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Who Governs the Common Fisheries Policy?

A Constitutional Analysis of the CJEU's Ruling in Friends of the Irish Environment (C-330/22)

JURM02 Graduate thesis

Graduate thesis, Master of Laws program

30 higher education credits

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Semester: Spring 26

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Summary

Who decides how many fish may be caught in European waters, and on what legal basis? These questions lie at the heart of the Common Fisheries Policy (CFP), the framework through which the European Union exercises its exclusive competence over the exploitation and conservation of marine biological resources. Its governance is structured around two distinct legal bases in Article 43 TFEU: Article 43(2), under which the European Parliament and the Council jointly adopt the provisions necessary for the pursuit of the CFP's objectives, and Article 43(3), under which the Council alone fixes and allocates fishing opportunities among the Member States.

This thesis examines the configuration of institutional balance within the CFP and whether it ensures sufficient interest representation in accordance with the democratic ideal enshrined in Article 10(3) TEU. In doing so, it adopts the understanding of institutional balance as a political principle developed by Lenaerts and Verhoeven, while remaining grounded in a legal dogmatic method informed by the European legal method as described by Neergaard and Nielsen.

The thesis demonstrates that the institutional balance within the CFP cannot be adequately understood through the Treaty framework alone. The practical scope of the Council's competence under Article 43(3) TFEU is shaped not only by the Treaties but also by the legislative framework adopted under Article 43(2) TFEU, informal interinstitutional agreements, and judicial interpretation. This is illustrated through an analysis of the MSY objective introduced in Article 2(2) of the CFP Basic Regulation and its subsequent implementation through the multiannual plans, where a key interinstitutional agreement concluded outside the ordinary legislative procedure proved instrumental in defining how the objective applies in practice. The CJEU's judgment in *Friends of the Irish Environment* (C-330/22) and the General Court's subsequent ruling in *ClientEarth v Council* (Joined Cases T-577/22 and T-648/22) confirm and develop this dynamic. Both courts read Article 2(2) in light of the legislative framework as a whole, finding that the Council retains a broad margin of discretion when allocating fishing opportunities for by-catch stocks in mixed fisheries under Article 43(3) TFEU. While this approach preserves the Council's meaningful prerogative under the Treaties, it also raises concerns regarding democratic legitimacy, as the practical meaning of a key legislative choice has been shaped through informal processes at considerable distance from the channels of accountability that Article 10 TEU relies upon.

The thesis concludes that the institutional balance within the CFP falls short of the democratic ideal enshrined in Article 10(3) TEU at both levels of its institutional framework, and that the principle of participatory democracy

under Article 11 TEU may offer a meaningful complement to the deficiencies of the representative democratic channels currently in place.

Sammanfattning

Vem beslutar hur mycket fisk som får fångas i europeiska vatten, och på vilken rättslig grund? Dessa frågor utgör kärnan i den gemensamma fiskeripolitiken (GFP), det ramverk genom vilket Europeiska unionen utövar sin exklusiva kompetens över utnyttjandet och bevarandet av marina biologiska resurser. Dess styrning är strukturerad kring två distinkta rättsliga grunder i artikel 43 FEUF: artikel 43(2), enligt vilken Europaparlamentet och Rådet gemensamt antar de bestämmelser som är nödvändiga för att uppnå GFP:s mål, och artikel 43(3), enligt vilken Rådet ensamt fastställer och fördelar fiskemöjligheterna mellan medlemsstaterna.

Denna uppsats undersöker hur den institutionella balansen inom GFP är utformad och om den säkerställer en tillräcklig intresserepresentation i enlighet med det demokratiska ideal som kommer till uttryck i artikel 10.3 FEU. Analysen tar sin utgångspunkt i den förståelse av den institutionella balansen som en politisk princip vilken utvecklats av Lenaerts och Verhoeven. Samtidigt förankras framställningen i en rättsdogmatisk metod, inspirerad av den europarättsliga metod som beskrivits av Neergaard och Nielsen.

Uppsatsen visar att den institutionella balansen inom GFP inte kan förstås enbart utifrån fördragen. Rådets befogenheter enligt artikel 43(3) FEUF påverkas även av lagstiftningsakter som antagits med stöd av artikel 43(2) FEUF, informella interinstitutionella överenskommelser och EU-domstolens praxis. Detta illustreras genom MSY-målsättningen i artikel 2(2) i GFP:s grundförordning och dess genomförande i de fleråriga planerna, där en central interinstitutionell överenskommelse ingången utanför det ordinarie lagstiftningsförfarandet visade sig avgörande för hur målsättningen tillämpas i praktiken. EU-domstolens dom i *Friends of the Irish Environment* (C-330/22) och tribunalens efterföljande avgörande i *ClientEarth mot Rådet* (förenade målen T-577/22 och T-648/22) bekräftar och utvecklar denna dynamik. Båda domstolarna tolkade artikel 2(2) mot bakgrund av lagstiftningsramverket i dess helhet och fann att Rådet behåller ett brett utrymme för skönsmässig bedömning när det fördelar fiskemöjligheter för bifångstarter i blandade fisken med stöd av artikel 43(3) FEUF. Även om detta synsätt innebär att Rådets självständiga befogenhet i fördragen förblir meningsfull ger det också upphov till frågor om demokratisk legitimitet, eftersom den praktiska innebörden av ett centralt lagstiftningsval har formats genom informella processer på ett avsevärt avstånd från de ansvarsutkrävandemekanismer som artikel 10 FEU förutsätter.

Uppsatsen drar slutsatsen att den institutionella balansen inom GFP inte lever upp till det demokratiska ideal som föreskrivs i artikel 10(3) FEU på någon av dess två institutionella nivåer, samt att principen om

deltagardemokrati i artikel 11 FEU kan utgöra ett meningsfullt komplement till de brister som kännetecknar de representativa demokratiska kanalerna i deras nuvarande utformning.

Acknowledgments

First, I would like to thank my supervisor, Xavier Groussot, for his advice and support throughout this work. His feedback and our conversations along the way have been of great help to me.

I also want to thank all the friends I have made throughout this programme. Sharing both the challenges and the memorable moments with them has made these four years something I will always look back on with gratitude.

