C-330/22-1

THE HIGH COURT

JUDICIAL REVIEW

2020 No. 396 JR

THURSDAY THE 7TH DAY OF APRIL 2022

BEFORE MR JUSTICE BARR

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE,

IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

This matter coming before the Court for remote hearing on the 7th day of December 2021 pursuant to Statement of Grounds filed herein on the 17th day of June 2020 seeking the following reliefs

1. A Reference to the Court of Justice of the European Union pursuant to Article 267 TFEU to determine the validity of the act of the Council of the European Union (Regulation No 123/2020) adopting fishing opportunities for 2020 dated 27th January 2020.
2. An Order of *Certiorari* by way of application for judicial review quashing the decision of the Respondents to make or approve Fisheries Management Notices 15, 16, 19, 20, 23 and 24 (identified as 'the Notices' for the purposes of these proceedings) in April, May and June 2020.
3. A Declaration that the Respondents breached section 12(1) of the Sea Fisheries and Maritime Jurisdiction Act 2006 in adopting the said Notices which fail to make any or any adequate provision for the achievement of a "*maximum sustainable yield exploitation rate by 2020 at the latest*" and/or fail to apply the "*precautionary approach to fisheries management*" as required by the Common Fisheries Policy Basic Regulation (No. 1380/2013).

4. An Order providing for the costs of the application and, where appropriate, an Order pursuant to the Applicant's rights under the Aarhus Convention enforceable under EU and national law and/or Part 2 of the Environment (Miscellaneous Provisions) Act 2011 in respect of the costs of this application.
5. Such further or other Order as this Honourable Court deems appropriate."

And on reading said Statement of Grounds the Order made herein on the 4th day of November 2020 granting leave to apply for Judicial Review to the Applicant the Affidavit of Fred Logue filed on the 6th day of November 2020 the Affidavit of Josephine Kelly filed on the 25th day of February 2021 the Statement of Opposition filed on the 25th day of February 2021 the Affidavit of Anais Berthier filed on the 15th day of June 2021 and the documents and exhibits referred to in said Affidavits and on hearing what was offered by Counsel for the respective parties

IT IS ORDERED that in principle and subject to a formal Order for Reference in due course the questions identified in the said Judgment be referred to the Court of Justice of the European Union

AND THE COURT directing that the parties are to provide further submissions to facilitate a reference to the Court of Justice of the European Union by the 8th day of March 2022

And the matter having been adjourned to this day and the Court having read the submissions of the respective parties

IT IS ORDERED that the 2 questions set out below shall be referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union

AND IT IS ORDERED that the Applicant do within twenty-eight days' of the date of this order lodge with the Principal Registrar of the High Court

electronic copies of books of all pleadings for transmission to the Court of Justice of the European Union

AND THEREUPON THE COURT adjourning the within proceedings to facilitate the making of a reference to the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union as set out in the said Reference dated the 7th day of April 2022 and attached as a Schedule to this Order the following 2 questions:

Question 1: In circumstances where the 2020 Regulation has been superseded and/or the national implementing measures have expired, is the within reference necessary to be referred?

Question 2: Is Annex IA of Council Regulation 2020/123/EU invalid, having regard to the aims and objectives of Regulation (EU) 1380/2013 (the "CFP Regulation"), and specifically Article 2(1) and 2(2) of the CFP including the objective of the second sentence of Article 2(2) and the principles of good governance set out in Articles 3(c) and (d) of the CFP Regulation (including the extent to which it applies to stocks for which a precautionary approach is required), when read in conjunction with Articles 9, 10, 15 and 16 of the CFP Regulation and the Recitals thereto and Articles 1, 2, 3, 4, 5, 8 and 10 of Regulation 2019/472 of the European Parliament and of the Council establishing a multi-annual plan for stocks fished in the Western Waters ("the Western Waters Regulation"), insofar as the total allowable catches ("TACs") set by the 2020 Regulation do not follow zero-catch advice for maximum sustainable yield ("MSY") issued by the International Council for the Exploration of the Sea ("ICES") for certain species?

MARIA MCLAUGHLIN
REGISTRAR
PERFECTED: 3RD MAY 2022

FP Logue Solicitors
Solicitors for the Applicants

Chief State Solicitor
Solicitor for the Respondents

SCHEDULE HEREINBEFORE REFERRED TO

THE HIGH COURT OF IRELAND

ORDER FOR A REFERENCE PURSUANT TO ARTICLE 267 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Mr. Justice Barr

7th April, 2022

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

1. Identity of the court making the reference.

1.This reference is made by the High Court of Ireland (Mr. Justice Anthony Barr) (hereinafter "the referring court"). The main proceedings bear the record number 2020/396 JR.

2.The reference has been submitted by E-Curia. In the event that it is necessary to communicate instead by way of post, the address is as follows: Principal Registrar, The High Court, Four Courts, Inns Quay, Dublin 7, D07 N972, Ireland.

2.Identity of the parties to the main proceedings.

3.The applicant is a company called Friends of the Irish Environment CLG. It is a company limited by guarantee. It is also a registered charity. It has been active in various issues concerning the Irish environment for a number of years.

4.The applicant is represented by Mr. James Devlin S.C. and Mr. John Kenny B.L. of the Bar of Ireland, instructed by FP Logue Solicitors. The address for service is FP Logue Solicitors, 8-10 Coke Lane, Smithfield, Dublin, D07 EN2Y, Ireland.

5.The first respondent is the Minister in the Government of Ireland with responsibility for fisheries. In particular, the Minister is responsible for issuing fisheries management notices pursuant to the Sea Fisheries and Maritime Jurisdiction Act 2006, setting limits on the number of fish that may caught by Irish vessels in various fisheries, within the period specified in the notice. The second and third respondents are the State of Ireland and its representative.

6.The respondents are represented by Mr. Ciaran Toland S.C. and Mr. David Browne B.L. of the Bar of Ireland, instructed by the Chief State Solicitor. The address for service is: Chief State Solicitor, Osmond House, Ship Street Little, Dublin 8, D08 V8C5, Ireland and Embassy of Ireland, 28 Route d'Arlon, Luxembourg. The Chief State Solicitor will also accept service by E-Curia.

3.Subject matter of the dispute in the main proceedings.

7.The applicant's challenge in these proceedings arises in the following way: what are known as fishing opportunities are fixed pursuant to Regulations passed by the European Parliament and the Council under Regulation (EU) No. 1380/2013 of the European Parliament and of the Council of 11th December, 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No. 1954/2003 and (EC) No. 1224/2009 and repealing Council Regulation (EC) No. 2371/202 and (EC) No. 639/2004 and Council Decision 2004/585/EC (known as the Common Fisheries Policy and hereinafter referred to as the "CFP Regulation"). Each year pursuant to the CFP Regulation, the Council fixes what is known as the total allowable catch (hereafter "TAC") for each species of fish in various areas of the ocean adjacent to European states.

8.Each year when the TAC is fixed for each species of fish, and it has been divided up among the member states, the first named respondent, being the Minister responsible for the fishing industry in Ireland, issues fisheries management notices on a monthly basis, stipulating the quantity of each species of fish that may be landed by Irish vessels in the relevant period. Fisheries management notices are usually issued on a monthly basis.

9.By means of Council Regulation 2020/123/ EU of 27th January, 2020 fixing for 2020 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 (hereinafter "the 2020 Regulation"), the Council fixed the TAC for 2020 for various species of fish in relevant fisheries.

10. The applicant's case is that the TAC fixed by the Council for 2020 in the 2020 Regulation, was in breach of the provisions of the CFP Regulation and was therefore

illegal; with the consequence that the resulting fisheries management notices issued by the first respondent during 2020, were also invalid under EU law.

11. The basis of the alleged invalidity of the 2020 Regulation is said to arise in the following way: Article 2(2) of the CFP Regulation provides that in order to reach the objective of progressively restoring and maintaining populations of fish stock above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks.

