

Case C-330/22 on fishing opportunities and the 2020 MSY Deadline

An explanation of the CJEU judgment

Top Lines

- This briefing is an analysis by ClientEarth for our partners and other interested NGOs to explain the different judicial steps and judgment in case C-330/22 - as well as its likely consequences on the future of setting total allowable catch (“**TACs**”) in the EU.
- It should be noted that there is no single interpretation of this ruling. Many legal questions remain unanswered regarding TACs setting and the requirement of Article 2(2) of the Common Fisheries Policy (“**CFP**”) Basic Regulation to fish all stocks at sustainable levels by 2020 (“**MSY Deadline**”).

1. Factual background

The Irish NGO Friends of the Irish Environment – supported by ClientEarth - (“**FIE**”) brought proceedings before the High Court of Ireland against the State of Ireland. It asked for judicial review of fisheries management notices establishing fishing opportunities for 2020 in Ireland. These fisheries management notices were implementing the EU Council Regulation establishing TACs for Member States in the North-East Atlantic for the year 2020 (“**Contested Regulation**”). In essence they were allocating at the national level, in the form of quotas and between Irish producer organisations, the TACs set at the EU level through the Contested Regulation.

FIE argued that these fisheries management notices were invalid as the Contested Regulation breached the MSY Deadline of Article 2(2) of the CFP Basic Regulation, which requires TACs for all stocks to be set below or at MSY levels by 2020 at the latest. In December 2019, 22 TACs adopted for North-East Atlantic stocks¹ were set contrary to the best available scientific advice provided by the International Council for the Exploration of the Sea (“**ICES**”) to ensure that they are managed at or below MSY exploitation rates to achieve the MSY Deadline (**ANNEX 1**: table of North-East Atlantic TACs for 2020 exceeding ICES advice).

Ireland defended the Contested Regulation, arguing that the EU fisheries legal framework provided flexibility and a certain margin of discretion to the Council to set TACs above ICES headline advice when it comes to mixed fisheries and in particular in cases where ICES recommended 0 catches of certain by-catch stocks. Considering this discretion, Ireland - and ultimately, the Council – would not have breached Article 2(2) of the CFP Basic Regulation when setting TACs above ICES headline advice.

After hearing submissions, the High Court of Ireland decided to refer the case to the Court of Justice of the European Union (“**CJEU**”) for a preliminary ruling. It asked whether certain TACs of the Contested Regulation were valid having regard to the aims and objectives of the CFP Basic Regulation. The four TACs covered by the question referred by the Irish judge were by-catch TACs in the North East Atlantic covered by the Western Waters Multiannual Plan and for which the Contested Regulation did not follow the “zero catch advice” delivered by ICES.

¹ This case only covered a sub set of stocks in the North-East Atlantic. It did not cover the Baltic or the Mediterranean Sea, or other TACs set outside EU waters.

In June 2023, Advocate General of the CJEU Tamara Capeta (“**AG Capeta**”) delivered her Opinion², which was overturned in January 2024 by the Court’s Fifth Chamber in its final judgment³.

2. The different rulings explained

2.1. The national procedure

In 2020, when the case was launched, NGOs did not have standing to take legal actions against that type of regulation directly before the CJEU. For this reason, FIE decided to take legal action against Ireland, asking the case to be referred to the CJEU, the competent jurisdiction to rule on the validity of EU law and, consequently, the Contested Regulation. In February 2022, the High Court of Ireland delivered its judgment concluding in favor of FIE that:

*“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.”*⁴

*“[...] 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.”*⁵

Therefore:

*“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.”*⁶

2.2. The EU procedure

The High Court of Ireland therefore referred a question to the CJEU. Both Parties had the opportunity to suggest the wording of the question to be referred to the CJEU. FIE suggested to rule on the validity of **all TACs** of 2020 fixed for the North-East Atlantic exceeding ICES headline advice. Unfortunately, as

² Case C–330/22 *Friends of the Irish Environment v. The Minister for Agriculture, Food and Marine, Ireland and the Attorney General* [2023] ECLI:EU:C:2024:19, Opinion of AG Capeta

³ Case C–330/22 *Friends of the Irish Environment v. The Minister for Agriculture, Food and Marine, Ireland and the Attorney General* [2023] ECLI:EU:C:2024:19.