Last but not least, a big thank you to my family and girlfriend for always believing in me and being there no matter what – stort tack ni är bäst!

Erik Hasselgren, 23 May 2026

Abbreviations

AG	Advocate General
Baltic Plan	Regulation (EU) No 2016/1139
CAP	Common Agricultural Policy
CFP	Common Fisheries Policy
CFP Basic Regulation	Regulation (EU) No 1380/2013 on the Common Fisheries Policy
CJEU	Court of Justice of the European Union
Commission	European Commission
Council	Council of the European Union
EEA	European Environment Agency
EO	European Ombudsman
EU, Union	European Union
ICES	International Council for the Exploration of the Sea
MAP, Plan, Multiannual plans	Multiannual Management Plan
MSY	Maximum Sustainable Yield
NGO	Non-Governmental Organisation
North Sea Plan	North Sea Multiannual Plan, Regulation (EU) No 2018/973

Parliament	European Parliament
TAC	Total Allowable Catch
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
Western Waters Plan	Regulation (EU) No 2019/472

1 Introduction

"The sea is common to all, because it is so limitless that it cannot become a possession of any one, and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries".[1]
— Hugo Grotius, *Mare Liberum* (1609)

The idea advanced by Hugo Grotius in *Mare Liberum*, namely that the sea is "common to all," constitutes a foundational principle of the law of the sea. Its origins can be traced back to Roman law and the Justinian Code, which form the basis of much of the Western legal tradition. This classical conception rests on the premise that the sea, by its nature, cannot be subject to exclusive appropriation.[2] As Garrett Hardin famously argued in his theory of the "tragedy of the commons," "freedom in a commons brings ruin to all," since common resources are vulnerable to overexploitation when individuals acting rationally in their own self-interest receive the benefits of increased use while the costs are distributed collectively.[3] This dynamic has also been reflected empirically in the depletion of global fish stocks, where increasing exploitation has contributed to widespread overfishing and declining marine biodiversity.[4] Similar patterns have also been observed within European fisheries, as recent assessments by the European Environment Agency (EEA) confirm that excessive exploitation has placed significant pressure on a majority of European fish stocks.[5]

Elinor Ostrom, however, challenged the assumption that common resources inevitably lead to overexploitation through empirical studies of fisheries and other common-pool resources. Her research demonstrated that users of shared resources are capable of developing stable institutions, collectively enforcing rules, and managing commons sustainably over time. This research was also recognised with the Nobel Prize in Economic Sciences in 2009.[6] Two of the central "design principles" in Ostrom's theory of sustainable long-term commons governance are "collective-choice arrangements," whereby individuals affected by operational rules are able to participate in modifying them, and "nested enterprises," according to which

[1] Grotius (1609), p. 64.
[2] Butler (2021), pp. 477–478.
[3] Hardin (1968), pp. 1243-1244.
[4] Worm et al (2006), pp. 787-788.
[5] European Environment Agency, 'Marine Fish and Shellfish Stocks' https://www.eea.europa.eu/en/analysis/indicators/status-of-marine-fish-and (accessed 8 May 2026).
[6] Nobel Prize Outreach AB, 'Elinor Ostrom – Facts' https://www.nobelprize.org/prizes/economic-sciences/2009/ostrom/facts/ (accessed 8 May 2026).

large and complex common resources require governance structures operating across multiple interconnected institutional levels.[7]

These aspects also reflect two central foundations of the European Union (EU), the international organisation responsible for governing large parts of Europe's common fisheries.[8] The Union is founded on the value of democracy.[9] At the same time, it operates within a system of multilevel governance in which authority is exercised across interconnected local, national, and Union levels.[10] This system of multilevel governance is deliberate rather than accidental. Rather, it reflects a complex institutional balance through which different interests are represented within the Union's decision-making processes. The Court of Justice of the European Union (CJEU) is the institution primarily tasked with ensuring the preservation of this institutional balance.[11]

1.1 Aim and Research Questions

This thesis aims to identify the configuration of institutional balance within the Common Fisheries Policy (CFP) and to examine to what extent it ensures adequate interest representation in accordance with the democratic ideal enshrined in Article 10(3) TEU. More specifically, it analyses how the CJEU in Case C-330/22 ("*Friends of the Irish Environment*"),[12] reviewed the validity of measures adopted by the Council of the European Union (Council) under Article 43(3) Treaty on the Functioning of the European Union (TFEU) in light of the legal framework established under Article 43(2) TFEU.

Research questions:

1. How is the institutional balance configured in practice within the CFP?

    a. How did the CJEU in *Friends of the Irish Environment* define and control the scope of the Council's discretion under Article 43(3) TFEU, and what does its approach to judicial review reveal about the configuration of institutional balance within the CFP?

    b. To what extent does subsequent case law support and develop that approach?

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[7] Ostrom (1990), pp. 90-91.
[8] Churchill and Owen (2010), pp. 49-61.
[9] Treaty on European Union (TEU), Article 2.
[10] Hooghe and Marks (2001), pp. 27-29.
[11] Lenaerts, Van Nuffel and Corthaut (2021), pp. 518-521.
[12] *Friends of the Irish Environment CLG v Minister for Agriculture, Food and the Marine and Others*, EU:C:2024:19.

2. Does the configuration of institutional balance within the CFP, as revealed in *Friends of the Irish Environment* ensure adequate interest representation in accordance with the democratic ideal enshrined in Article 10(3) TEU?

1.2 Methodology and Theoretical Framework

Traditionally, institutional balance functions as a legal principle that may be invoked before the courts. This function is directly linked to Article 13(2) TEU, which requires each institution to act within the limits of the powers conferred upon it by the Treaties.[13] In practice, however, significant aspects of European governance function either on the margins of, or entirely beyond, the formal constitutional structure established through the principle of institutional balance.[14] Lenaerts and Verhoeven argue that the traditional understanding of institutional balance as a legal principle fails to provide an adequate account of the actual institutional balance within the Union. To address this deficiency, they developed a broader understanding of institutional balance as a political principle in their article *Institutional Balance as a Guarantee for Democracy in EU Governance*.[15] This thesis adopts that approach, albeit with certain reservations explained below.

