JUDGMENT OF THE COURT (Third Chamber)

8 November 2007 *

In Case C-141/05,

ACTION for annulment under Article 230 EC, brought on 29 March 2005,

Kingdom of Spain, represented by E. Braquehais Conesa and A. Sampol Pucurull, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by F. Florindo Gijón and A. de Gregorio Merino, acting as Agents,

defendant,

* Language of the case: Spanish.

supported by:

Commission of the European Communities, represented by F. Jimeno Fernández and T. van Rijn, acting as Agents, with an address for service in Luxembourg,

intervener,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus, J.N. Cunha Rodrigues, A. Ó Caoimh and P. Lindh (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 6 June 2007,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Kingdom of Spain seeks annulment of Council Regulation (EC) No 27/2005 of 22 December 2004 fixing for 2005 the fishing opportunities and

associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required (OJ 2005 L 12, p. 1), in so far as that regulation does not allocate it certain quotas in the Community waters of the North and Baltic Seas.

Legal background

The Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties

2 Articles 156 to 166 of the 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; 'the Act of Accession') regulate, in particular, the access of Spanish vessels to Community waters and their resources. Article 166 provides that the regime thus established was to be applicable for a period which ended on 31 December 2002 ('the transitional period').

Regulations (EEC) No 170/83 and No 172/83

3 Under Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources (OJ 1983 L 24, p. 1), the legislature established rules for the distribution of the overall catch among the Member States. The objective of the Council of the

European Union was, among other things, to contribute to relative stability of fishing activities. The fifth to seventh recitals in the preamble to that regulation introduce the notion of relative stability as being designed to safeguard the particular needs of regions where local populations are especially dependent on fisheries and related industries, given the temporary biological situation of stocks.

4 By Council Regulation (EEC) No 172/83 of 25 January 1983 fixing, for certain fish stocks and groups of fish stocks occurring in the Community's fishing zone, total allowable catches for 1982, the share of these catches available to the Community, the allocation of that share between the Member States and the conditions under which the total allowable catches may be fished (OJ 1983 L 24, p. 30), the Council allocated, for the first time, the resources available in Community waters ('the initial allocation').

5 In order to facilitate a fair allocation of the available resources, it is apparent, from the fourth recital in the preamble to Regulation No 172/83, that the Council took particular account of traditional fishing activities, the specific needs of areas particularly dependent on fishing and its dependent industries, as well as the loss of fishing potential in the waters of non-member countries.

6 The reference period taken into account for that allocation was that which ran between 1973 and 1978 ('the initial reference period').

Regulation (EEC) No 3760/92

7 Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ 1992 L 389, p. 1) repealed

Regulation No 170/83. It contains a definition of the notion of 'relative stability', which reproduces, in essence, that in Regulation No 170/83, and rules relating to the allocation of catches, which are set out, in particular, in Article 8(4) thereof.

8 Article 8(4)(iii) of Regulation No 3760/92 provides:

'... where the Community establishes new fishing opportunities in a fishery or group of fisheries not previously prosecuted under the common fisheries policy, [the Council shall] decide on the method of allocation taking into account the interests of all Member States'.

Regulation (EC) No 2371/2002

9 Regulation No 3760/92 was repealed and replaced by Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ 2002 L 358, p. 59). Article 17(1) of Regulation No 2371/2002 provides that Community fishing vessels are to have equal access to the waters and resources in all Community waters as defined in that article, subject to the measures adopted to ensure the conservation of fish species and their sustainability.

10 Under the heading 'Allocation of fishing opportunities', Article 20(1) of Regulation No 2371/2002 provides that the Council is to decide on catch and/or fishing effort limits and on the allocation of fishing opportunities among Member States as well as the conditions associated with those limits. Fishing opportunities are to be distributed among Member States in such a way as to ensure for each Member State relative stability in respect of fishing activities for each stock or fishery.

11 The principle of relative stability is defined in recitals 16 to 18 in the preamble to that regulation, which refer in particular to the temporary biological situation of stocks, and to the needs of regions where local populations are especially dependent on fisheries and related activities.