⁴ Para. 105

⁵ Para. 109

⁶ Para. 110

supported by the Irish State, the question finally referred exclusively focused on the validity of **TACs for four specific stocks** (i.e. by-catch stocks with zero catch advice), which considerably narrowed the scope of the case before the CJEU. The four stocks are West of Scotland Cod, Celtic Sea Cod, Irish sea Whiting and Plaice. We would have clearly preferred that the question referred would not exclusively address the issue of choke species, but that it would also address the other legal questions relating to TAC setting and the interplay with Article 2 (2) of the CFP Basic Regulation. It is the judge who ultimately decides the question referred to the Court.

The question focused on whether the TACs for these four stocks were valid or invalid having regard to the aims and objectives of the CFP Basic Regulation, specifically: the objectives set out in Article 2(1) and 2(2)); the principles of good governance set out in Article 3(c) and (d). This assessment, as framed by the referred question, should also be read in conjunction with the relevant provisions of Western Waters Regulation ("**WW Regulation**"), which established the Western Waters Multiannual Plan.

2.2.1. The Opinion of AG Ćapeta

In June 2023, AG Ćapeta delivered an Opinion on this case. In EU law, an Advocate General has an advisory role (AG opinions are not legally binding). The role of the AG is to assist the CJEU by submitting a coherently argued opinion ahead of the judgment. Although not legally binding, AG Opinions are often referred to in case-law and literature, giving them a certain legal authority.

AG Ćapeta concluded that the TACs for the four stocks at issue are invalid in so far as it sets fishing opportunities above zero. Beyond this finding, the reasoning of AG Ćapeta clarifies many points of law regarding the process for setting TACs in line with EU law.

AG Ćapeta started by saying that the Court's analysis must focus on the question whether or not the CFP Basic Regulation and the other EU fisheries legislations leave the Council the discretion to set annual fishing opportunities for the four stocks at issue above ICES headline advice (in our case, above zero), and therefore to depart from the MSY Deadline laid down at Article 2(2) of the CFP Basic Regulation.

AG Ćapeta considered that Article 2(2) of the CFP Basic Regulation removed the margin of discretion previously granted to the Council as it sets in a clear and precise wording that the **MSY Deadline cannot be circumvented after the year 2020** and that it **applies to all stocks**. Following her reasoning, there are therefore no exceptions to the 2020 Deadline for by-catch stocks caught in mixed fisheries.

AG Ćapeta's Opinion also considered that it was impossible to determine that the WW Regulation amended the CFP Basic Regulation. As legal certainty demands that an implied amendment should be sufficiently clear to enable the conclusion that it is an amendment to an existing law, the WW Regulation cannot be considered as amending the CFP Basic Regulation and the MSY Deadline in particular.

Finally, AG Ćapeta concluded her reasoning by declaring that, even if the CJEU would recognise that the WW Regulation were to be interpreted as amending the CFP Basic Regulation, the judges should nevertheless agree that the Council did not provide sufficient arguments to ensure that the TACs were adopted within the limits established by the CFP Basic Regulation and the WW Regulation.

2.2.2. The CJEU judgment

The Judgment of the CJEU delivered on 11 January unfortunately overturned AG Opinion and declared valid the four TACs with regard to the EU fisheries legal framework.

The CJEU first concluded that the EU legislature intended to provide for the possibility, in the context of multiannual plans, of adapting the objectives set out in Article 2(2) of the CFP Basic Regulation; as allowed by Article 9(5) of the CFP Basic Regulation (read in the light of Recital 8) in order to take account of the difficulty in mixed fisheries of achieving MSY for all stocks exploited at the same time. In that regard, according to the CJEU, the EU legislature established in the WW Regulation a differentiated management regime to address this flexibility: a) for target stocks; and b) for by-catch stocks. Depending on whether it concerns target or by-catch stocks, the Court's reasoning leads to two different conclusions.