First, this approach allows the thesis to move beyond the "formal" institutional balance established in the Treaties and instead examine how institutional balance functions in practice. In this regard, the analysis extends beyond the formal allocation of competences in the Treaties and takes into account what has been described in the literature as the "constitutional reality" of the Union, namely those institutional elements and practices that operate on the margins of, or partly outside, the formal constitutional framework established by the Treaties.[16] This perspective is particularly relevant in the context of the CFP. Although Article 43(3) TFEU establishes a direct Treaty-based competence for the Council to allocate fishing opportunities, the practical operation of that competence forms part of the broader system of EU executive rulemaking. As Lenaerts and Verhoeven observe, this area of Union governance is only partially regulated by the Treaty framework and exists within what they describe as a "constitutional twilight zone". It is further shaped by the case law of the EU courts, fragmented secondary legislation, and various declarations and interinstitutional arrangements.[17] Although the Treaty of Lisbon addressed this issue to some extent, it nevertheless remains a feature of EU law.[18] Limiting the analysis solely to the formal Treaty framework would therefore

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[13] C-9/56 *Meroni & Co Industrie Metallurgiche SpA v High Authority*, EU:C:1958:7; C-70/88 *European Parliament v Council* (Chernobyl), EU:C:1990:217, para. 22.

[14] De Búrca (1999), pp. 55, 61.

[15] Lenaerts and Verhoeven (2002), pp. 44–48.

[16] Ibid, p. 48.

[17] Lenaerts and Verhoeven (2002), p. 48.

[18] Craig (2013), pp. 282-283.

risk obscuring how the institutional balance within the CFP functions in practice and would thereby present an incomplete picture.

Second, this broader approach also allows for reflection on the particular role that each institution is called upon to perform within the Union's decision-making process, including the interests it is intended to represent.[19] In this regard, the understanding of institutional balance as a mechanism for ensuring fair interest representation has not only been advanced by Lenaerts and Verhoeven, but has also been reflected in the work of other leading scholars in the field, including Curtin, Joerges, Neyer, Craig and de Búrca.[20] This thesis similarly adopts that perspective when analysing the respective constitutional roles of the institutions within the CFP. This also raises questions regarding whether such representation is achieved in an adequate manner. More specifically, it raises the question of whether the legal framework governing an institution enables it to be genuinely representative. It further invites consideration of whether certain interests still lack sufficient institutional channels through which to participate effectively in decision-making at the European level.[21]

These questions are, as noted by Smismans, inherently normative, as they concern not merely how the law is, but also what kind of institutional arrangement the legal framework seeks to establish.[22] As argued by Smulders and Eisele, it is therefore easy to enter the realm of political science.[23] However, while Lenaerts and Verhoeven approach these questions partly through external theories of democracy and political legitimacy,[24] this thesis adopts a more strictly internal legal perspective. Rather than evaluating the Union's institutional structure against external democratic theories, the analysis examines how democracy and representative legitimacy are themselves constructed within the Union's constitutional framework following the Treaty of Lisbon. In this regard, the thesis approaches institutional balance through the constitutional principles of democracy and representative government as expressed in Articles 2 and 10 TEU. The normative dimension of the analysis therefore derives not from external political theory, but from the Treaties themselves and the constitutional choices they embody. This approach makes it possible to analyse the democratic implications of institutional balance within the CFP while remaining grounded in legal analysis and positive EU law.

This thesis therefore examines institutional balance within the CFP primarily from a *de lege lata* perspective, while allowing for normative

[19] Lenaerts and Verhoeven (2002), p. 47.
[20] Smismans (2002), p. 101.
[21] Lenaerts and Verhoeven (2002), p. 47.
[22] Smismans (2002), p. 99.
[23] Smulders and Eisele (2012), p. 114.
[24] Lenaerts and Verhoeven (2002) pp. 47-50.

reflections of a *de lege ferenda* nature derived from the constitutional structure of positive EU law itself. Methodologically, the thesis applies a legal dogmatic method. However, because EU law functions as a multi-level legal order characterised by interaction between different legal and institutional levels, the analysis is further informed by what Ulla Neergaard, Ruth Nielsen and others have termed the European legal method.[25] In applying the legal dogmatic method, this thesis does not approach EU law solely through a traditional hierarchy of legal sources, but rather as a legal order characterised by interaction between primary law, secondary legislation, case law, and general principles across different levels of governance.

1.3 Limitations and Added Value

Since this thesis approaches institutional balance as a political principle in the sense developed by Lenaerts and Verhoeven,[26] its analysis is not confined to the formal Treaty framework but extends to the case law of the EU Courts, secondary legislation, and interinstitutional arrangements. EU fisheries law is, however, vast and complicated. [27] Given the limited word count and scope of the thesis, it has therefore been necessary to narrow down which elements fall within or outside the scope of this paper.

To address the broad question of institutional balance within the CFP within a clearly defined scope, the thesis operationalises the analysis through two sub-questions: first, how the Court defined and controlled the scope of the Council's discretion in *Friends of the Irish Environment* and what that approach reveals about the broader configuration of institutional balance within the CFP; and second, to what extent subsequent General Court case law supports and develops that approach. Together, these sub-questions allow the thesis to use a specific and well-defined legal dispute as an analytical tool for drawing broader conclusions about institutional balance within the CFP and its democratic implications.

This thesis has therefore limited its scope by anchoring its analysis of institutional balance within the CFP to a constitutional analysis of *Friends of the Irish Environment* and the subsequent litigation it has generated in the joined cases T-577/22 and T-648/22 *ClientEarth AISBL v Council of the European Union*, EU:T:2025:631 and T-342/24 *Coalition Clean Baltic v Council of the European Union (pending)*. This is not an arbitrary choice. First, the CJEU is the institution responsible for enforcing the institutional balance.[28] Second, the specific question raised by the case, namely how the relevant legal framework under Article 43(2) TFEU constrains the Council's competence under Article 43(3) TFEU, directly reflects a historical point of

[25] Neergaard and Nielsen (2012), p. 9.
[26] Lenaerts and Verhoeven (2002) pp. 47-50.
[27] Butler (2024), p. 171.
[28] Lenaerts, Van Nuffel and Corthaut (2021), p. 520.

contention between the Council and the European Parliament (Parliament) regarding the allocation of competences under Article 43 TFEU.[29] The case therefore offers a focused but generalisable window into the configuration of institutional balance within the CFP as it functions in practice. This means that elements of the EU fisheries law that are not directly relevant to this thesis are left out.