12. Article 16.4 of the CFP provides that fishing opportunities shall be fixed in accordance with the objectives set out in Article 2(2) and shall comply with quantifiable targets, time-frames and margins established in accordance with Art. 9(2) and points (b) and (c) of Art. 10(1) of the CFP.

13. The CFP further provides that in fixing the TAC for each species, the Council shall have regard to the best available scientific advice that is provided by the International Council on the Exploration of the Seas (hereinafter "ICES").

14. For the purposes of this application, the applicant selected a representative sample of three species of fish from four particular fisheries as basis for their claim. They referred to the following: cod for the fisheries designated as West of Scotland and the Celtic Sea; whiting in the Irish Sea and plaice in the Celtic Sea South. These are designated fisheries in respect of which ICES gave separate catch advice.

15. For each of the species in each of the relevant fisheries, ICES had advised that for 2020, there should be a zero catch in order to achieve maximum sustainable yield (MSY). In the 2020 Regulation, the Council set catch limits as follows: cod in west of Scotland – 1279 tonnes; cod in the Celtic Sea – 805 tonnes; whiting in the Irish Sea – 721 tonnes; and plaice in the Celtic Sea South – 67 tonnes.

16. The applicant submits that in disregarding the advice from ICES, which constituted the best available scientific advice, the Council acted unlawfully and in breach of the provisions of Art. 2 (2) of the CFP Regulation, by setting TACs for the species concerned at levels above zero.

17. The applicant accepted that national courts do not have the power to declare measures enacted by European institutions to be invalid. That can only be done by the Court of Justice of the European Union. It is on that basis that the applicant sought a reference to the Court of Justice of the European Union under Art. 267 of the Treaty on the Functioning of the European Union, for a determination on the validity of the 2020 Regulation.

18. In response to the plea that had been raised by the respondents, that the Irish court should not refer the matter to the CJEU, because the issue was moot, due to the fact that the 2020 Regulation had been superseded by subsequent regulations in 2021 and 2022, that were not challenged in these proceedings and because the fisheries management notices that were challenged in the proceedings, had long since expired; the applicant argued that the doctrine of mootness should not prevent the court determining the proceedings herein, because if it was allowed as a valid objection to the bringing of the proceedings herein, that would effectively mean that both the Council regulations and the fisheries management notices issued by the first respondent consequent thereon, would be immune from challenge; because, due to their time limited nature, it would not be possible to challenge them before the courts while they were still in force.

19. It was submitted that if the doctrine of mootness were permitted to prevail in such circumstances, it would mean that interested parties, such as the applicant, would effectively not be able to challenge the legality of the Council regulations fixing the

TAC for any given year, or the fisheries management notices, because they would not be able to get a judicial determination thereon during the lifetime of the regulations, or the fisheries management notices. It was submitted that that would work a grave injustice against the applicant.

20. It was further submitted that in view of the fact that the challenge herein involved an issue of environmental challenge and as further regulations would be made in the future, which would raise the same legal issues, it was appropriate that a reference would be made to the Court of Justice of the European Union and that same would be determined by that court.

21. In response and by way of preliminary objection, it was submitted on behalf of the respondents, that the High Court in Ireland should not entertain the applicant's challenge, due to the fact that it had become moot, because the 2020 Regulation had expired and had been replaced by further regulations fixing TACs for 2021 and a further regulation in 2022. Furthermore, it was submitted that the fishing management notices under challenge in the proceedings, had long since expired.

22. On the substantive issues raised by the applicant, the respondents submitted that the 2020 Regulation was not unlawful and was in compliance with the CFP Regulation, when one had regard to all the relevant recitals and to the provisions of the CFP Regulation, rather than having regard to one particular sub-paragraph in the Article of the CFP Regulation setting out the objectives of the Common Fisheries Policy.

23. It was submitted that the CFP Regulation had to be read in conjunction with Regulation 2019/472 of the European Parliament and of the Council establishing a multi-annual plan for stocks fished in the western waters (hereinafter "the Western Waters Regulation"). It was submitted that when both documents were read together, it was clear that the Council had to engage in an extremely complex assessment of a multi-

faceted issue; in particular, in relation to the difficulty of fishing in mixed fisheries, where a particular species may be caught by way of by-catch, when other species were the target catch.

24. In addition, it was submitted that the Council was obliged to have regard to the economic effects on the livelihoods of those involved in the fishing industry and those communities living in coastal areas, who depended on fishing for their livelihoods.

25. It was submitted that when the provisions of the CFP Regulation and the Western Waters Regulation were read together, it was clear that the Council had not acted unlawfully in fixing the TACs for 2020 in the manner that they had done.

26. Furthermore, it was submitted that in having regard to the advice issued by ICES when fixing the TAC for species of fish in various fisheries, it was permissible for the Council to also have regard to the advice issued by ICES in relation to the difficulties presented by fishing for one species in a mixed fishery, where the strict adherence to a zero TAC for one species, could result in the phenomenon of "choke species", thereby resulting in the premature closure of the fishery.

27. It was submitted that when one had regard to all of these factors, and to all of the advice issued by ICES, the Council had not acted unlawfully in fixing the TAC for each species in the way that it had done in the 2020 Regulation.

4.Article 2 (2) of the CFP Regulation.

28. The second paragraph of Art. 2 (2) is the key provision in this case. This sub-article provides as follows:

> "*In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall*

be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks."

5.Necessity for a reference to the Court of Justice of the European Union.

29. All parties in this case were agreed that the High Court in Ireland did not have jurisdiction to declare any measure adopted by the Council to be unlawful or invalid. Only the Court of Justice of the European Union had jurisdiction to do that. The parties were further agreed that if the High Court had doubts as to the validity of a piece of European legislation, it should refer that question to the Court of Justice of the European Union for determination.

30. Having heard extensive argument from the parties in relation to the validity of the 2020 Regulation, this court had doubts as to its legal validity. In these circumstances, it became necessary for this court to refer the matter to the Court of Justice of the European Union for a determination on the legality of the questioned measure of European law.

6.Questions referred.

Question 1

In circumstances where the 2020 Regulation has been superseded and/or the national implementing measures have expired, is the within reference necessary to be referred?

Question 2

Is Annex IA of Council Regulation 2020/123/EU invalid, having regard to the aims and objectives of Regulation (EU) 1380/2013 (the "CFP Regulation"), and specifically Article 2(1) and 2(2) of the CFP including the objective of the second sentence of Article 2(2) and the principles of good governance set out in Articles 3(c) and (d) of

the CFP Regulation (including the extent to which it applies to stocks for which a precautionary approach is required), when read in conjunction with Articles 9, 10, 15 and 16 of the CFP Regulation and the Recitals thereto and Articles 1, 2, 3, 4, 5, 8 and 10 of Regulation 2019/472 of the European Parliament and of the Council establishing a multi-annual plan for stocks fished in the Western Waters ("the Western Waters Regulation"), insofar as the total allowable catches ("TACs") set by the 2020 Regulation do not follow zero-catch advice for maximum sustainable yield ("MSY") issued by the International Council for the Exploration of the Sea ("ICES") for certain species?

Appendix.

Judgment of the High Court delivered on 8th February, 2022, reported at [2022] IEHC 64.

ANNEXES

1.Booklet of Pleadings

2.Judgement of the High Court delivered on 8th February, 2022, reported at [2022] IEHC 64.

3.Order for reference as perfected by the Registrar or the High Court dated 7 April 2022

THE HIGH COURT

[Record No. 2020/396 JR]

BETWEEN

FRIENDS OF THE IRISH ENVIRONMENT CLG

APPLICANT

AND

THE MINISTER FOR AGRICULTURE, FOOD AND THE MARINE, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Mr. Justice Barr delivered electronically on the 8th day of February, 2022

Introduction

1. The applicant is a company limited by guarantee. It is also a registered charity. It has been active in various issues concerning the Irish environment for a number of years.