12 Article 20(2) of Regulation No 2371/2002 provides that when the Community establishes new fishing opportunities the Council is to decide on the allocation for those opportunities, taking into account the interests of each Member State.

Regulation No 27/2005

13 On 22 December 2004, the Council adopted Regulation No 27/2005, the subject of the present action, basing itself on, inter alia, the provisions of Article 20 of Regulation No 2371/2002.

The background to the dispute and procedure

14 Taking the view that it was entitled, from the expiry of the transitional period, to participate in the allocation of the species subject to catch limitations in the North and Baltic Seas, the Kingdom of Spain submitted a request to the Council to obtain fishing quotas in those two seas.

15 The Kingdom of Spain claimed that the quotas allocated after its accession to the Community, in the zone to which the Spanish fleet did not have access during that period, had to be revised in order to take account both of its strictly legal inability to participate in that allocation and of the Spanish fleet's catches in the North Sea during the initial reference period.

16 The Council rejected the Kingdom of Spain's request.

17 Following that rejection, the Kingdom of Spain brought two actions before the Court relating to the allocations for 2003 (cases which gave rise to the judgment in Joined Cases C-87/03 and C-100/03 *Spain* v *Council* [2006] ECR I-2915), two actions relating to the allocations for 2004 (cases which resulted in the order of the President of the Court of 20 June 2006 in Case C-133/04 *Spain* v *Council* (not published in the ECR), made following the Kingdom of Spain's discontinuance of its action, and in the judgment of 19 April 2007 in Case C-134/04 *Spain* v *Council* (not published in the ECR)), as well as the present action in respect of the year 2005.

18 The Kingdom of Spain submits that, as Regulation No 27/2005 did not allocate it certain fishing quotas in the North and Baltic Seas, the Spanish fleet is in practice, in spite of the end of the transitional period, unable to fish for most of the species subject to quotas in those two seas. In support of its action the Kingdom of Spain raises three pleas in law. The first alleges infringement of the principle of non-discrimination, the second infringement of the Act of Accession, and the third breach of Article 20(2) of Regulation No 2371/2002.

19 In connection with its third plea in law, the Kingdom of Spain states, in paragraph 27 of its application, that the following species were concerned, namely the sand eel

(zones IIa, IV), the angler fish (zones IIa, IV), the dab and plaice (zones IIa, IV), the megrims (zones IIa, IV), the witch flounder (zones IIa, IV), the Norway lobster (zones IIa, IV), the blue whiting (zones IIa, IV), the prawn (zones IIa, IIIa, IV), the common turbot and the turbot (zones IIa, IV), the ray (zones IIa, IV), the spurdog (zones IIa, IV) and the horse mackerel (zones IIa, IV).

20 By order of the President of the Court of 21 June 2005, the Commission of the European Communities was granted leave to intervene in support of the form of order sought by the Council in the present action.

21 By decision of the President of the Court of 10 May 2005, the proceedings in the present case were suspended pending delivery on 30 March 2006 of the judgment in Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, by which the Court ruled on the first two actions.

22 Following that judgment, the Kingdom of Spain was asked whether it wished to continue the present action. By letter of 27 April 2006, it replied in the affirmative.

23 In that letter, the Kingdom of Spain maintained, on the basis of the judgment in Joined Cases C-87/03 and C-100/03, that the species which were the subject of an allocation of quotas for the first time, according to it, in Regulation No 27/2005 constitute new fishing opportunities, namely:

— the tusk, zone IV (Norwegian waters)

— the angler fish, zones IIa (Community waters) and IV (Community waters)

— the blue whiting, zone IV (Norwegian waters)

— the ling, zone IV (Norwegian waters)

— the Norway lobster, zone IV (Norwegian waters).

24 The Kingdom of Spain submits that, by failing to allocate it any quota in respect of those species, the Council breached its obligations under Article 20(2) of Regulation No 2371/2002.

The admissibility of the action

25 In its statement in intervention, the Commission submits that the Kingdom of Spain's action is inadmissible on the ground that, by its letter of 27 April 2006, it altered the subject-matter of its action by focusing solely on the third plea in law relied upon and by referring to species which were allocated for the first time by Regulation No 27/2005, adopted in December 2004, and which were not mentioned in its original application. In addition, even though the original action had been continued, it had become, in any event, devoid of purpose following the judgment in Joined Cases C-87/03 and C-100/03 *Spain* v *Council*.