1.4 Materials and Outline

The thesis is structured into seven sections: an introduction, five main sections, and a conclusion. Section two examines the institutional balance within the CFP as established in the Treaties. It begins by addressing the principle of conferral and the constitutional significance of the choice of legal basis, before turning to the horizontal allocation of powers between the Union's institutions under Article 43 TFEU. The section concludes by considering how the democratic ideal enshrined in Article 10(3) TEU relates to decision-making at each level of the CFP. Section three examines whether the institutional balance within the CFP can be adequately understood through the Treaty framework alone. It addresses the hierarchy of norms introduced by the Treaty of Lisbon and the CJEU case law on the relationship between Articles 43(2) and 43(3) TFEU, before considering the practical scope of the Council's competence and its implications for the predictability of the allocation of political authority within the CFP.

Sections four, five, and six analyse the institutional balance as it operates in practice. Unlike sections two and three, these sections draw additionally on the area- and subject-specific legislative framework and the case law of the EU Courts.

Section four addresses the legislative framework adopted under Article 43(2) TFEU, with particular focus on the CFP Basic Regulation and the MSY objective in Article 2(2), as well as their implementation through the multiannual management plans (MAPs). It further examines the interinstitutional process through which the definition and application of the Maximum sustainable yield (MSY) objective were determined in practice. Section five analyses C-330/22, *Friends of the Irish Environment*. It examines the Opinion of Advocate General Tamara Ćapeta (AG Ćapeta) and the judgment of the CJEU, with particular attention to the Court's interpretive approach and its treatment of the scope of the Council's discretion under Article 43(3) TFEU. Section six examines the subsequent case law, including the General Court's judgment in *ClientEarth v Council* (Joined Cases T-577/22 and T-648/22) and the pending case *Coalition Clean Baltic v Council* (T-342/24), considering the extent to which these proceedings engage with and build upon the approach taken in Friends of

[29] Task Force on Multiannual Plans, *Final Report* (April 2014), ANNEX 1; Penas Lado (2020), pp. 56-57.

the Irish Environment. Lastly, section seven draws together the central findings of the preceding analysis and addresses the research questions set out in section one.

Finally, a note on the use of AI assistance: in writing this thesis, generative AI has been used through Microsoft Copilot via Lund University's license. The tool has been used for language review, in accordance with the Faculty of Law's guidelines at Lund University regarding the use of generative AI in teaching and examination.[30]

[30] Faculty of Law at Lund University, *Policy on the Use of AI Tools for Students* (2023) https://www.jur.lu.se/sites/jur.lu.se/files/2023-12/Juridiska%20fakultetens%20policy%20fo%CC%88r%20anva%CC%88ndning%20av%20GAI-verktyg%20-%20studenter.pdf (accessed 23 May 2026).

2 The Balance Established by the Treaties

The European Union is a unique legal and political entity to which the Member States have conferred powers for the purpose of creating an economic and political union.[31] In accordance with the principle of conferral, enshrined in Article 5(2) TEU, the Union may act only within the limits of the competences conferred upon it by the Treaties. Consequently, all Union acts must be based on and adopted according to an appropriate legal basis.[32] The choice of legal basis is of constitutional significance.

First, it determines the scope of Union competence. In this way, the Member States, in adopting the Treaties, have chosen how to allocate power "vertically" between the Union and themselves.[33] In the specific context of the conservation of marine biological resources under the CFP, the Treaties confer exclusive competence on the Union (Article 3(1)(d) TFEU). This means that the power to adopt legally binding acts in this field has, under the Treaties, been allocated exclusively to the Union rather than to the Member States. The Member States may therefore act only where the Union has explicitly delegated powers back to them.[34]

Second, it determines the way competence is to be exercised, including the applicable decision-making procedure. The applicable legal basis determines both which institutions are competent to adopt the particular act and the applicable voting requirements, such as qualified majority voting or unanimity. The legal basis thus also allocates power horizontally between the Union institutions, as well as vertically between the Member States and the Union.[35]

2.1 The horizontal allocation of power in the CFP

The horizontal allocation of powers between the Union's institutions within the CFP is set out in the legal basis for the policy in Article 43 TFEU, which contains two distinct provisions for the adoption of measures establishing and managing the CFP.[36] Article 43(2) TFEU provides that:

> "The European Parliament and the Council, acting in accordance with the ordinary legislative procedure… shall establish the

[31] Smulders and Eisele (2012), p. 113.
[32] Lenaerts, Van Nuffel and Corthaut (2021), p. 90.
[33] Ibid, p. 85.
[34] Butler (2024), p. 171.
[35] Lenaerts, Van Nuffel and Corthaut (2021), pp. 85-86.
[36] Ibid, p. 278.

> provisions necessary for the pursuit of the objectives of the common fisheries policy."[37]

The objectives of the CFP, which measures adopted under Article 43(2) TFEU are intended to pursue are set out in Article 39 TFEU for the Common Agricultural Policy (CAP).[38] The CFP is therefore often described in the literature as forming a "separate" part of the CAP.[39] However, even if the objectives of the CFP are formally the same as those set out for agriculture, Churchill argues that they must be seen in the context of the specific characteristics of the fishing sector. For example, the objective of ensuring the rational development of agricultural production and assuring the availability of food supplies in Article 39(1)(a) must, in the context of the CFP, be understood as including the conservation of fisheries.[40] Article 43(3) TFEU, by contrast, provides that:

> "The Council, on a proposal from the Commission, shall adopt measures on… the fixing and allocation of fishing opportunities."[41]

In allocating fishing opportunities, the Council distributes, on the basis of a predictable share of fish stocks for each species in Union waters, the total quantity of each stock that each Member State is permitted to catch during a given calendar year, commonly referred to as the total allowable catch (TAC).[42]