2. The respondent is the Minister with responsibility for issuing fisheries management notices pursuant to the Sea Fisheries and Maritime Jurisdiction Act 2006, setting limits on the number of fish that may be caught by Irish vessels, within the period specified in the notice. The notices are usually issued on a monthly basis.

3. The primary purpose of the present application is to secure a reference from the court to the Court of Justice of the European Union (hereinafter 'the CJEU') as to

the legality of Council Regulation (EU) 2020/123 of 27th January, 2020, fixing for 2020 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 (hereinafter 'Regulation 2020/123').

4. The applicant's challenge arises in the following way: What are known as fishing opportunities are fixed pursuant to regulations passed by the European Parliament, and the Council, being Regulation 1380/2013, also known as the Common Fisheries Policy (hereinafter referred to as 'the CFP'). Each year pursuant to the CFP, the Council fixes what is known as the total allowable catch (hereinafter 'TAC') for each species of fish in various areas of the ocean adjacent to European states.

5. Each year when the TAC is fixed for each species of fish, and has been divided up among the Member States, the respondent issues fisheries management notices on a monthly basis, stipulating the quantity of each species that may be landed by Irish vessels in that period.

6. The applicant's case is that the TAC fixed by the Council for 2020 in Regulation 2020/123, was in breach of the provisions of the CFP and was therefore illegal; with the consequence that the fisheries management notices issued by the respondent during 2020, were also invalid under EU law.

7. The basis of the alleged invalidity of Regulation 2020/123 arises in the following way: Article 2(2) of the CFP provides that in order to reach the objective of progressively restoring and maintaining populations of fish stock above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks.

8. Article 16.4 of the CFP provides that fishing opportunities shall be fixed in accordance with the objectives set out in Art. 2(2) and shall comply with quantifiable targets, timeframes and margins established in accordance with Art. 9(2) and points (b) and (c) of Art. 10(1).

9. The CFP further provides that in fixing the TAC for each species, the Council shall have regard to the best available scientific advice that is provided by the International Council on the Exploration of the Seas (hereinafter 'ICES').

10. For the purposes of this application, the applicant selected a representative sample of three species of fish from four particular fisheries. They referred to cod for the fisheries designated as West of Scotland and the Celtic Sea, whiting in the Irish Sea and plaice in the Celtic Sea south. These are designated fisheries in respect of which ICES gave separate catch advice.

11. For each of the species in each of the relevant fisheries, ICES had advised that for 2020 there should be a zero catch in order to achieve MSY. In Regulation 2020/123, the Council set catch limits as follows: cod in West of Scotland – 1279 tonnes; cod in the Celtic Sea – 805 tonnes; whiting in the Irish Sea – 721 tonnes; and plaice in the Celtic Sea south – 67 tonnes.

12. The applicant submits that in disregarding the advice from ICES, which constituted the best available scientific advice, the Council acted unlawfully and in breach of the CFP by setting TACs for the species concerned at levels above zero.

13. The applicant accepted that national courts do not have the power to declare acts of European institutions to be invalid. That can only be done by the CJEU. It is on that basis that the applicant seeks a reference to the CJEU under Art. 267 of TFEU, for a determination on the validity of Council Regulation 2020/123.

14. In response and by way of preliminary objection, the respondent submitted that the court should not entertain the applicant's challenge, due to the fact that it had become moot, because the 2020 Regulation had expired and had been replaced by a further regulation fixing TACs for 2021. Indeed, that regulation would shortly be replaced by a further regulation fixing TACs for 2022. Furthermore, the monthly fishing management notices under challenge had long since expired.

15. On the substantive challenge raised by the applicant, the respondent agreed that national courts could not declare a measure of EU law to be unlawful or invalid. That could only be done by the CJEU.

16. However, it was submitted that if the national court was satisfied that the challenge to the legality of the particular measure, as raised by the applicant, was without substance, the national court had jurisdiction to declare the measure valid under EU law. Counsel for the respondent accepted that if the national court had doubts about the validity of the measure of EU legislation, it had to refer the matter to the CJEU.

17. The respondent submitted that Regulation 2020/123 was in compliance with the CFP, when one had regard to all the relevant recitals and to the provisions of the CFP, rather than having regard to one particular subparagraph in the article of the CFP setting out the objectives of the policy.

18. In addition, it was submitted that the CFP had to be read in conjunction with Regulation 2019/472 of the European Parliament and of the Council establishing a multi-annual plan for stocks fished in the Western Waters (hereafter the "Western Waters Regulation"). It was submitted that when both documents were read together, it was clear that the Council had to engage in an extremely complex assessment of a multifaceted issue; in particular, in relation to the difficulty of fishing in mixed

fisheries, where a particular species may be caught by way of by-catch, when other species were the target catch. In addition, it was submitted that the Council was obliged to have regard to the economic effects on the livelihoods of those involved in the fishing industry and those communities living in coastal areas, who depended on fishing for their livelihoods. It was submitted that when the provisions of the CFP and the Western Waters Regulation were read together, it was clear that the Council had not acted unlawfully in fixing the TACs for 2020 in the manner that they had done. Accordingly, it was submitted that the court should hold Regulation 2020/123 to be valid and therefore it was unnecessary to make a reference to the CJEU.

19. Those are the broad parameters of the issues before the court. The arguments of the parties will be set out in more detail later in the judgment.

Glossary of terms.

20. Unfortunately, there are numerous technical terms in this case, which will have to be referred to in this judgment, as they formed part of the argument of counsel. It will be helpful to the reader to set out a general description of the various bodies, terms and acronyms at this stage:

Maximum sustainable yield – means the highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average environmental conditions without significantly affecting the reproduction process (hereafter "MSY");

FMSY – is the value of the estimated fishing mortality that with a given fishing pattern and under current average environmental conditions gives the long term maximum yield;

Range of FMSY – means a range of values provided in the best available scientific advice, in particular from ICES or a similar independent scientific body recognised at Union or international level, where all levels of fishing mortality within that range result in MSY in the long term with a given fishing pattern and under current average environmental conditions, without significantly affecting the reproduction process for the stock in question. It is derived to deliver no more than a five percent reduction in long term yield compared to the MSY. It is capped so that the probability of stock falling below the limit spawning stock biomass reference point (BLIM) is no more than 5%;

MSYF lower – means the lowest value within the range of FMSY;

MSYF upper – means the highest value within the range of FMSY;

BLIM – means the spawning stock biomass reference point provided for in the best available scientific advice, below which there may be reduced reproductive capacity;

stock – means a marine biological resource that occurs in a given management area;

mixed fisheries – means fisheries in which more than one species is present and where different species are likely to be caught in the same fishing operation;

spawning stock biomass – means an estimate of the mass of the fish of a particular stock that reproduces at a defined time, including both males and females and fish that reproduce viviparously;

MSY Btrigger –means the spawning stock biomass reference point, below which specific and appropriate management action is to be taken to ensure that exploitation rates in combination with natural variations rebuild stocks above levels capable of producing MSY in the long term;

By-catch - refers to a species of fish that is caught in a mixed fishery, when another species is the target catch;

Multi-annual plans – these are provided for in recitals 23 and 24 and Art. 9 of the CFP; the CFP provides that they shall be adopted as a priority based on scientific, technical and economic advice and shall contain conservation measures to restore and maintain fish stocks above levels capable of producing MSY in accordance with Art. 2(2) of the CFP; the content of multi-annual plans (hereinafter 'MAPS') is set out in Art. 10 of the CFP.

Article 2(2) of the CFP.

21. The second paragraph of Art 2(2) that is the key provision in this case. This sub-article provides as follows: -

> "*In order to reach the objective of progressively restoring and maintaining populations of fish stocks above biomass levels capable of producing maximum sustainable yield, the maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks.*"

Legal submissions on behalf of the applicant.