26 It is, however, appropriate to point out that the Council, the defendant in support of which the Commission was granted leave to intervene, has raised no objection to the admissibility of the Kingdom of Spain's action.

27 Under the fourth paragraph of Article 40 of the Statute of the Court of Justice, an application to intervene is to be limited to supporting the form of order sought by one of the parties. In addition, as Article 93(4) of the Rules of Procedure provides, the intervener must accept the case as he finds it at the time of his intervention.

28 It follows that the Commission, as intervener, had no standing to raise a plea of inadmissibility (see Case C-107/99 *Italy* v *Commission* [2002] ECR I-1091, paragraph 29).

29 However, it falls to the Court to examine of its own motion, pursuant to Article 92(2) of the Rules of Procedure, whether the Kingdom of Spain has, in the course of the proceedings, altered their subject-matter, contrary to the requirements of Article 38 of the Rules of Procedure, and whether the action has become devoid of purpose following the judgment in Joined Cases C-87/03 and C-100/03 *Spain* v *Council.*

30 On the first point, the Kingdom of Spain, by its letter of 27 April 2006 in reply to the Court's enquiry whether, in view of the delivery of that judgment, it maintained its action, replied in the affirmative. It also confirmed its reply at the hearing before the Court.

31 It is true that, in that letter, the Kingdom of Spain refers to the importance which it believes should be attached, following the delivery of that judgment, to the examination of the question whether certain fish species constitute new fishing opportunities within the meaning of Article 20(2) of Regulation No 2371/2002, which is the subject of the third plea in law raised in the application. It will therefore have to be determined, if necessary, as part of analysis of that plea, whether the reference to those species falls within the subject-matter of the original action or whether it constitutes an inadmissible extension thereof.

32 With regard to the question whether the action has become devoid of purpose following the judgment in Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, it must be stated that the regulation, partial annulment of which the Kingdom of Spain sought in the proceedings which gave rise to that judgment, differs from the regulation being challenged in the present case. The regulation in issue in that judgment was Council Regulation (EC) No 2341/2002 of 20 December 2002 fixing for 2003 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required (OJ 2002 L 356, p. 12), whereas the regulation being challenged in the present action is Regulation No 27/2005 fixing the fishing opportunities for 2005. Those two cases have, accordingly, different subject-matters.

33 Consequently, the present proceedings are admissible.

Substance

The plea in law alleging infringement of the principle of non-discrimination

Arguments of the parties

34 The Kingdom of Spain argues that, as from the expiry of the transitional period, Spanish vessels should have been entitled to equal access not only to Community waters, which is not denied them, but also to the resources of those waters, which entails the allocation of fishing quotas in the North and Baltic Seas. Regulation No 27/2005, however, allocated practically no quota to the Kingdom of Spain in

those two seas. That regulation fails to meet the conditions of equal treatment and gives rise to discrimination against Spanish fishermen.

35 No objective reason, it contends, justifies that discrimination. The general rule by which all Community law is fully applicable to new Member States from the time of their accession to the Community must be observed. The derogations from that rule, provided for by an act of accession, are temporary and should be interpreted strictly.

36 The Kingdom of Spain submits that the concepts of access to waters and access to resources are inherently connected. Regulation No 27/2005 does not distinguish between them and the Council is thus under an obligation to adopt appropriate measures to amend the allocation formula.

37 In practice, the lack of access to resources renders the right of access to waters meaningless. Only species subject to quotas have any economic value. In addition, the obligation, in the absence of quotas, to throw catches of those species back into the sea, even if they are dead, causes biological damage. Finally, having practically no quota in those two seas, the Kingdom of Spain is unable to undertake exchanges of fishing opportunities as provided for by Article 20(5) of Regulation No 2371/2002.