2.2 Institutional balance and Representation

This distribution of powers reflects an intended and deliberate balance between the different interests represented by the Union's institutions, or, in other words, an institutional balance.[43] As described by Lenaerts**,** this principle must also be understood in conjunction with Article 13(2) TEU, which provides that each institution shall act within the limits of the powers conferred upon it by the Treaties and in accordance with the procedures, conditions, and objectives laid down therein. Accordingly, Union institutions are prohibited from acting in a manner that deprives other institutions of their prerogatives as granted by the Treaties. As Lenaerts notes, the principle of institutional balance is therefore not about maintaining the most balanced relationship between the institutions per se

[37] Article 43(2) TFEU.
[38] Churchill and Owen (2010), pp. 29-30.
[39] Butler (2024), p. 167.
[40] Churchill and Owen (2010), pp. 29-30.
[41] Article 43(3) TFEU.
[42] Ibid, pp. 132-135.
[43] Lenaerts and Verhoeven (2002), p. 47.

but rather about maintaining the balance between the institutions set out by the Member States in the Treaties.[44]

Within the Union's institutional balance, the two legislators are said to represent different interests. The European Parliament is said to 'represent the peoples of the States brought together in the Community'**,** and the Council is argued to represent 'the Member States' governments'. In these cases, 'representation' does not only mean standing for such abstractions as 'the interest of the European peoples' or 'the interests of the Member States' or 'national interests' but also refers to the direct or indirect 'electoral mandate' of the European Parliament and the Council.[45] It is therefore unsurprising, according to Lenaerts, that Union decision-making is designed to reconcile national and common interests through interaction between the Council and the European Parliament. Where decisions are taken by the Council alone, the Council's relative autonomy may result in compromises between national positions. By contrast, where the common interest prevails, the Treaties allocate shared decision-making power between the Council and the European Parliament.[46]

In light of the principle of institutional balance, the horizontal allocation of power set out in the Treaties within the CFP is therefore, in my view, to be understood as an intended balance reflecting a 'fair' representation of interests. Article 43 TFEU may therefore be understood as reflecting two different balances of interests. Under Article 43(2) TFEU, decisions are taken through the ordinary legislative procedure on measures necessary to pursue the objectives of the CFP. The Treaties provide for joint decision-making between the Council and the European Parliament, which serves as a counterbalance to the representation of national interests through the Council, ensuring that the common interest is also taken into account. Under Article 43(3) TFEU, by contrast, the allocation of fishing opportunities is reserved exclusively to the Council on the basis that such decisions directly and significantly affect Member States, reflecting a balance in which national interests prevail.

2.3 Democracy and Institutional Balance

Democracy is one of the values upon which the Union is founded.[47] However, as Lenaerts explains, there is within a federal system such as the Union no universally correct level for democratic decision-making, and the choice between different levels of democratic decision-making is a normative and political one rather than a technical or neutral one.[48] Consequently, the question of whether EU decision-making is democratic

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[44] Lenaerts, Van Nuffel and Corthaut (2021), pp. 519-520.
[45] Smismans (2002), p. 97.
[46] Lenaerts, Van Nuffel and Corthaut (2021), pp. 519-520.
[47] Article 2 TEU.
[48] Lenaerts (2013), pp. 279-281.

cannot be answered in the abstract. It can only be answered once one has clarified which democratic ideal one starts from. If one takes the view that decisions should be made by a democratic majority at Union level, the participation of the Parliament is necessary for democratic legitimacy. If one instead takes the view that decisions should be made by democratic majorities within each Member State, the dominance of the Council is entirely democratically legitimate. [49]

2.3.1 The Pre-Lisbon Framework

Prior to the Treaty of Lisbon, the legal basis for adopting measures in the CFP was a single provision, Article 37 of the Treaty establishing the European Community (TEC), which provided that:

> "The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority, make regulations, issue directives, or take decisions…"[50]

Under this previous institutional balance within the CFP, all decisions were made by democratic majorities within each Member State, since the Council was the sole decision-maker. By contrast, the democratic majority at Union level played a limited role, since the European Parliament was confined to a consultative role. This institutional structure reflected a democratic model in which the interests of the Member States prevailed over common Union interests in CFP decision-making. As noted by Schweiger, this structure historically meant that CFP decision-making was dominated by considerations of national interest within the Council when allocating fishing rights, rather than by the pursuit of a rational system for fisheries management. [51] Symes and Crean similarly emphasize that, when the CFP was established in 1983, ministers were expected primarily to defend national interests in securing a share of the available resources, regardless of the consequences for the common good.[52]

According to Lado, this gave rise to a deeply rooted tradition of maximizing the largest possible share of resources in the short term for individual Member States, a culture that has largely persisted to this day. This approach has, in turn, hindered efforts to "grow the size of the pie" through more sustainable management practices. Furthermore, this tradition is linked to a form of paternalism that has characterized fisheries management in many Member States. As a result, parts of the industry have viewed the

[49] Lenaerts, Van Nuffel and Corthaut (2021), pp. 563-564.
[50] Article 37 TEC.
[51] Schweiger (2010), p. 76.
[52] Symes and Crean (1995), p. 147.

predominance of national interests not merely as a feature of market-based allocation, but also as an aspect of social welfare policy.[53]

2.3.2 The Post-Lisbon Framework

The democratic ideal reflected in Article 37 TEC was, however, perceived to suffer from a democratic deficit. Many studies indicated both a lack of proper involvement and an absence of a feeling that what happens at the European Union level really matters in citizens' daily lives. [54] This view was also expressed in the European Commission's (Commission) 2009 Green Paper on the reform of the CFP. There, the Commission characterised the existing management approach as a top-down system in which decisions had often been taken far from those most affected. As a result, the policy failed to motivate the catching sector, the processing and seafood chain, and consumers to support the objectives of the CFP and take responsibility for implementing them effectively. In the Commission's own words, the fishing industry had been given "few incentives to behave as a responsible actor accountable for the sustainable use of a public resource" and "very little can be achieved if the CFP fails to motivate the catching sector, the processing and seafood chain, as well as consumers, to support the objectives of the policy and take responsibility for implementing them effectively". The Commission argued that co-management, whereby decisions would be taken closer to, and by, those responsible, could reverse this situation.[55]