(a) Mootness

22. Mr. Devlin SC, on behalf of the applicant, accepted that the doctrine of mootness was well established in Irish law. Essentially, a court, either at first instance, or on appeal, will decline to hear an action, or an appeal, which due to the events that have transpired since the commencement of the action, or prior to the hearing of the appeal, have rendered the controversy moot. Where that happens, the court will decline to determine the issue, as a court will not give an advisory opinion. In this regard, counsel referred to the decisions in *Goold v. Collins* [2004] IESC 38; *Lofinmakin v. Minister for Justice, Equality and Law Reform* [2013] 4 IR 274; *P.V. (A*

minor) v. the Courts Service & Ors. [2009] IEHC 321, as recently applied in *Shields v. Central Bank of Ireland* [2020] IEHC 518.

23. However, it was submitted that there were exceptions to the doctrine of mootness, such as where a decision of the court involved interpretation of a statute, which would affect the exercise of statutory powers by a statutory body in the future; or where the issue was one of general public importance, such that it was in the public interest to obtain a definitive ruling on the issue; or where the case before the court was a test case, the outcome of which would affect other cases pending before the courts: see for example *O'Brien v. PIAB (No. 2)* [2007] 1 IR 328.

24. It was submitted that a further exception arose where the measures under challenge were designed to be of limited duration, such that the impossibility of bringing a challenge before the court before the measure expired, would, if the issue were held moot, prevent such measures ever being challenged before the courts. In such circumstances, it was submitted that the courts would relax the operation of the mootness doctrine, as otherwise such measures would be permanently immune from review. It was submitted that this was particularly the case where the measures under challenge were designed to be repeated in the future.

25. It was submitted that these considerations arose in the present case, where the regulations setting TACs only lasted in general for one year and where the fishing management notices issued by the Minister were of only one month in duration.

26. It was pointed out that the issue of the fixing of TACs had not been raised as being moot, or held to be moot in previous cases where a challenge had been brought to the fixing of fishing opportunities: see *Northern Ireland Fish Producers Organisation Limited v. Department of Agriculture for Northern Ireland* (case C-

4/96) and *R (on the application of Unitymark Ltd) v. Department for Environment, Food and Rural Affairs (Case C-535/03).*

27. It was submitted that the court should entertain the present application in circumstances where the case came within the time limitation exception and also within the exception of raising an issue of public importance, given that the ruling could have a profound effect on the fishing industry, not only in this country, but in other Member States. In addition, the issue was likely to arise again, where future TACs were fixed in excess of the level advised in the best available scientific advice.

(b) The challenge to Regulation 2020/123.

28. Counsel submitted that it was well established in European law that the national courts did not have jurisdiction to declare a measure of European legislation to be invalid: *Foto Frost v. Hauptzollant Lubeck – Ost* (case C-314/85). It was submitted that if the court had doubts as to the validity of a measure of European law, it had to refer the matter to the CJEU.

29. In relation to whether the current application reached that threshold, counsel submitted that the CFP was enacted by the European Parliament and the Council of the European Union pursuant to Art. 43(2) of TFEU. Therefore, it was primary legislation of the EU. The regulation under challenge, had been issued by the Council pursuant to Art. 43(3). It was submitted that in making such regulation, the Council could not make new policy that went outside the terms of the CFP: see *EU Parliament and EU Commission v. Council of the European Union* (joined cases C-124/13 and C-125/13).

30. It was submitted that the CFP set out a clear mandate in Art. 2(2), which provided for the attainment of MSY by 2015 if possible, and by 2020 at the latest for all stock. It was submitted that the wording of the article, which provided that "*the*

maximum sustainable yield exploitation rate shall be achieved by 2015 where possible and, on a progressive, incremental basis at the latest by 2020 for all stocks", made it clear that the steps necessary to attain MSY had to be implemented by 2020 at the latest.

31. It was submitted that ICES had clearly advised in 2019 that to achieve MSY, it was necessary to fix TACs for cod, plaice and whiting at zero in the relevant fisheries. The advice from ICES was deemed to be the best available scientific advice per recital 9 to the Western Waters Regulation. It was submitted that the unambiguous wording of Art. 2(2) of the CFP, meant that Regulation 2020/123 fixing TACs for these fish in the areas of the sea identified by the applicant, were clearly in excess of the limit identified by ICES, which meant that the regulation was unlawful as contravening Art. 2(2) of the CFP.

32. Insofar as it was argued by the respondent that the TACs for 2020 for cod, plaice and whiting were only for by-catch in mixed fisheries; it was submitted that that was irrelevant because Art. 2(2) did not make any distinction between catch and by-catch, it simply referred to "all stock".

33. While ICES had provided advice in relation to fishing activities in mixed fisheries, that was only an estimate of how much by-catch of cod, would be caught if the level of catch of the target catch, was set at various levels. It was submitted that the advice given by ICES on mixed fisheries was not a statement that such levels of by-catch would be consistent with achieving MSY for that species if it was only caught as by-catch. The advice was merely a mathematical estimate of the quantity of one species that would be caught as by-catch, when another species was fished as the target catch in a mixed fishery; when the target catch was caught at various levels.

34. Counsel submitted that while the respondent had argued that the TACs fixed for cod, plaice and whiting were merely to cater for by-catch in mixed fisheries, these could not be excused on any *de minimis* principle, because the level of catch allowed actually constituted a significant proportion of the spawning stock biomass. In this regard, counsel referred to a document that had been handed into court which purported to show that the TACs which had been fixed for cod for 2020 represented 54% and 62% of the spawning stock biomass in the two relevant fisheries and for whiting, the TAC represented 52% of the SSB for the relevant fishery.

35. Counsel stated that the applicant's solicitor had written to the Council inviting them to make submissions and, if appropriate, to apply to be joined into the proceedings. However, by letter dated 22nd February, 2021, the Council had indicated that it would await a determination from the national court as to whether it would make a reference to the CJEU, and, if so, they would exercise their right of audience before that court at that stage. Counsel further pointed out that a similar challenge to the TACs was currently pending before the courts in France; although that action was still at the pleading stage.

36. In summary, counsel stated that Art. 2(2) of the CFP set a clear mandatory provision that had to be achieved at the latest by 2020. The fact that the setting of the TAC at zero for various species in various areas of the ocean that were mixed fisheries, may mean the premature closure of that fishery, as a consequence of that provision, was not a ground on which the court could refuse to apply that provision of the CFP.

37. It was submitted that the court could not avoid interpreting Art. 2(2) in its ordinary and natural meaning just to avoid that consequence. If the consequence was to be avoided, that was a matter for the European politicians. They could amend Art.

2(2) if they wanted to avoid a consequence that they regarded as unacceptable, or inappropriate.

38. It was submitted that the 2020 Regulation in setting TACs above the level recommended by ICES for achieving MSY for the species in question in the relevant fisheries, the Council had acted contrary to the clear provisions of Art. 2(2). The 2020 Regulation was therefore invalid. As the national court did not have power to declare the measure invalid, the court should make a reference to the CJEU.

The respondent's submissions

(a) Mootness.

39. Mr. Toland SC on behalf of the respondent submitted that the court should decline to entertain the applicant's application for a reference to the CJEU on the basis that the matter was entirely moot. The regulation which was alleged to be invalid, being Regulation 2020/123, was entirely spent. It had been replaced by a further regulation in 2021 and would soon be replaced by another regulation setting the TACs for 2022. In addition, the present action concerned a challenge to the legality of the fisheries management notices issued by the respondent. The notices specified in the amended statement of grounds, had all long since expired, as these notices only lasted for a month at a time. Counsel submitted that on the authorities which had been opened to the court by the applicant, it was well settled that the Irish courts will not entertain an action which has become moot.

40. Counsel stated that in *Kriszan & Ors. v. Slovenska* (case C-244/13), the CJEU had noted that the initiation of the reference process depended entirely on the national court's assessment as to whether that reference was appropriate and necessary. It was

submitted that that discretion enabled the court to refuse to refer a question to the CJEU on an issue that had become moot.

41. Counsel further submitted that the CJEU may refuse a request for a preliminary ruling in a number of circumstances, such as where the interpretation sought bore no relation to the facts of the main action, or its purpose; where the problem was hypothetical; or where the court of justice did not have available to it the factual or legal material necessary to give an answer to the questions asked.

