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INFORMATION NOTE

From:	Legal Service
To:	Permanent Representatives Committee (Part 1)
Subject:	Judgment of the Court of Justice (Third Chamber) of 24 November 2022 <ul style="list-style-type: none">– Case C-259/21 (European Parliament v Council)– Dismissal of the action for annulment against technical measures in Council Regulation (EU) 2021/92 fixing certain fishing opportunities for 2021

I. INTRODUCTION

1. In its judgment of 24 November 2022 in case C-259/21¹ the Court of Justice rejected the action for annulment brought by the European Parliament against Articles 15 to 17, 20 and 59(2) of Council Regulation 2021/92 fixing for 2021 the fishing opportunities for certain fish stocks and groups of fish stocks.²

¹ Judgment of 24 November 2022, *European Parliament v Council*, C-259/21, EU:C:2022:917.

² Council Regulation (EU) 2021/92 of 28 January 2021 fixing for 2021 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters, OJ L 31, 29.1.2021, p. 31.

2. The contested provisions concerned technical measures in several sea areas and prohibited species as well as a related transitional provision.³ The Court rejected the argument that these measures constituted a misuse of procedure/powers that deprived the European Parliament of its prerogatives and that they breached the duty of loyal cooperation.
3. The judgment clarifies the scope of the Council's powers to set fishing opportunities under Article 43(3) TFEU in the framework of the Common Fisheries Policy (CFP).

II. **THE JUDGMENT**

4. The contested provisions in Regulation 2021/92 ("the 2021 TAC Regulation") concern technical measures for cod and whiting in the Celtic Sea (Article 15), technical measures in the Irish Sea (Article 16) and in the West of Scotland (Article 17), prohibited species (Article 20) and the transitional provision in Article 59(2) according to which Articles 15, 16 and 17 were to apply until the date on which a delegated act adopted in accordance with Article 15(2) of Regulation (EU) 2019/1241 ("the Technical Measures Regulation")⁴ became applicable.
5. The Court first holds that the action is admissible even though the contested provisions were no longer applicable by the time of the judgment following the entry into force and date of application of Delegated Regulation 2021/2324⁵ and of Regulation 2022/109⁶ (paragraphs 45-48).

³ See also the information note in doc. 8699/21.

⁴ Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1224/2009 and Regulations (EU) No 1380/2013, (EU) 2016/1139, (EU) 2018/973, (EU) 2019/472 and (EU) 2019/1022 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005, OJ L 198, 25.7.2019, p. 105.

⁵ Commission Delegated Regulation (EU) 2021/2324 of 23 August 2021 amending Regulation (EU) 2019/1241 of the European Parliament and of the Council as regards technical measures for certain demersal and pelagic fisheries in the Celtic Sea, the Irish Sea and the West of Scotland, OJ L 465, 29.12.2021, p. 1.

⁶ Council Regulation (EU) 2022/109 of 27 January 2022 fixing for 2022 the fishing opportunities for certain fish stocks and groups of fish stocks applicable in Union waters and for Union fishing vessels in certain non-Union waters, OJ L 21, 31.1.2022, p. 1.

It justifies this “*by the need to ensure that the alleged illegality does not recur*”, which “*is the case where, as here, the legislation adopted in the area of fishing is limited in time and new rules are adopted each year*” and adds that “*since the Parliament is not required to demonstrate an interest in bringing proceedings in order to bring an action for annulment ..., nor is it required to prove that such an interest persists during the proceedings*”.

6. The Court then rejects the Parliament’s first plea, which was that the Council committed a misuse of procedure/powers that deprived the European Parliament of its prerogatives by adopting the contested provisions in a regulation based on Article 43(3) TFEU instead of those provisions being adopted through a delegated act under Articles 10(4) and 15 of the Technical Measures Regulation or, alternatively, under Article 9 of Regulation (EU) 2019/472 (on the Western Waters Multiannual Plan)⁷.
7. The Court first recalls that paragraphs 2 and 3 of Article 43 TFEU “*pursue different aims and each have a specific field of application, which means that they may be used separately as a basis for adopting particular measures under the CFP*” (paragraph 63), that, when acting on the basis of Article 43(3) TFEU, the Council “*must act within the limits of its powers and, where relevant, within the legal framework already established under Article 43(2) TFEU*” (paragraph 64) and that Article 43(3) TFEU “*may extend to measures which do more than merely fix and allocate fishing opportunities, provided that they do not entail a policy choice that is reserved to the EU legislature because the measures are necessary for the pursuit of the objectives of the common policies for agriculture and fisheries*” (paragraph 66).

⁷ Regulation (EU) 2019/472 of the European Parliament and of the Council of 19 March 2019 establishing a multiannual plan for stocks fished in the Western Waters and adjacent waters, and for fisheries exploiting those stocks, amending Regulations (EU) 2016/1139 and (EU) 2018/973, and repealing Council Regulations (EC) No 811/2004, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007 and (EC) No 1300/2008, OJ L 83, 25.3.2019, p. 1.