38 The Kingdom of Spain claims that its situation differs from that of the Member States which have also not obtained quotas under Regulation No 27/2005. The latters' vessels are not necessarily interested in fishing in the waters in question,

unlike those of the Kingdom of Spain, a Member State the populations of which are dependent on fishing, particularly in Galicia and the Basque provinces. The Kingdom of Spain submits that, in the absence of transitional provisions, it participated in the first allocation of quotas after its accession to the Community in 1986 and was accordingly granted quotas in 2003.

39 The Council argues that Regulation No 27/2005 does not give rise to discrimination against the Kingdom of Spain. The Kingdom of Spain, it submits, is treated in the same way as the Member States which did not receive quotas on the ground that they were not engaged in fishing activities, the stability of which the Council could decide to safeguard, those States accounting for almost half of the Member States. The Council points out that the Spanish Government fails to draw the necessary distinction between the concept of access to Community waters and that of access to their resources.

Findings of the Court

40 Compliance with the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see, inter alia, Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, paragraph 46; Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, paragraph 48; and Case C-134/04 *Spain* v *Council*, paragraph 28).

41 The question therefore arises as to whether the situation of the Kingdom of Spain is comparable to that of the Member States which obtained fishing quotas under Regulation No 27/2005 in the waters of the North and Baltic Seas.

42 As pointed out in paragraph 50 of the judgment in Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, the Court has already had to consider the issue of possible discrimination against Member States which did not obtain certain fishing quotas after their accession to the Community.

43 It is clear from paragraph 41 of the judgment in Joined Cases C-63/90 and C-67/90 *Portugal and Spain* v *Council* [1992] ECR I-5073 that the Portuguese Republic had argued that the Portuguese fleet had carried on fishing activities in Greenland waters from 1973 to 1977, that is to say, during part of the initial reference period. It had stated that the quantities caught by the Portuguese fleet were comparable to those caught by the German fleet and substantially higher than those caught by the United Kingdom fleet.

44 The Court, however, took the view that the Republic of Portugal's situation was not comparable to that of the other Member States which had received allocations. It held that, in so far as the Act of Accession did not change the existing situation as regards the allocation of external resources, the existing Community rules continued to be applicable and that, accordingly, the new Member States could not rely on circumstances prior to accession, in particular their fishing activities during the reference period, in support of their contention that the provisions in question should not be applied. Since their accession, they had been in the same position as the Member States excluded from the allocations under the principle of relative stability of fishing activities, which was reflected, as far as the agreements concluded before accession were concerned, in the allocation effected in 1983 (*Portugal and Spain* v *Council*, paragraphs 43 and 44; Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, paragraph 52; and Case C-134/04 *Spain* v *Council*, paragraph 32).

45 That reasoning is applicable to the present case. It follows that the Kingdom of Spain is not in a situation comparable to that of the Member States which received quotas in the initial allocation and, consequently, it cannot rely on the fishing activities carried on by Spanish vessels between 1973 and 1976 in the North Sea, during the

initial reference period. Its situation is, by contrast, comparable to that of the Member States the vessels of which did not obtain such quotas, whether or not those Member States carried on fishing activities in the waters of the North and/or Baltic Seas during that period (see Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, paragraph 53, and Case C-134/04 *Spain* v *Council*, paragraph 33).

46 The end of the transitional period does not change that situation in any way.

47 The Council submitted, rightly, that it is important to distinguish between the concept of access to Community waters and the concept of access to resources. While, after the end of the transitional period, the Kingdom of Spain may again have access to the waters of the North and Baltic Seas, it does not follow that Spanish vessels can have access to the resources of those seas in the same proportions as the vessels of the Member States which participated in the initial or subsequent allocations (Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, paragraph 55, and Case C-134/04 *Spain* v *Council*, paragraph 35).

48 The Council was entitled to form the view that, since Spanish vessels had not fished in the waters of the North and Baltic Seas for more than 20 years, the failure to allocate quotas did not infringe the principle of relative stability of the fishing activities of the populations concerned. It follows that the Council was also entitled to form the view that the Kingdom of Spain was not in a position equivalent to that of the Member States the vessels of which had recently, during the relevant reference period, fished in those waters (see Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, paragraph 56, and Case C-134/04 *Spain* v *Council*, paragraph 36).