42. It was submitted that in the present proceedings, where the contested notices were no longer in being, no challenge was necessary to resolve the application for *certiorari*. Moreover, the 2020 Regulation itself had been superseded. It was submitted that in these circumstances, the court should refuse to make the reference to the CJEU, as sought by the applicant.

(b) The validity of Regulation 2020/123.

43. In their written submissions, the respondent accepted that the TACs for the four species set out in Table 1 at E17, in the statement of grounds, were set above the ICES catch advice.

44. However, counsel submitted that that was not the end of the matter. It was submitted that the applicant had adopted an overly simplistic approach to the interpretation of the CFP and the obligations cast on the Council under that regulation and under the Western Waters Regulation of 2019, when setting the TACs for 2020 and beyond. It was submitted that the applicant had focussed solely on one subparagraph of one article in the CFP, to the exclusion of a number of important recitals in the CFP and a number of articles, both in that regulation and in the Western Waters Regulation, which had to be read together, in order to fully understand the

extent of the legal obligation that was cast upon the Council when setting the annual TACs.

45. It was submitted that the CFP had to be interpreted in context. In particular, counsel referred to recital 6 of the CFP, which highlighted the need for measures of European law to be consistent with the commitments of the EU under various international instruments. Recital 7 provided that exploitation rates should be achieved by 2015. Achieving those exploitation rates by a later date should be allowed only if achieving them by 2015 would seriously jeopardise the social and economic sustainability of the fishing fleets involved. After 2015, those rates should be achieved as soon as possible and in any event no later than 2020. Where scientific information was insufficient to determine those levels, approximate parameters may be considered.

46. Counsel also referred to recital 8, which provided that management decisions relating to MSY in mixed fisheries should take into account the difficulty of fishing all stocks in a mixed fishery at MSY at the same time, in particular where scientific advice indicated that it is very difficult to avoid the phenomenon of "choke species" by increasing the selectivity of the fishing gears used. Appropriate scientific bodies should be requested to provide advice on the appropriate fishing mortality levels in such circumstances.

47. Counsel also referred to the provisions of Art. 2(5) of the CFP, which set out a number of objectives of the CFP. It provided that the CFP shall, in particular, gradually eliminate discards on a catch by catch basis; where necessary make the best use of unwanted catches; shall provide conditions for economically viable and competitive fishing capture and processing industry and land-based fishing related activity; shall contribute to a fair standard of living for those who depend on fishing

activities, bearing in mind coastal fisheries and socio-economic aspects; take into account the interests of both consumers and producers and promote coastal fishing activities, taking into account socio-economic aspects.

48. Counsel submitted that in addition, the Council had to have regard to the fact that the landing obligation, as provided for in Art. 15 of the CFP, had fully come into effect as and from 1st January, 2019. Article 15 provided that all catches of species which are subject to catch limits, which are caught during fishing activities, must be brought and retained on board the fishing vessels, recorded, landed and counted against the quotas where applicable, except when used as live bait, in accordance with certain prescribed time-frames. All species subject to catch limits (*i.e.* managed under the TAC system) have been subject to the landing obligation since 1st January, 2019.

49. It was submitted that Art. 15 of the CFP provided that fishing opportunities allocated to Member States must ensure the relative stability of fishing activities of each Member State for each stock of fishery and that the interests of each Member State shall be taken into account when new fishing opportunities are allocated. Since the landing obligation in respect of all fish stock was introduced, fishing opportunities must be fixed taking into account the change from landings, to fixing fishing opportunities that reflect catches, on the basis that discarding of that stock will no longer be allowed.

50. It was submitted that the difficulties posed in relation to fixing TACs for mixed fisheries, together with the full implementation of the landing obligation had been recognised in the Western Waters Regulation of 2019. In particular, counsel referred to recitals 15, 16, and 17 therein. Article 17 provided that it was appropriate to establish the target fishing mortality (F) that corresponds to the objective of reaching and maintaining MSY at ranges of values which are consistent with

achieving MSY (FMSY). Those ranges based on best available scientific advice, are necessary in order to provide flexibility to take account of developments in the scientific advice, to contribute to the implementation of the landing obligation and to take into account the characteristics of mixed fisheries.

51. The recital went on to provide that FMSY ranges should be calculated, in particular by ICES in its periodic catch advice. The recital further provided that based on the plan they should be derived to deliver no more than 5% reduction in long term yield compared to MSY. The upper limit of the range should be capped, so that the probability of the stock falling below Blim was no more than 5%. That upper limit should also conform to the ICES "advice rule", which indicated that when the spawning biomass or abundance was in a poor state, F was to be reduced to a value that did not exceed an upper limit equal to the FMSY point value multiplied by the spawning biomass or abundance in the total allowable catch (TAC year divided by MSY Btrigger). ICES uses these considerations and the advice rule in its provision of scientific advice on fishing mortality and catch options. Counsel submitted that as far as mixed fisheries were concerned, it was clear from these provisions that the Council were given a margin of discretion when fixing the relevant TACs.

52. Counsel also referred to Art. 4(1) of the 2019 Regulation, which provided that fishing mortality, in line with the ranges of FMSY defined in Art. 2, shall be achieved as soon as possible, and on a progressive incremental basis by 2020 for the stocks listed in Art. 1(1), and shall be maintained thereafter within the ranges of FMSY, in accordance with that article. Article 4(7) further provided that fishing opportunities shall in any event be fixed in such a way as to ensure that there is less than a 5% probability of the spawning stock biomass falling below Blim.

53. Counsel also referred to Art. 5 of the 2019 Regulation, which deals with the management of by-catch stocks. Article 5(1) provides that management measures for the stock referred to in Art. 1(4) including, where appropriate, fishing opportunities shall be set taking into account the best available scientific advice and shall be consistent with the objectives laid down in Art. 3. Article 5(3) provides that in accordance with the Art. 9(5) of the CFP, the management of mixed fisheries with regard to stocks referred to in Art. 1(4) of the 2019 Regulation, shall take into account the difficulty of fishing all stocks at MSY at the same time, especially in situations where that leads to a premature closure of the fishery.

54. It was submitted that when the CFP and the 2019 Regulation were read together, it was clear that they established a complex interlocking legal framework, under which the Council was obliged to take a considerable number of factors into account when considering the fixing of TACs for mixed fisheries. It was submitted that taking the single catch advice, as issued by ICES and applying that to the provisions of one article in the CFP, being Art. 2(2), was overly simplistic. It ignored the wider ramifications for the conservation of fish stocks, within the maintenance of a fishing industry in European waters.

55. Counsel referred to the ICES advice as given by the Working Group on Mixed Fisheries from its 2019 meeting (vol. 2, issue 93), which was exhibited at exhibit JK1 to the affidavit of Josephine Kelly. Counsel submitted that the mixed fisheries analysis as carried out at section 3.5.2 of that report, made it clear that the Council could adopt a TAC that was within the range of FMSY. It was pointed out that the analysis specifically recognised that mixed fisheries catch scenarios could take specific management priorities into account, and the results indicated that it was not possible to achieve all single-species management objectives simultaneously.

56. Counsel referred to the fact that the TACs awarded took account of the fact that they were allocated to mixed fisheries with unavoidable by-catches of certain fish stocks. For certain stocks, and in particular the zero advice stocks, the TACs made available to Members States were exclusively for by-catches in the relevant fisheries. That was specifically set down in the annual TAC and in the regulation.

57. It was submitted that if the recommended TAC in the ICES advice for single stock catch had been strictly adhered to, that would have resulted in the "choke species" phenomenon, which would have "choked" allowances for other species in mixed fisheries, resulting in the premature closure of the fishery. The TACs that had been set for the species in question had been set at a level, so as to avoid the consequences of "choke stock" in mixed fisheries. Had that not been done, it would have led to the premature closure of the fisheries in question.