The authors of the Treaty of Lisbon thus sought to address these concerns. First, they formally recognised democracy as a fundamental principle of EU constitutionalism. Second, they gradually empowered the European Parliament. [56] They therefore changed the institutional balance in a number of policy areas, including fisheries, by extending the co-decision procedure, renamed the "ordinary legislative procedure," to the policy as seen in Article 43(2) TFEU.[57] However, while the authors in most other areas, such as agriculture and transport, gave the European Parliament and the Council equal status, they chose within the CFP to reserve the specific competence to allocate fishing opportunities to the Council alone.[58]

2.4 Democracy under the Lisbon Treaty

In establishing democracy as a fundamental principle of EU constitutionalism, the authors of the Treaties gave expression to the

[53] Penas Lado (2019), pp. 1-2.
[54] Lenaerts and Verhoeven (2002), p. 89.
[55] COM (2009) 163 final, p. 11.
[56] Lenaerts (2013), p. 275.
[57] Smulders and Eisele (2012), p. 115.
[58] Lenaerts, Van Nuffel and Corthaut (2021), p 278.

principle of democracy in Articles 9 to 12 TEU, thereby positively anchoring the democratic ideal in the EU legal order.[59]

2.4.1 Representative Democracy

In this regard, the treaties explicitly identify representative democracy as the principle upon which the functioning of the Union is founded.[60] Accordingly, the Treaties establish a "dual basis of democratic legitimacy": the direct representation of citizens through the European Parliament and the representation of Member States via the Council and in the European Council, both of which are held democratically accountable to their respective national parliaments and indirectly to their citizens.[61]

In light of the democratic ideal enshrined in Article 10 TEU, the division of the old legal basis in Article 37 TEC into Articles 43(2) and 43(3) TFEU can be understood as a normative constitutional choice regarding how representative democracy is to function within the CFP. The two provisions establish separate procedures founded upon different forms of democratic representation. Under Article 43(2) TFEU, the procedure has what Mendes refers to as a "dual basis of democratic legitimacy", as it is founded on the direct representation of citizens in the Parliament and the representation of Member States in the Council, which is democratically accountable to their respective national parliaments and indirectly to their citizens.[62] Under Article 43(3) TFEU, however, the procedure may be understood as having what may be described as a sole basis of democratic legitimacy, founded solely upon the representation of Member States in the Council. Unlike Article 43(2) TFEU, the procedure therefore lacks the element of direct citizen representation through the European Parliament, thereby constituting an exception to the general democratic ideal expressed in Article 10 TEU.

2.4.2 Participatory Democracy

Moreover, the Treaties recognised for the first time participatory democracy as a complementary source of EU democracy. Participatory democracy under Article 11 TEU does not replace representative democracy but complements it, providing an additional channel through which those affected by Union decisions can engage with the institutions directly and at an earlier stage in the decision-making process. In contrast to the representative model of Article 10 TEU, which channels democratic legitimacy through elected institutions, Article 11 TEU creates a direct relationship between the Union's institutions and citizens and civil society organisations. It requires the institutions to maintain an open, transparent, and regular dialogue with representative associations and civil society, and

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[59] Lenaerts (2013), p. 275.

[60] Article 10(1) TEU.

[61] Article 10(2), first paragraph TEU; Article 10(2), second paragraph TEU; Mendes (2016), p. 156.

[62] Article 11(2) TEU; Article 11(3) TEU; Mendes (2016) p. 156.

to carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.[63]

Mendes and Marxsen therefore argue that this channel of Union democracy can help mitigate potential shortcomings associated with the two channels of representative democracy. Participatory democracy mechanisms nevertheless face several well-documented limitations. [64] Mendes has highlighted the privileged position often enjoyed by organised interests within EU consultation structures, the difficulties inherent in ensuring genuinely representative participation, and the limited extent to which consultation processes translate into substantive influence over institutional outcomes.[65]

2.4.3 Democracy in Practice

Mendes argues, however, that both channels of representative democracy suffer from considerable deficiencies with regard to taking decisions as openly and as closely as possible to citizens, thereby undermining the right of every citizen to participate in the democratic life of the Union under Article 10(3) TEU.[66]

She identifies several practical challenges facing the European Parliament in achieving the democratic ideal of representative democracy. First, she points to the low turnout in European elections, which results in a de facto less representative composition of the European Parliament. Furthermore, she highlights that multilingualism, together with the challenges associated with translation and interpretation, slows down the Parliament's work and makes it more difficult for citizens to follow its activities. With regard to the Council, Mendes argues that its channel of representative democracy is unsatisfactory for two reasons. The first shortcoming concerns the transparency of the Council's decision-making process, as a significant proportion of its decisions are adopted at lower, non-ministerial levels. As a result, substantial parts of the process are often inaccessible to the public. Second, Mendes argues that accountability to national parliaments is weakened by the insufficient or delayed transmission of information concerning EU activities.[67]

Mendes therefore concludes that the Union's system of representative democracy faces significant challenges concerning both transparency and accountability. In practice, these challenges make it more difficult to ensure that decisions are taken as openly and as closely to citizens as possible, in accordance with Article 10(3) TEU, both when decisions are adopted jointly

[63] Marxsen (2015), pp. 153–154.
[64] Mendes (2016), p. 154; Marxsen (2015), pp. 156, 158.
[65] Mendes (2011), pp. 94–98, 84–85.
[66] Ibid, pp. 163, 168.
[67] Ibid, pp. 164–167.

by the Council and the Parliament, but especially when they are adopted by the Council alone.[68] It should be emphasised, however, that these observations are general in nature and concern the Union's representative democratic structure as a whole. Applying them uncritically to the CFP context therefore risks overlooking sector-specific institutional mechanisms that may influence how the democratic ideal under Article 10(3) TEU is realised within the CFP's institutional balance.

