse of powers the same arguments as it put forward in *Spain* v *Council*.

89. More precisely, the Kingdom of Spain claims, in support of the submission alleging infringement of the principle of non-discrimination on grounds of nationality:

— first, 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 the Kingdom of Spain, unlike the other Member States, was subject to a restrictive regime by reason of its accession to the European Community; and,

— second, that the delimitation of the biologically sensitive area as defined in Article 6(1) of Regulation No 1954/2003, 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.

90. More generally, the Kingdom of Spain argues that the transitional arrangements 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.

91. The Kingdom of Spain also maintains 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.

92. With regard to the second principal submission, the Kingdom of Spain claims 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 was not to protect juvenile hake but to maintain the restrictions already applying to the Spanish fleet in the Irish Box.

93. The Kingdom of Spain argues that, if the objective sought had really been to 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 maintains 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. [41]

94. Those two submissions were considered in detail by Advocate General Léger in his Opinion in *Spain* v *Council*.

95. I agree with his analysis and I would refer the Court to points 41 to 81 of that Opinion.

96. I will merely note the following points.

97. With regard to the first submission, it is objectively justified in my view, in the light of the aim of conserving fisheries resources, to make provision in Regulation No 1954/2003, in respect of all Member States, for a regime restricting the fishing effort on the basis of the effort exerted by each Member State, in the fisheries concerned, during a recent, earlier period between 1998 to 2002. The

41 — OJ 1998 L 125, p. 1.

general system for managing fishing effort provided for in Article 3 of Regulation No 1954/2003 cannot therefore be classed as discriminatory.

98. 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.[42] 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 was to be 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 — 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 seems to me justified in the light of the objective of restricting fishing effort in an area of high concentration of juvenile hake.

99. Consequently, the first principal submission must be dismissed.

42 — See charts annexed to the Council rejoinder and the Commission's statement in intervention in *Spain* v *Council*.

100. With regard to the second principal submission, and having regard to the Court's case-law,[43] I do not think that the adoption of Article 6 of Regulation No 1954/2003 constitutes a misuse of powers on the part of the Council.

101. 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.

102. 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.

103. It follows that the second principal submission put forward by the Kingdom of Spain in support of its plea of illegality should also, in my view, be rejected.

43 — 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. According to that case-law, 'a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive or main purpose of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case'.

104. Since none of the submissions put forward in support of the plea of illegality have been accepted, that plea — the only plea in law on which the application for annulment of Articles 1 to 6 of Regulation No 1415/2004 is based — should be rejected.

105. It follows from all the foregoing that the present action should be dismissed as unfounded.

IV — Conclusion

106. In the light of the above considerations, I suggest that the Court should:

'— declare admissible the plea of illegality raised by the Kingdom of Spain in regard to Articles 3 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;

— dismiss the action for annulment brought by the Kingdom of Spain; and

— order the Kingdom of Spain to pay the costs, pursuant to Article 69(2) of the Rules of Procedure of the Court, with the Commission of the European Communities bearing its own costs pursuant to Article 69(4) of those rules.'