On the one hand, the CJEU explained that, as regards the target stocks covered by the WW Regulation (in Article 4(1)), the MSY Deadline set out in the second subparagraph of Article 2(2) strictly applies.⁷ The wording from the judgment is unequivocal and does not allow for any derogation – regardless of whether target stocks have precautionary or MSY advice. This first finding is welcome and supportive of the FIE's interpretation of the law. This means that TACs for target stocks must follow ICES headline advice and the Council has no flexibility to depart from this objective.

On the other hand, for by-catch stocks falling within the scope of the WW Regulation (Article 5(1)), the CJEU ruled that the Council has a margin of discretion to depart from ICES Headline advice when setting TACs, considering the difficulties arising when trying to achieve the MSY Deadline for all stocks fished at

⁷ Paras. 73 and 75.

the same time, especially if that would lead to the premature closure of a fishery.⁸ This second finding for by-catch stocks departs from the AG Opinion and the Applicant's interpretation of the law.

It is for the Court to examine whether the Council clearly exceeded the bounds of that discretion. For the four TACs at issue, the Court concluded that the Council did not exceed the bounds of its discretion as it respected the following criteria when departing from ICES Headline advice:

- a) For the four stocks at issue, there were ICES estimates of likely by-catches of these stocks under the assumption that the TACs for target stocks were set in line with the ICES headline advice;
- b) The TACs were set with a view of achieving a good biological status and decreasing mortality for those stocks;
- c) the Council set the TACs below or at the level of the estimate of by-catches provided by ICES;
- d) Remedial measures were adopted to limit by-catches of the stocks at issue.

Although these criteria provided boundaries to the Council discretion, one would note that for the time being, they do not improve the situation but rather maintain status quo for by-catch stocks.

3. Consequences and next steps

The Court's conclusion is unequivocal: the four TACs at issue are declared valid with regard to the aims and objectives of the CFP Basic Regulation. The scope of the question replied in the judgment is limited to four specific TACs which are set for stocks falling under one specific category for which the Court conducted an assessment of the Council's discretion: by-catch stocks with zero catch advice covered by a MAP. Another finding lies in the Court's reasoning declaring that there is no discretion to depart from the MSY Objective when setting TACs for target stocks identified as such in a MAP.

This limited scope results from the specific question in validity referred to the CJEU as part of the preliminary ruling. Even though the scope of the question was limited, the Court could have decided to rule on the principle to clarify the future of TACs setting at large. This has unfortunately not been the case and it leaves many questions unanswered.

⁸ Para. 75

In particular, future cases could try to seek clarity on:

- The implementation of the ecosystem based approach to fisheries management in the context of TAC setting;
- TACs for stocks falling under shared management (the majority of TACs following Brexit);
- TACs for by catch stocks with ICES advice above zero:
- TACs for by-catch stocks with ICES zero catch advice which do not fulfil the Court's criteria of the allowed Council's discretion;
- TACs falling out of the scope of the MAPs.

In addition, clarification is required on how to determine what constitutes a *by-catch stock* and a *target stock* to know if a stock benefits from a certain flexibility when setting its TAC. Indeed, the CJEU ruling implies that, as prescribed at Article 9(5) of the CFP Basic Regulation, the flexibility for by-catch TACs applies to stocks included in a multiannual plan. However, the CJEU does not clarify whether that discretion applies only to by-catch stocks which do not fall under the list of target stocks of Article 1 (1) of the WW Regulation (and are therefore qualified as by-catch stocks under Article 1(4) of the WW MAP) or whether it also applies to stocks that the Council declares as by-catch (even though they are listed as target in a MAP). On that point, the judgment contradicts itself⁹ and the Court also grants discretion for the TAC for cod, although listed as a target stock under the WW Regulation.

Finally, we do not think that this judgment should in any case shift negatively or lower the ambition of NGO's advocacy work on TACs and quotas. On the contrary, we are convinced that such legal actions (even in case the Court does not rule in our favor) put pressure on EU and national decision-makers when setting TACs. This also brings to light a long-lasting issue and makes decision-makers accountable for their acts. Lastly, such a ruling and future rulings do not prevent NGOs from having their own interpretation of the law and from disagreeing with the Court's interpretation.