8. With regard to **Articles 15 to 17 of the 2021 TAC Regulation**, the Court notes that the purpose of the technical measures laid down by those provisions is, by improving selectivity of fishing gear, to contribute to the recovery of the stocks concerned (paragraph 67) and that those technical measures “*are functionally linked to the TAC levels for target species caught in mixed fisheries as, without those measures, TAC levels would have to be reduced to allow the by-catch stocks to recover*” (paragraph 68).
9. As regards **Article 20 of the 2021 TAC Regulation**, the Court notes that the prohibitions on fishing prescribed therein constitute a lack of fishing opportunities, which may, if appropriate, be subsequently amended into limited fishing opportunities (paragraph 69).
10. The Court then finds that the adoption of the contested provisions is not intended to adapt the general mechanism for setting the TACs (paragraph 70) but that, on the contrary, those provisions “*are unique in that they are limited in scope to particular circumstances – that is to say, the measures they provide for are intended to apply to certain types of vessel, operating in certain areas only, and only to certain types of species – and in that they are intended to apply temporarily*” and that “[a]ccordingly, they do not entail a policy choice that is reserved to the EU legislature” (paragraph 71) and consequently “*fall, in principle, within the Council’s power under Article 43(3) TFEU*” (paragraph 72).
11. The Court furthermore holds that the Commission’s power to adopt delegated acts pursuant to Article 9 of Regulation (EU) 2019/472 on the Western Waters Multiannual Plan and Articles 10(4) and 15 of the Technical Measures Regulation “*does not prevent the Council from adopting, on the basis of its power under Article 43(3) TFEU, technical measures relating to matters similar to those covered by those provisions of the basic regulations in circumstances such as those of the present case, that is to say, where the Commission has not itself taken steps to adopt delegated acts on the basis of those provisions*” (paragraph 74).

12. The Court also notes that pursuant to Article 59 of the 2021 TAC Regulation, Articles 15 to 17 of that regulation were intended to cease applying as soon as the Commission adopted one or more delegated acts on the same technical measures, as was also confirmed in its recital 59 (paragraphs 75 and 77), and holds that “*in those circumstances, ..., the contested provisions are temporary in nature and that the Council did not encroach upon, but rather expressly sought to preserve, the Commission’s power to adopt delegated acts*” (paragraph 76).
13. As regards the **prohibited species**, the Court notes that Article 20 of the 2021 TAC Regulation is similar to Article 10(2) of the Technical Measures Regulation but is aimed at other species of fish and crustaceans (paragraph 78) and holds that while it is true that the latter provision empowers the Commission to adopt delegated acts in order to amend the list of species set out in Annex I to the Technical Measures Regulation, Article 10(2) of that regulation “*states that, in addition ..., it is prohibited for Union vessels to fish for, retain on board, ... or offer for sale the species ... for which fishing is prohibited ‘under other Union legal acts’*” and that the latter “*should be regarded ... as including, ..., Council regulations fixing fishing opportunities, adopted pursuant to Article 43(3) TFEU*” (paragraphs 79-81).
14. The Court concludes that “*in adopting the contested provisions, the Council acted within the limits of its powers under Article 43(3) TFEU and complied with the specific legal framework established under Article 43(2) TFEU*” (paragraph 82) and that “[*i*]*n those circumstances, the material in the file ... does not support the finding, ..., that the contested provisions are vitiated by a misuse of powers*” (paragraph 83).
15. As regards Articles 15 to 17 of the 2020 TAC Regulation, the Court also notes the delay in submitting a joint recommendation related to the withdrawal of the UK from the Union and finds that “*the adoption of the contested provisions by the Council served to fill a void that would otherwise have carried on throughout part, if not all, of 2021*” (paragraphs 87-88).

16. Finally, the Court rejects the Parliament's second plea that the Council infringed the principle of sincere cooperation under Article 13(2) TEU in adopting the contested provisions, since the Parliament relied on the premiss that the Council adopted the contested provisions in excess of its powers under the Treaties and the Court rejects that argument (paragraphs 96 to 100). It also finds that there was no violation of point 25 of the Interinstitutional Agreement on Better Law-Making⁸ since Regulation 2021/92 was adopted on the same legal basis as that proposed by the Commission and therefore there was no modification of the legal basis within the meaning of that provision of that Interinstitutional Agreement (paragraph 99).

III. ANALYSIS AND IMPLICATIONS

17. The judgment contains important clarifications of the extent of the Council's powers to adopt measures under Article 43(3) TFEU.
18. In particular, first, it confirms the legality of the Council's consistent practice to include additional prohibited species in its fishing opportunities regulations, also after the adoption of the Technical Measures Regulation.
19. Second, it clarifies that the powers under Article 43(3) TFEU may include the adoption of certain technical measures relating to matters that are similar to measures covered by Article 9 of the Western Waters Multiannual Plan Regulation and Articles 10 and 15 of the Technical Measures Regulation in specific circumstances, notably where the Commission has not itself taken steps to adopt delegated acts on the basis of those provisions, where the measures do not intend to adapt the general mechanism for setting the TACs and do not entail a policy choice that is reserved to the EU legislature but are intended to apply only temporarily and are limited in scope to particular circumstances, such as an application only to certain types of vessel, operating in certain areas only, and only to certain species.

⁸ Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L 123, 12.5.2016, p. 1.