49 It is appropriate to add that the fact that it was impossible for the Kingdom of Spain to participate in the new allocations of fishing quotas during the transitional period

by reason of a purely temporary legal exclusion from access to the waters of the North and Baltic Seas does not in any way affect that finding. It does not follow that the Council was under an obligation to change the allocation formula at the end of that period in order to take the Kingdom of Spain's interests into account. Contrary to that Member State's submission in the written procedure and at the hearing, it has in no way been demonstrated that, but for that exclusion from access to the two seas concerned during the transitional period, it would have obtained certain quotas for the species which were the subject of a new allocation during that period.

50 Furthermore, the Kingdom of Spain's other arguments noted in paragraph 37 of the present judgement cannot alter the finding in paragraph 47 above. Thus, the fact that species subject to quotas are more valuable than other species cannot mean that a Member State must be allocated certain quotas. The alleged ecological risk has not been proved. The inability to make certain exchanges of quotas follows from the fact that those quotas were not allocated. Article 20(5) of Regulation No 2371/2002 provides simply for a right to exchange the quotas which Member States possess. It does not, however, give rise to a right to obtain quotas.

51 Accordingly, by not treating the Kingdom of Spain, in Regulation No 27/2005, in the same way as the Member States which participated in the initial allocation of fishing quotas prior to that Member State's accession to the Community, or in subsequent allocations during the transitional period, the Council has not acted in a discriminatory manner towards it.

52 Having regard to the foregoing considerations, the plea in law alleging infringement of the principle of non-discrimination must be rejected.

The plea in law alleging infringement of the Act of Accession

Arguments of the parties

53 The Spanish Government takes the view that, by failing to allocate to the Kingdom of Spain part of the fishing quotas allocated in respect of the zones of Community waters in the North and Baltic Seas after its accession to the European Community, Regulation No 27/2005 extends the transitional period beyond what is provided for in the Act of Accession and therefore infringes the provisions of that act.

54 The Kingdom of Spain submits that extending the derogations provided for in the Act of Accession beyond the transitional period fixed in that act effectively disregards their exceptional, transitional and limited nature.

55 The Kingdom of Spain adds that, while the Court has already considered, in Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, whether the Act of Accession has been infringed, the present case nevertheless differs in so far as Regulation No 27/2005, unlike the regulation examined in that judgment, relates, in particular, to quotas allocated for the first time in 2005, which constitute new fishing opportunities.

56 For its part, the Council submits that the provisions of the Act of Accession ceased to be applicable on the expiry of the transitional period and can therefore no longer constitute a criterion for determining whether the measures adopted by the Council are lawful.

57 Furthermore, the Act of Accession neither requires nor provides for a revision of the system for allocating quotas.

58 The Council adds that Articles 156 to 164 of the Act of Accession, which are transitional provisions, do not govern the manner in which the Council is required to proceed for the purpose of allocating new fishing opportunities in 2005, that is to say, several years after those provisions ceased to be applicable.

Findings of the Court

59 It must be observed, as the Council argues, that Articles 156 to 164 of the Act of Accession define the regime applicable in the fishing sector only during the transitional period. Those articles cannot therefore serve, in principle, as the basis for claims concerning a period commencing on a date subsequent to the end of that transitional period (see Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, paragraph 64, and Case C-134/04 *Spain* v *Council*, paragraph 44).

60 Furthermore, it does not follow from the Act of Accession that the Council was obliged, during the transitional period, to alter, with respect to the future, the formula for the allocation of fishing opportunities adopted after the Kingdom of Spain's accession.

61 Even though the regime applicable during the transitional period is, by definition, temporary, it does not follow that all the restrictions for which it provides cease automatically when that period comes to an end, if those restrictions arise also from the *acquis communautaire* applicable to that Member State. As was stated in paragraph 29 of the judgment in Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, the *acquis communautaire* includes the allocation formula fixed by the existing rules at the time of the accession of the Kingdom of Spain. That allocation formula remains in force, in principle, so long as it has not been amended by an act of the Council.

62 As regards the allocations of quotas during the transitional period, these are governed not by the Act of Accession but by the regulations establishing the quotas in question and by the principle of relative stability (see Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, paragraph 66, and Case C-134/04 *Spain* v *Council*, paragraph 47). As for the allocations made for the first time under Regulation No 27/2005, they are also not subject to the provisions of the Act of Accession.