⁹ Para. 59

ANNEX I

List of 2020 TACs exceeding scientific advice, contrasting agreed and proposed TACs with the underlying scientific headline ICES advice.^{1,2}

Common name	TAC code(s)	Advice code(s) [#]	WW MAP Art.	ICES advice basis	ICES advice	COM proposal	Agreed TAC	TAC excess in t	TAC excess in %
Cod	COD/7XAD34	cod.27.7e-k	1.1.7	MSY	0	189	805	805	non-0 TAC
Cod	COD/58E6A	cod.27.6a	-	MSY	0	1023	1279	1279	non-0 TAC
Herring	HER/7G-K.	her.27.irls	-	MSY	0	869	869	869	non-0 TAC
Whiting	WHG/07A.	whg.27.7a	1.4	MSY	0	721	721	721	non-0 TAC
Hake	HKE/8C3411	hke.27.8c9a	1.1.20	MAP (Fmsy ranges)*	6615	7406	8752	2137	32
Megrim	LEZ/07. + LEZ/8ABDE.	meg.27.7b-k8abd + ldb.27.7b-k8abd	1.1.10	MAP (Fmsy ranges)*	19982	20526	20526	544	3
Cod	COD/07A.	cod.27.7a	1.1.6	PA	116	257	257	141	122
Cod	COD/03A5.	cod.27.21	-	PA	0	130	130	130	non-0 TAC
Cod	COD/5W6-14	cod.27.6b	1.4	PA	14	74	74	60	429
Common sole	SOL/7BC.	sol.27.7bc	1.4	PA	24	42	42	18	75
Common sole	SOL/7HJK.	sol.27.7h-k	1.1.34	PA	213	213	329	116	54
Herring	HER/5B6ANB + HER/6A57BC	her.27.6a7bc	-	PA	0	4840	5110	5110	non-0 TAC
Norway lobster	NEP/08C.	nep.fu.25 + nep.fu.31	-	PA	0	2.7	2.7	2.7	non-0 TAC
Plaice	PLE/7BC.	ple.27.7bc	-	PA	24	74	74	50	208
Plaice	PLE/7HJK.	ple.27.7h-k	1.4	PA	0	67	67	67	non-0 TAC
Plaice	PLE/8/3411	ple.27.89a	1.4	PA	155	316	355	200	129
Pollack	POL/8ABDE. + POL/08C. + POL/9/3411	pol.27.89a	-	PA	1131	1796	1944	813	72
Pollack	POL/56-14 + POL/07.	pol.27.67	1.1.29	PA	3360	7536	12401	9041	269
Sole	SOO/8CDE34	sol.27.8c9a	1.1.35, 1.1.36	PA	502	643	858	356	71
Undulate ray	RJU/9-C.	rju.27.9a	-	PA	31	50	50	19	61
Whiting	WHG/08.	whg.27.89a	1.1.18	PA	2276	2203	2540	264	12
Whiting	WHG/56-14	whg.27.6b + whg.27.6a**	1.4	PA	9	937	937	928	10311

These are the stock codes used in the ICES advice to identify the different stocks.

* Note that where the ICES advice was based on F_{MSY} ranges under a multiannual plan (MAP), the TAC was compared to the advice corresponding to the F_{MSY} point value for consistency.

** The advice for whiting in the West of Scotland (area 6a) alone was 0 catches.

1 Note that information on deductions applied to some TACs in order to account for exemptions from the landing obligation has not been available until recently and was therefore not incorporated in this preliminary analysis. However, inclusion of this information is unlikely to change the overall number of TACs identified as exceeding scientific advice, but would only affect the tonnage by which the advice was exceeded. Also note that the complete list of all TACs exceeding scientific advice (including those agreed with third countries) will be longer, since our analysis focuses on the EU-only stocks.

2 For further information on the methodology used for the TAC analysis, please refer to Production n°12 (ClientEarth's report 'Taking stock – are TACs set to achieve MSY?' <https://www.documents.clientearth.org/library/download-info/taking-stock-are-tacs-set-to-achieve-msy/>)

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