2.4.4 Democracy within the CFP

Under Article 43(2) TFEU, provisions are adopted on a "dual basis of democratic legitimacy".[69] The most significant reform following the institutional changes introduced by the Treaty of Lisbon was the adoption of the 2013 CFP Basic Regulation.[70] Prior to its adoption, the Commission issued a Green Paper in April 2009 intended "to stimulate a debate on reform of the Common Fisheries Policy" and to gather input from all individuals and organisations affected by the future of the fishing industry.[71] The European Parliament, the European Economic and Social Committee, and the Committee of the Regions also issued opinions on the Green Paper, while the Council discussed the reform on several occasions.[72] Furthermore, the Commission's Staff Working Document synthesising the consultation on the CFP reform demonstrates that the reform process involved extensive public debate, hundreds of consultation contributions, and broad institutional engagement, including participation from the European Parliament, the Member States, and stakeholder organisations.[73]

Taken together, these preparatory documents indicate that the legislative process under Article 43(2) TFEU functioned in a comparatively transparent and accountable manner in the specific context of the 2013 CFP reform. Although this concerns only one reform among many within the CFP framework, the 2013 reform nevertheless provides concrete support for the view that the dual basis of democratic legitimacy within the CFP can function comparatively well. As the most extensive post-Lisbon CFP reform, it also demonstrates that decisions can be taken as openly as possible and as closely as possible to citizens, as required by Article 10(3) TEU.

Under Article 43(3) TFEU, measures are adopted on what may be described as a sole basis of democratic legitimacy. In 2019, the European Ombudsman (EO) conducted an official inquiry into the Council's allocation of fishing

[68] Ibid, pp. 188-189.
[69] Mendes, p. 156; cf. Article 289(1) TFEU.
[70] Penas Lado (2019), preface xiii.
[71] COM(2009) 163, pp. 6, 25-26.
[72] COM(2011) 425 final, p. 6.
[73] SEC(2010)428 final, pp. 2-3, 24-36.

opportunities under Article 43(3) TFEU.[74] In its inquiry, the Ombudsman found that Member States' positions on TAC decisions were often not recorded, as key discussions frequently took place within working groups and informal settings. The final documents therefore often failed to reveal which Member States had supported particular positions, making it difficult to hold national ministers politically accountable for their decisions.[75] Furthermore, where documents did exist, they were frequently marked as "LIMITE" or otherwise restricted and were often only released after decisions had already been adopted. Consequently, neither the public, relevant stakeholders, nor national parliaments were able to effectively scrutinize and engage in the decision-making process while it was underway.[76]

While the EO's findings are not legally binding on the institutions, the Ombudsman nevertheless constitutes a treaty-based Union body under Article 228 TFEU entrusted with an important supervisory function relating to good administration, transparency, and accountability within the Union administration. The European Ombudsman thus forms "a significant part of the accountability structure of the EU" and has become "a key part of the EU's bid to secure its own transparency and accountability". [77] Accordingly, the Ombudsman's findings carry significant institutional and persuasive weight regarding how Union institutions are expected to function in practice.

The EO's findings therefore indicate that the same structural weaknesses identified by Mendes in relation to the Council's channel of representative democracy are also reflected in the procedure under Article 43(3) TFEU.[78] In particular, the lack of transparency concerning Member States' positions, combined with the restricted accessibility of relevant documents, limits both political accountability and effective public scrutiny. [79] This, in turn, supports the view that decision-making under Article 43(3) TFEU may fail in practice to ensure that decisions are taken as openly and as closely to citizens as possible, as required by Article 10(3) TEU.

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[74] European Ombudsman, Recommendation in case 640/2019/TE on the transparency of the Council of the EU´s decision-making process leading to the adoption of annual regulations setting fishing quotas (total allowable catches) (25 October 2019).

[75] Ibid, paras. 15–16.

[76] Ibid, paras. 41–50.

[77] Kirkham (2018), pp. 84–85.

[78] Mendes (2016), pp. 164-167.

[79] European Ombudsman, Recommendation in case 640/2019/TE on the transparency of the Council of the EU´s decision-making process leading to the adoption of annual regulations setting fishing quotas (total allowable catches) (25 October 2019), paras. 15, 48.

3 Institutional Balance beyond the Treaties

The constitutional framework of EU law is, however, not confined to the Treaties alone. As recognised by Lenaerts and Verhoeven and further developed by de Búrca, significant aspects of constitutional practice developed beyond the boundaries of the formal constitutional framework prior to the Treaty of Lisbon.[80] The European Treaties therefore captured only part of the "institutional balance" as it functioned in practice. Most notably, executive rulemaking operated within what Lenaerts and Verhoeven termed a "constitutional twilight zone". This area was only partially governed by Treaty provisions and was instead shaped by the EU-Courts, secondary legislation, and various interinstitutional agreements.[81] Føllesdal and Hix nevertheless criticised this constitutional arrangement for suffering from a democratic deficit. They argued that its complex and often closed nature gave voters little opportunity to influence the legislative agenda, while national legislatures frequently struggled to control the Council's exercise of executive power.[82]

3.1 The Lisbon Hierarchy of Norms

In the Treaty of Lisbon, the drafters sought to address these concerns and, in doing so, make Union decision-making more democratic and transparent. The Treaty therefore introduced a hierarchy of norms by distinguishing between legislative acts and non-legislative delegated acts and implementing acts.[83] The main purpose of this hierarchy was not merely to provide conceptual clarity, but also to ensure that politically significant choices remained with the legislative institutions, while questions of technical detail and implementation could be delegated to the Commission, the Council, or the Member States.[84]

First, at the top of the hierarchy, legislative acts are legal acts adopted through a legislative procedure. Second, delegated acts are non-legislative acts of general application that may supplement or amend certain non-essential elements of a legislative act, as defined in Article 290 TFEU. Third, implementing acts are non-legislative acts adopted by the Commission or the Council where uniform conditions are required for implementing legally binding Union acts.[85] Craig, however, notes that this categorization is incomplete, as there are acts that do not seem to fit within any of these categories and that the hierarchy of norms introduced by the

[80] De Búrca (1999), pp. 55, 61; Lenaerts and Verhoeven (2002), pp. 47-48.
[81] Lenaerts and Verhoeven (2002), pp. 47-48.
[82] Føllesdal and Hix (2006), pp. 534-537.
[83] Lenaerts, Van Nuffel and Corthaut (2021), pp. 529-530.
[84] Smulders and Eisele (2012), pp. 117-118.
[85] Article 289 TFEU; Article 290 TFEU; Article 291 TFEU; Craig (2013), pp. 252-255.