63 Therefore, by not allocating to the Kingdom of Spain, under Regulation No 27/2005, certain fishing quotas in the North and Baltic Seas, the Council did not infringe the Act of Accession.

64 Accordingly, the plea in law alleging infringement of the Act of Accession must be rejected.

The plea in law alleging breach of Article 20(2) of Regulation No 2371/2002

Arguments of the parties

65 The Kingdom of Spain submits that the five species mentioned in its letter of 27 April 2006 and noted in paragraph 23 of the present judgment constitute new fishing opportunities. By not allocating to it any quota in respect of those species, the Council failed to take into account that Member State's interests and, consequently, breached the provisions of Article 20(2) of Regulation No 2371/2002.

66 The Council acknowledges that the species which were the subject of a first allocation under Regulation No 27/2005 constitute new fishing opportunities. However, of the five species mentioned by the Spanish authorities, only the following species, which were allocated in specific zones for the first time in 2005, constituted new fishing opportunities at that time:

— the tusk, zone IV (Norwegian waters)

— the angler fish, zone IV (Norwegian waters)

— the ling, zone IV (Norwegian waters)

— the Norwegian lobster, zone IV (Norwegian waters).

67 However, the angler fish, zone IIa (Community waters) and zone IV (Community waters), referred to in paragraph 23 of the present judgment, was first the subject of allocation in 1998. The blue whiting, zone IV (Norwegian waters), also referred to in paragraph 23, had already been the subject of allocation prior to 2002. The Kingdom of Spain, the Council submits, is therefore wrong in referring to those species as constituting new fishing opportunities.

68 So far as concerns the four new fishing opportunities which it has identified, the Council submits that it took the interests of all the Member States into account, including those of the Kingdom of Spain, but that it does not follow from the fact that those new opportunities were taken into account that all Member States had to

receive an allocation of quotas. The Council fixed a reference period covering the years 1999 to 2003. Since Spanish vessels had not fished for the species in question in the zones concerned during that period, although they could have done so, no quotas were allocated to that Member State. The Council concludes that it did not exceed its discretion and that it has therefore not breached Article 20(2) of Regulation No 2371/2002.

69 In its reply, the Kingdom of Spain acknowledges that it made an error, as regards the identification of the species constituting new fishing opportunities, and accepts that only the four species mentioned by the Council for specific zones correspond to the expression in question. It maintains, however, that, with regard to those four species, the Council did breach Article 20(2).

70 The Commission, for its part, submits that, as the four species mentioned by the Council came within the category of 'other species' for which an overall quota was allocated to the Community, under regulations prior to 2005, they do not constitute new fishing opportunities. That expression applies only to species available to the Community because of access to new waters or new species.

71 The Commission adds that, if the Court does not agree with its interpretation of the concept of 'new fishing opportunities' and finds that the four species mentioned by the Council do fall within that concept, it must be held, in any event, that the Council did not exceed the limits of its discretion and therefore did not breach Article 20(2) of Regulation No 2371/2002.

Findings of the Court

— Preliminary remarks

72 The Kingdom of Spain, the Council and the Commission agree that only the four species mentioned by the Council and noted in paragraph 66 of the present judgment were the subject of a first allocation under Regulation No 27/2005 and are covered by the third plea in law in the present action.

73 A problem arises, however, as to the admissibility of that plea in law.

74 As was stated in paragraph 31 of the present judgment, it is necessary to determine whether the Kingdom of Spain, by referring to those four species, altered the subject-matter of the proceedings, contrary to the requirements of Article 38 of the Rules of Procedure.

75 Among the four species under consideration, the angler fish is mentioned in paragraph 27 of the Kingdom of Spain's application in relation to zone IV, without it being made clear whether it is in respect of Community waters or Norwegian waters or all those waters. In its letter of 27 April 2006, the Spanish Government mentions the angler fish, zone IV (Community waters), but it corrects that reference in its reply and submits that it was referring to Norwegian waters.