58. It was submitted that in order to strike the right balance between continuing fisheries in view of the potentially severe socio-economic implications, and the need to achieve a good biological status for those stocks, taking into account the difficulty of fishing all stocks in a mixed fishery at MSY at the same time, the 2020 Regulation recognised that it was necessary to establish specific TACs for by-catches for those stocks.

59. The TACs provided for were purely in relation to by-catch and as a further precaution, the TAC for the main catch of haddock, had been set at lower than FMSY.

60. Counsel submitted that the CJEU had recognised in *Kingdom of Spain v. The Council* (case C-128/15), that the fixing of TACs in a mixed fishery was an extremely complex task, which involved the Council having to evaluate a complex economic situation. While the Council had to take account of available scientific, technical and economic advice when adopting conservation measures, that did not prevent the

European Union legislature from adopting such conservation measures where there was no conclusive scientific technical and economic advice. The court further stated that fishery conservation measures need not be completely consistent with scientific advice and the absence of such advice, or the fact that it was inconclusive, could not prevent the Council from adopting such measures as it deemed necessary for achieving the objectives of the CFP: see paras. 46-53 of the judgment.

61. In conclusion, Mr. Toland SC submitted that the State's position was that the provisions of the CFP, including Art. 2(2) upon which the applicant placed reliance, could not be read in isolation. They had to be considered in the context of the overall aims of the regulation and in the light of the other terms thereof. While the CFP endorsed a precautionary approach towards fish stock management, that had to be balanced against other factors referred to in the regulation, such as providing conditions for economically viable and competitive fishing capture; and ensuring a fair standard of living for those who depend on fishing activities, as well as the interests of both consumers and producers.

62. It was submitted that while the applicant argued that Art. 2(2) mandated an absolutist approach towards fisheries management, it failed to acknowledge that that had to be balanced against the socio-economic objectives in Art. 2(1), or the multifactorial context provided in Art. 2(5) of the regulation; or that Art. 2(2) itself contained language which was couched in terms of aims and normative objectives.

63. It was submitted that fundamentally, the application of the CFP had to be considered in context, having regard to its various aims and objectives and the complexity of managing by-catches and choke species. It was submitted that in the circumstances, when the CFP and the 2019 Regulation were read as a whole, it was clear that Regulation 2020/123 was in compliance with the terms thereof.

Accordingly, it was submitted that there was no basis on which the court could hold that the regulation was invalid or unlawful. Therefore, the court should refuse to make a reference to the CJEU.

Conclusions

(a) The mootness issue.

64. Having considered the papers in this case and the arguments of counsel, the court is satisfied that the issues between the parties in relation to the legality of Regulation 2020/123 and the fishing management notices made thereunder, are moot, because the regulation itself and the relevant fishing management notices have expired and are no longer in force.

65. The court accepts the general statements in relation to the doctrine of mootness as set down in *Goold v. Collins*; *Lofinmakin v. Minister for Justice, Equality and Law Reform;* and *P.V. (A minor) v. The Courts Service*, as recently analysed and summarised by this court in its decision in *Shields v. Central Bank of Ireland* [2020] IEHC 518.

66. However, the doctrine of mootness, is not an absolute rule preventing the courts from deciding issues that have become moot. The court accepts the submission made by Mr. Devlin SC on behalf of the applicant that there are certain circumstances where, notwithstanding that the controversy has become moot, the court will proceed to give a decision in the case. Examples of this are where the issue involved concerns an issue of statutory interpretation and the procedure adopted by a statutory body in performing its duty under a statute: see *O'Brien v. PIAB*. Another example is where the issue involved in the case which has become moot, is one of general public importance, which is likely to arise in future cases. A further example is where the

case that has become moot, was a test case and where there are other cases raising similar points pending before the courts. In each of these exceptional cases, it is appropriate for the court to proceed to give judgment in the matter, notwithstanding that the issue between the parties has become moot since the inception of the proceedings.

67. The court accepts the submission made by counsel on behalf of the applicant that a further exception that can arise is where the act or measure in dispute is limited in duration, such that it is not possible for a person affected by the order or measure to mount a legal challenge to it and bring it before the courts within the lifetime of the measure in question. If the court were to apply the mootness doctrine in a strict manner in such cases, it could effectively mean that such measures would be immune to challenge.

68. This ground of exception was recognised by Hardiman J. in his judgment in the *Goold* case where he stated as follows at p.26:

> "*In the United States, an issue is not deemed moot if it is 'capable of repetition, yet evading review' a phrase devised in 1911 and constantly used thereafter, e.g. in Honig v. Doe 484 US 305 [1988]. This is said to be the case where '(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again'. (See generally, Tribe op cit. page 349).*
>
> *As might be expected from that formulation, such cases have tended to focus on time limited events such as election campaigns, pregnancy, (as in Roe v. Wade) and time limited court orders especially in the domestic violence area.*"

69. It is noteworthy that in *Roe v. Wade* [1973] 410 US 113, the plaintiff's challenge to the prohibition on abortion was heard two years after her baby was born.

70. A similar approach was adopted by Murphy J. in *Whelan v. Governor of Mountjoy Prison* [2015] IEHC 273, which involved a challenge by a prisoner to the deprivation of one hour's exercise in the open air, while he was detained in the Challenging Behaviour Unit of the prison as a punishment. By the time his case came on for hearing, he had served his period of punishment in the CBU. The respondent argued that the issue was therefore moot. Murphy J. noted that while the applicant had served his period of punishment in the CBU before the matter came on for hearing, there was nothing before the court to suggest that the applicant could not be subjected to further incarceration in the CBU during the remainder of his imprisonment. She stated as follows at para. 17: -

> "*In these circumstances, on the basis of both the Canadian and American tests, as approved by Hardiman J in Goold v. Collins, the Court is satisfied that the application is not moot. For that reason, it is not necessary for the Court to go further and consider whether this is one of the exceptions to the mootness rule where the Court will determine an issue despite the fact that it is moot, such as arose to an extent in O'Brien v PIAB [2007] 1 IR 328 and very directly in Okunade v. The Minister for Justice, Equality & Law Reform and Others [2013] 1 ILRM. In so holding, the Court is nonetheless conscious that were it to find this application moot, as night follows day further applications on this issue would emerge, and so had the Court been compelled to consider whether this case came within the exceptions to the moot rule, it might well have concluded that it does.*"

71. In light of these authorities, this Court is satisfied that the applicant's challenge herein, while moot, should be allowed to proceed. The court has reached this conclusion for two reasons: firstly, the court is satisfied that given the limited duration of both the regulation and the fisheries management notices, it would not be possible for any applicant to challenge them before the Irish courts within the lifespan of the particular regulation or notice, given the delays existing in the Irish courts at present. Were the court to hold the issue moot, it would mean that both the Council regulation and the fisheries management notices were effectively immune from legal challenge. The court is satisfied that that would not be in the interests of justice.

72. The court is further supported in its conclusion herein by virtue of the fact that the Council is likely to fix TACs in the future that are above the zero rate advised by ICES. Accordingly, the issue that arises in this case, while moot in respect of the 2020 Regulation, is likely to be a "live issue" in respect of other regulations issued by the Council in the future. Accordingly, it is desirable that a decision be reached on the general legality of such regulations in terms of their compliance with Art. 2(2) of the CFP.

73. Secondly, the court is satisfied that this case comes within the public interest exception to the rule on mootness. The court is satisfied that the issues raised by the applicant herein, raise issues of general public importance for two reasons: firstly, the application raises issues in relation to the conservation of fish stock, which are of fundamental importance to the citizens of the EU and secondly, the issues raised herein have enormous ramifications for the fishing industry in the Member States of the EU.

74. For the reasons set out herein, the court is satisfied that while the issues between the parties in relation to the 2020 Regulation and the fisheries management

notices identified in the amended statement of grounds are now moot, this is an appropriate case in which to permit the applicant's proceedings herein to proceed.

(b) Whether a reference should be made to the CJEU.