76 In view of the general reference in the application to zone IV, it is appropriate to take the view that the reference was to all of the waters of that zone and, consequently, that the third plea in law, so far as it concerns angler fish, zone IV (Norwegian waters), is admissible.

77 By contrast, as regards the other three species, tusk and ling are not mentioned in paragraph 27 of the application and Norwegian lobster is not referred to for zone IV. Consequently, the view must be taken that the application covered neither tusk nor ling and covered Norwegian lobster for zone III alone. The reference to those three species for zone IV (Norwegian waters) in the letter of 27 April 2006, as well as in the reply, constitutes an extension of the subject-matter of the proceedings which must be struck out as inadmissible. The fact that those species appear in Annex I to Regulation No 27/2005, which is in issue in this dispute, is not sufficient, since the Kingdom of Spain is seeking annulment of the regulation only in so far as it does not allocate certain quotas to the Spanish fleet and it specified, in paragraph 27 of the application, the only species covered by its third plea in law.

— The plea in law

78 The Kingdom of Spain submits that the allocation of angler fish in zone IV (Norwegian waters) by Regulation No 27/2005 constitutes a new fishing opportunity and that the Council, by not allocating to it any quota for that species, failed to take its interests into account, contrary to Article 20(2) of Regulation No 2371/2002.

79 It is necessary to examine whether the allocation of angler fish in zone IV (Norwegian waters) constitutes a new fishing opportunity within the meaning of Article 20(2) and, if so, whether the Council took the Kingdom of Spain's interests into account.

80 On the first point, it is common ground that the allocation made by Regulation No 27/2005 constitutes the first allocation between the Member States of quotas in respect of that species.

81 The Commission submits that angler fish in zone IV (Norwegian waters) is not, however, a new fishing opportunity, but an existing fishing opportunity, inasmuch as it is not a species being exploited for the first time under the Community policy, pursuant to Article 8(4)(iii) of Regulation No 3760/92. Article 20(2) of Regulation No 2371/2002 replaced Article 8(4)(iii) and must be read in the light thereof. It follows that this species should be the subject of allocation in accordance with the principle of relative stability under Article 20(1) of Regulation No 2371/2002, and not on the basis of the taking into account, pursuant to Article 20(2), of Member States' interests.

82 It must, however, be observed that Regulation No 2371/2002 differs in some respects from Regulation No 3760/92.

83 Thus, Regulation No 2371/2002 makes clear the meaning of 'fishing opportunity', which it defines in Article 3(q) as a quantified legal entitlement to fish. As regards Article 20(2) of that regulation, its wording differs from that of the abovementioned Article 8(4)(iii) and provides simply that, when the Community establishes new fishing opportunities, the Council is to decide on the allocation for those opportunities, taking into account the interests of each Member State.

84 It is therefore necessary to interpret the meaning of 'new fishing opportunities' by taking account of the scheme and purpose of Article 20(1) and (2) of Regulation No 2371/2002, read in the light of the case-law (see Case 46/86 *Romkes* [1987] ECR 2671; Case C-70/90 *Spain* v *Council* [1992] ECR I-5159; Case C-71/90 *Spain* v *Council* [1992] ECR I-5175; Case C-73/90 *Spain* v *Council* [1992] ECR I-5191; and Joined Cases C-87/03 and C-100/03 *Spain* v *Council*).

85 It is thus apparent from the examination of those two paragraphs of Article 20 that the first deals with existing fishing opportunities, whilst the second is devoted to new fishing opportunities. Existing fishing opportunities are to be allocated among the Member States by application of the principle of relative stability.

86 The Court has held that 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 as long as an amending regulation has not been adopted (see, inter alia, *Romkes*, paragraph 17, and Joined Cases C-87/03 and C-100/03 *Spain* v *Council*, paragraph 27).

87 In so far as the application of the principle of relative stability to existing fishing opportunities involves the retention of an allocation formula already laid down among the Member States, the establishment of a first formula for allocation among the Member States involves the conferral of new fishing opportunities and an allocation which takes into account the interests of each of them. The concept of 'interests' may encompass the need to safeguard the relative stability of fishing activities, but is not limited to that need.

88 Thus, contrary to the view expressed by the Commission, when a first allocation formula is fixed per Member State, particularly after the Member States have exercised their right to fish in a zone and for species for which the Community has an overall quota, the Council decides by taking into account the interests of each of them, in accordance with the provisions of Article 20(2) of Regulation No 2371/2002. Since, by definition, no allocation formula can be retained in such a case, there is no need to apply the provisions of Article 20(1) of that regulation.

89 It must be added that the interpretation advocated by the Commission would lead to a paradoxical situation in which the Member States' right of access to new waters and new species could never be regarded as new fishing opportunities and, accordingly, never permit account to be taken of the interests of those States, within the meaning of Article 20(2) of Regulation No 2371/2002. That would be the case each time that, as in this case, the new right of access took, initially, the form of an overall quota in favour of the Community before, subsequently, being allocated to the Member States individually. It does not follow from Regulation No 2371/2002 that the legislature intended thus to limit the taking into account of the Member States' interests.

90 Having regard to the foregoing, it must be held that the first allocation to Member States of angler fish in zone IV (Norwegian waters), based on the establishment of a first allocation formula for that species in the waters concerned, constitutes a new fishing opportunity.

91 It is thus necessary to examine whether the Council took proper account of the Kingdom of Spain's interests.

92 As regards a regulation concerning fisheries, within the context of the common agricultural policy, it is settled case-law that the Community legislature has a wide discretion in this field, corresponding to the political responsibilities given to it by Articles 34 EC to 37 EC (see, inter alia, Case C-535/03 *Unitymark and North Sea Fishermen's Organisation* [2006] ECR I-2689, paragraph 55).

93 It is, none the less, necessary to determine whether or not the Community legislature has exceeded the limits of its discretion.

94 The Kingdom of Spain claims that, during the reference period selected by the Council, that is to say, from 1999 to 2003, the provisions of Articles 156 to 164 of the Act of Accession prohibited its access to the waters concerned. In deciding to allocate quotas only to the Member States the fleets of which had fished for the species concerned, in particular angler fish, during that period, and by not allocating it any quota, in spite of the fact that the absence of Spanish vessels from the zone in question was attributable to a strictly legal exclusion, the Council did not take its interests into account.

95 It must, however, be held, as the Council contended in its defence and rejoinder, that Articles 156 to 164 of the Act of Accession cover only access to Community waters and not access to Norwegian waters and that, therefore, the Kingdom of Spain's argument is irrelevant.

96 At the hearing, the Kingdom of Spain sought to put forward other arguments designed to demonstrate that it was impossible for Spanish vessels to fish in Norwegian waters. It maintained, first of all, that it is not always easy to identify, within a given zone, the waters in which vessels are fishing, before going on to submit that it had not been allocated any quota in Norwegian waters.

97 Those arguments are not, however, conclusive since angler fish, which was not subject to any specific quota per Member State, could be freely fished by the various fleets of the Member States, subject to an overall quota applicable to the Community for various species, one of which was angler fish.

98 It must be held that the failure to allocate, to the Kingdom of Spain or to another Member State, quotas in respect of angler fish does not mean that the Council failed to take into account those Member States' interests.

99 As regards the selection of the reference period, the Court has already ruled that the Council has a degree of flexibility (see, to that effect, Case C-120/99 *Italy* v *Council* [2001] ECR I-7997, paragraph 42). The period of five years, from 1999 to 2003, is a recent and sufficiently long period as not to be open to criticism.

100 In allocating quotas for angler fish only to the Member States the vessels of which had fished for that species in the course of that period, and in not allocating any quota to the Kingdom of Spain on the ground that Spanish vessels had not fished for that species, even though they had a right of access to the zone concerned, the Council did not exceed the limits of its discretion.

101 The third plea in law must accordingly be rejected.

102 Since none of the pleas in law put forward has been upheld, the action brought by the Kingdom of Spain must be dismissed.

Costs

103 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of those Rules, the Commission must bear its own costs.

On those grounds, the Court (Third Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the Kingdom of Spain to pay the costs;**

3. **Orders the Commission of the European Communities to bear its own costs.**

[Signatures]