75. The parties were agreed that the threshold which the court has to apply in relation to whether it should make a reference to the CJEU, is whether the court has doubts as to the legal validity of the regulation under challenge: see decision in the *Foto Frost* case.

76. While a large amount of technical evidence was put before the court, the key legal issue which the court must determine, is whether Art. 2(2) of the CFP constitutes an overarching binding legal imperative, that had to be observed when the Council was fixing the TACs for 2020 and succeeding years; or whether, as argued by the respondent, it was merely one of a number of aspirational objectives, which the Council had to take into account, along with a great deal of other matters, both scientific and within the broader economic sphere, when setting TACs for 2020 and beyond.

77. There is considerable force in the argument put forward by the respondent, to the effect that in fixing the TACs, the Council was obliged by the CFP and the Western Waters Regulation to have regard to a large range of matters, including the difficulty of providing TACs designed to achieve MSY for one species, when that species is caught in a mixed fishery, together with the allied problem of avoiding a situation where "choke species" would force the premature closure of a fishery.

78. The Council also had to take account of the fact that the landing obligation had become fully operational by 1st January, 2019. This meant that all fish had to be landed and counted as part of the catch, even if not the primary or intended object of

the fishing effort. There was no longer any provision for discards, which did not have to be counted as part of the catch.

79. In addition, the Council was also specifically obliged to have regard to the economic impacts that fixing TACs could have on Member States and in particular, on coastal communities, who depended greatly on the income from commercial fishing. The court accepts that in fixing the TACs, the Council had to have regard to all these matters.

80. While the respondent submitted that the ICES advice, while independent and highly regarded, was not the only advice that could be taken into account and in this regard referred to the advices furnished in January 2019 by the Scientific, Technical and Economic Committee for Fisheries (STECF), it was not seriously contended that there was any other scientific advice, which challenged the single catch advice issued by ICES in respect of the three species in the fisheries referred to by the applicant.

81. The court finds that the ICES advice furnished in 2019 in respect of the allowable single catch for the species in question, which advised that same should be set at a zero rate in order to achieve MSY in 2020, constituted the best available scientific advice at that time.

82. As an alternative submission, Mr. Toland SC submitted that the advice of ICES on mixed fisheries, clearly gave a range of catch, which was permissible. The court does not accept that submission for the following reasons: it is clear, from the terms of that advice, that ICES was not stating that in a mixed fishery, the various TACs referred to in that advice, could be permitted in order to achieve MSY of the relevant by-catch. Rather, the advice was setting out on a scientific basis, the number of a particular by-catch (in this case cod) that would likely be caught if another species (in this case haddock) was the main target catch. The ICES advice on mixed

fisheries, merely set out the number of cod that would likely be caught as by-catch, if haddock was caught at particular levels.

83. It followed from that advice, that the lower the quantity of haddock that was caught, the lower the quantity of cod that would be caught as unavoidable by-catch. The court is satisfied that in giving that advice, ICES was not stating that allowing a particular quantity of cod to be caught as by-catch, would achieve MSY for cod in that fishery.

84. In the course of the hearing, it was asserted by the applicant that in failing to adhere to the single catch advice given by ICES, to the effect that in order to achieve MSY, there should be a zero TAC for the three species in the specified fisheries, the Council was putting the survival of these species in the affected fisheries, in great jeopardy. The court does not accept that that gives a fair picture of the overall state of play on a year by year basis under the CFP in recent years.

85. The court notes that in the STECF report of January 2019, monitoring the performance of the CFP, it noted in its conclusions that the latest results were generally in line with those reported in 2017 and 2018, which confirmed a reduction in the overall exploitation rate for the North East Atlantic. On average, the stock biomass was increasing and stock status was improving. However, it went on to note that based on the set of assessed stocks included in the analysis, many stocks remained over fished and/or outside safe biological limits, and that progress achieved until 2017 seemed too slow to ensure that all stocks would be rebuilt and managed according to FMSY by 2020.

86. In its state of play analysis report issued by the Commission in June 2019, it was noted that in the North Atlantic and adjacent areas, pressure on fish stocks

(F/FMSY) showed an overall downward trend over the period 2003-2017, with the median fishing mortality stabilised at 1.0. The report went on to note as follows:

> "*TACs are one of the main fisheries management tools. In the Northern Atlantic and adjacent areas, the Commission proposed TACs in line with or below FMSY for 2019, for all the 76 TACs, for which FMSY advice was available. This was not possible for 5 TACs for which the International Council for the Exploration of the Seas (ICES) gave zero tack advice, because doing so would have led to choke situations with serious socio-economic impacts, and where it was decided to maintain by-catch TACs at low levels. The Council set 59 TACs in line with FMSY, which corresponds to three additional TACs compared to 2018.*"

87. The report noted that in relation to biomass trends in the Northern Atlantic and adjacent areas, the number of stocks within safe biological limits had almost doubled from 15 in 2003 to 29 in 2017 (an increase of 2% from 2016), with the largest increase in the Bay of Biscay and the Iberian waters – from 2 to 8 stocks within safe biological limits. The overall biomass volume had continued to develop positively, increasing by around 36%.

88. Thus, it does not appear to the court, that the TACs fixed in the years prior to 2020, have put the existence of species in jeopardy; however, it is undoubtedly true that MSY for the reference species in these fisheries, has not yet been achieved.

89. Before deciding the central issue in this case, the court should set out the canons of interpretation that the court is obliged to adopt when interpreting a measure of EU legislation.

90. The court accepts that in interpreting measures of European law, the CJEU has adopted three main approaches: (i) the literal or textual approach; (ii) the schematic

approach; and (iii) the teleological approach. Very often, these approaches to interpretation are used simultaneously. The literal and textual approach is well-known in the common law world, where the words are given their ordinary and natural meaning. The rationale for the literal and textual approach is that where words are perfectly clear in their meaning, they should not be distorted under the pretense of interpretation. Legal certainty and legitimate expectation are features of European law, principles which underlie the rationale of the literal approach. In *United Kingdom v The Commission* (Case C – 209/96) the CJEU stated as follows at para. 35:

> "*The first point to be borne in mind here is the need to ensure legal certainty, which means that rules must enable those concerned to know precisely the extent of the obligations which they impose on them (see, to that effect, Case 348/85 Denmark v Commission [1987] ECR 5225, paragraph 19). The Commission thus cannot choose, at the time of the clearance of EAGGF accounts, an interpretation which departs from and is not dictated by the normal meaning of the words used (see, to that effect, Case 349/85 Denmark v Commission (1988) ECR 169, paras. 15 and 16).*"

91. A further rationale for the literal approach has been that if the words in question are clear in their meaning, it is not for the courts to give them a different meaning, as that would involve the courts in carrying out a function entrusted to the legislature: see *Hauptzollamt Neubrnadenburg v Leszek Labis* (Case C-310/98 & C-406/98), where the CJEU stated as follows;

> "*Whatever the reasons which might be put forward for requiring, as the French, Netherlands and Finnish Governments and the Commission have done, objective proof of the place where an offence was committed, the Court is not entitled to assume the role of the Community legislature and interpret a*

provision in a manner contrary to its express wording. It is for the Commission to submit proposals for appropriate legislative amendments to that end."

92. The second approach adopted by the CJEU is the schematic approach. This provides that the meaning of words and expressions are to be considered in the context of the provision in which they appear, but also by reference to how that provision exists in the scheme as a whole. Interpretations that are consistent with the identified scheme are preferred over interpretations that are not. A particular interpretation can be tested by examining the logical effects on related provisions. The same word in the same measure or related provision tends to be given the same meaning. Where a particular interpretation would render some other provision nugatory, whereas an alternative would not, the alternative may be preferred.

93. Finally, there is the teleological approach. This approach is used to secure the objectives of the treaties and legislation. Put at its simplest, the court will seek the interpretation which best serves the purpose for which a provision was enacted. This approach is underlined by the principle of effectiveness, or *effet utile*. The source for identifying the objective, purpose or scheme, is typically the legislation itself, related legislation and the treaties.

94. It has been noted that the teleological approach has three basic effects. First, alternative interpretations may be evaluated by reference not only to the text, but by reference to identified objectives and the consequences that arise from each. Secondly, the literal meaning may be departed from where it is inconsistent with, or fails to give effect to, the identified objective. Thirdly, where an enactment is silent on a particular question, interpretations consistent with the purpose may be readily supplied by the teleological approach.

95. In *HMIL Ltd v Minister for Agriculture* (Unreported, High Court, 8th February, 1996), the following definition of the operation of the teleological approach as furnished by Schermers & Waelbroeck in their textbook 'Judicial Protection in the European Communities', 5th edition, (1992) at paragraph 29, was cited with approval:

> *"Although at first the Court [The European Court of Justice] was more strict, after gradually establishing its position it increasingly used interpretations based on the purposes of the Community treaty. It does not rely merely on the wording, the background or even the context of the provisions concerned, but chooses the interpretation which best serves the purpose for which the provision was made. For this type of interpretation the expression "effete utile", "purposive", "function" and "teleological" interpretation are used. It is employed either for the interpretation of Community treaties or for that of secondary Community law. In the former case the expression "constitutional interpretation" may be used in order to stress the treaties, the constitution of the Communities, are the basis for this interpretation. A legal order is developing out of the constitution, and in its constitutional interpretation the Court interprets the legal order as it has evolved and in such a way that it may fulfill its function more efficiently. The spirit and the purpose of the constitution form the core of this interpretation. As a similar kind of interpretation is used for secondary Community law, the expression "teleogolical interpretation" seems more appropriate as a general denomination."*
>
> *..... Teleogolical interpretation is used for three purposes:*
>
> *(1) to promote the objective for which the rule of law was made;*

(2) to prevent unacceptable consequences to which a literal interpretation might lead, and

(3) to fill gaps which may otherwise exist in the legal order."

96. It should be noted that the High Court decision in that case was overturned on appeal to the Supreme Court, following a reference to the CJEU. However, the statement of law cited above, was not questioned in the appeal judgment.

97. Notwithstanding the flexibility that is afforded to the court by the adoption of these approaches to the interpretation of measures of European legislation, the court is satisfied of the correctness of the submission made by Mr. Devlin SC on behalf of the applicant, to the effect that where the words are clear and unambiguous in their meaning, the court cannot adopt an alternative interpretation that is not open on a natural reading of the provision, in order to avoid consequences that the court may regard as unacceptable. For the court to do so, it would in effect be substituting its view as to the desirability of certain legislative measures, for that of the institutions of the EU, that are mandated under the treaties to enact European legislation.

98. The court accepts the submission made by Mr. Devlin SC, that when the words of EU legislation are clear, the court cannot adopt another interpretation of the legislation, because adopting the ordinary and natural meaning of the words may lead to consequences that some might regard as extreme, or undesirable.

99. Counsel for the applicant did not shy away from the fact that were the court to uphold the interpretation and effect of Art. 2(2) as propounded by the applicant and were the Council obliged to give effect to that article, it would, in circumstances where ICES had given a zero catch advice, lead to the elimination of fishing for those species and probably lead to the closure of those mixed fisheries, when the three species in question were unavoidable by-catch of other target species.

100. It was submitted that if that was a consequence which the European Parliament and the Council wished to avoid, they were obliged to amend Art. 2(2) of the CFP. It was submitted that the national court could not ignore the provisions of the article, or adopt a strained interpretation of it, so as to avoid these consequences. The court accepts the general thrust of this submission, that the court cannot ignore any provisions of the regulation, nor apply a strained interpretation thereto, so as to avoid any consequences that may be regarded as being unpalatable. To do so, this court would effectively be usurping the role of the EU legislature.

101. Insofar as it had been argued that the TACs fixed for the three species in the 2020 Regulation were only for by-catch, it was submitted that that was irrelevant. Article 2(2) refers to "all stock". It was submitted that the article did not differentiate between catch or by-catch; nor did it make any exemption for by-catch. The court accepts the submission that Art. 2(2) does not contain any specific provision, much less an exemption for by-catch, from the provisions of that article.

102. Insofar as it may be thought that the TACs fixed for 2020 were at a very low level, such that a *de minimis* argument might be made in their favour, the court accepts the evidence submitted in the document that was handed into the court during the hearing, which showed that the TACs allowed for cod in 2020 represented 62% and 54% of the spawning stock biomass in the two affected fisheries; and for whiting the TAC represented 52% of the SSB in that fishery. Accordingly, the court holds that the relevant TACs set for 2020 cannot be excused on any form of *de minimis* argument.

103. Turning to the key issue in this case, the court is satisfied that the provisions of Art. 2(2) are clear. They place a binding obligation on the Council to fix TACs in

accordance with the best available scientific advice to achieve MSY for all stock by 2020 at the latest.

104. The best scientific advice for 2020, as issued by ICES in 2019, was to the effect that in order to achieve MSY for the three species concerned in the fisheries identified, there should be a zero catch set for that year.

105. The court is satisfied that Art. 2(2) represents a clear mandatory obligation on the Council when fixing TACs for 2020 and subsequent years. It is not merely an aspirational objective that should be achieved by that date. It is clear that it is a key objective of the CFP, which places a mandatory obligation on the Council from 2020 onwards.

106. The high status of the provisions provided for in Art. 2(2) of the CFP, is shown by the fact that that article is referred to elsewhere in the CFP. In particular, Art. 9 which deals with the principles and objectives of multi-annual plans, provides that such plans shall contain measures to restore and maintain fish stocks above levels capable of producing MSY in accordance with Art. 2(2).

107. Article 16 of the CFP deals with fishing opportunities. Article 16(3) deals with new scientific evidence which shows that a significant disparity exists between the fishing opportunities that have been fixed for a specific stock and the actual state of that stock, in such circumstances, Member States having a direct management interest may submit a request to the Commission for it to submit a proposal to alleviate the disparity, while respecting the objectives set out in Art. 2(2). Article 16(4) provides that fishing opportunities shall be fixed in accordance with the objectives set out in Art. 2(2).

108. The Western Waters Regulation of 2019 also refers to Art. 2 of the CFP. Article 3(1) of the 2019 Regulation deals with the objectives of that regulation and

provides that the multi-annual plan shall contribute to the achievement of the objectives of the CFP listed in Art. 2 of the CFP, in particular by applying the precautionary approach to fisheries management and shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce MSY. Article 4(3) of that regulation provides that in accordance with Art. 16(4) of the CFP, when the Council fixes fishing opportunities for a stock, it shall establish those opportunities within the lower range of FMSY available at that time for that stock.

109. The court is satisfied that interpreting both the CPF and the 2019 Regulation in their ordinary and natural meaning, it is clear that Art. 2(2) of the CFP is more than just an aspirational objective of the CFP. The court is satisfied that there is certainly an argument that it represents a mandatory *ne plus ultra,* that had to be achieved by 2020 at the latest. It is against that interpretative backdrop that the court has serious doubts about the legality of Council Regulation 2020/123, having regard to the mandatory nature of Art. 2(2) of the CFP.

110. In these circumstances, the court is obliged to refer the issue to the CJEU for a determination as to the validity of Council Regulation 2020/123.

111. As the court has decided to make a reference to the CJEU, it cannot determine any of the other grounds of challenge raised by the applicant at this stage. In particular, the validity of the fishing management notices issued by the respondent, will depend to a very large extent on the legal validity of the regulation under which they were made.

112. The court will receive submissions from the parties on the terms of the question that will be referred to the CJEU pursuant to Art. 267 of TFEU.

113. To that end, the parties will have four weeks to either agree a question to be referred to the CJEU, or to suggest their own wording for the reference, which submissions should be submitted in writing. In the event that the court thinks it necessary, the court will arrange a further oral hearing on the matter. The written submissions furnished by the parties, should deal with the form of the question to be referred to the CJEU and any other matter that may arise.