Treaty of Lisbon therefore does not capture the totality of the ways in which legal norms are made in the post-Lisbon Union.[86]

While provisions adopted under Article 43(2) TFEU are adopted through the ordinary legislative procedure and therefore fall squarely within the definition of legislative acts set out in Article 289 TFEU, measures adopted under Article 43(3) TFEU do not fall within any of the categories established by the Treaty of Lisbon, thereby leaving them outside the hierarchy of norms it established. First, measures adopted under Article 43(3) TFEU are not legislative acts, as the European Parliament is entirely left out of the procedure, meaning that they are not adopted through either the ordinary legislative procedure as established in Article 289(1) TFEU or a special legislative procedure defined in Article 289(2) TFEU. Second, they do not fit within the categories of non-legislative acts provided for in the Treaties. Since the Council's competence is conferred directly by the Treaties, it is neither delegated under Article 290 TFEU nor conferred within the meaning of Article 291 TFEU through an enabling legislative act.

3.1.1 The Limits of the Lisbon Hierarchy

While Articles 289–291 TFEU establish a hierarchy between legislative acts and certain non-legislative acts, outside this framework there is no general inherent hierarchy between legislative and non-legislative acts in EU law.[87] This is illustrated in C-643/15 and C-647/15, *Slovak Republic and Hungary v Council* where the Court held that the distinction between legislative and non-legislative acts is primarily procedural rather than hierarchical, as even measures of major political importance can constitute non-legislative acts if the Treaties do not prescribe a legislative procedure. The Court explained that a measure constitutes a legislative act only if it is adopted through a legislative procedure expressly provided for in the Treaties under Article 289 TFEU, whereas measures adopted outside such procedures are non-legislative acts. In the area specific context of migration the Court therefore ruled that non-legislative acts adopted under Article 78(3) TFEU could temporarily derogate from legislative acts adopted under Article 78(2) TFEU. [88]

This is also true for the relationship between Articles 43(2) and 43(3) TFEU. Although measures adopted under Article 43(2) are legislative acts and measures adopted under Article 43(3) are non-legislative acts, there is no inherent hierarchy between the two, as they "pursue different aims and

[86] Ibid, pp. 282-283.

[87] Curtin and Manucharyan (2015), pp. 118-123.

[88] C-643/15 and C-647/15 *Slovak Republic and Hungary V Council of the European Union*, EU:C:2017:631, paras. 53, 57-82.

each have a specific field of application".[89] In my view, the immediate consequence of this is that substantial elements of the constitutional reality of the CFP are regulated outside the Treaties, and that the Treaties therefore might concern only part of the institutional balance as it exists in practice within the CFP. This may in turn raise questions regarding the extent to which the changes introduced to the CFP by the Treaty of Lisbon addressed the perceived democratic deficit that existed prior to the reform.

3.2 The Scope of the Council's Powers

Pursuant to Article 19(1) TEU, it falls to the CJEU to ensure that "in the interpretation and application of the Treaties the law is observed". The Court therefore has the ultimate responsibility to clarify the meaning of the Treaties, but also to enforce the institutional balance established in the Treaties.[90]

In the context of the relationship between Article 43(2) and (3) TFEU, the CJEU has held that the adoption of provisions under Article 43(2) TFEU "necessarily presupposes an assessment of whether they are necessary for the pursuit of the objectives of the common policies governed by the TFEU, with the result that it entails a policy decision that must be reserved to the EU legislature." By contrast, measures on the fixing and allocation of fishing opportunities under Article 43(3) TFEU "are of a primarily technical nature and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2)".[91]

The Court has, however, further clarified several aspects of the relationship between Article 43(2) and (3) TFEU.[92] While Article 43(3) TFEU confers on the Council the power to adopt implementing acts in the area concerned, these are not simply to be equated with those provided for in Article 291(2) TFEU. Rather, "paragraphs 2 and 3 of Article 43 TFEU pursue different aims and each have a specific field of application". Consequently, they may be used separately as a legal basis for adopting particular measures under the CFP. However, when the Council adopts measures on the basis of Article 43(3) TFEU, it must act within the limits of its powers and, where relevant, within the legal framework already established under Article 43(2) TFEU.[93]

[89] C-124/13 and C-125/13 *European Parliament and European Commission v Council of the European Union*, EU:C:2015:337, para 58; Lenaerts, Van Nuffel and Corthaut (2021), p. 278.

[90] Lenaerts, Van Nuffel and Corthaut (2021), p. 520.

[91] C-103/12 and C-165/12 *European Parliament and European Commission v Council of the European Union*, EU:C:2014:2400, para. 50.

[92] C-124/13 and C-125/13 *European Parliament and European Commission v Council of the European Union*, EU:C:2015:337.

[93] Ibid, para. 48.

3.2.1 Policy Choices Reserved for the Legislator

The first limit of the Council's power identified by the CJEU is that it cannot adopt provisions necessary for the pursuit of the objectives of the CFP, as those are "policy decisions" reserved for the legislator.[94]

The Court has found that this distinction entails that measures adopted under Article 43(3) TFEU are to be confined to providing only for the fixing and actual allocation of fishing opportunities in specific circumstances and on an annual basis, and not to the adoption of general mechanisms for setting TACs and fishing effort limitations in order to remedy the shortcomings arising from the application of previous rules. According to the Court, such measures define the legal framework within which fishing opportunities are established and allocated and therefore constitute policy choices with a long-term impact on the objectives that the CFP is designed to attain. They are therefore reserved for the legislator under Article 43(2) TFEU.[95]

The idea that certain basic policy choices or essential principles must remain with the legislator, while non-legislative acts are intended merely to implement those choices, reflects a broader structural pattern in EU law and underpins the hierarchy between primary legislative acts and secondary non-legislative delegated and implementing acts established by the Treaty of Lisbon. The underlying logic is based on considerations of democratic legitimacy, namely that the legislator should focus on politically significant choices rather than questions of technical detail.[96] This logic traces its origins back to the Köster case, where the Court emphasized that the authority to shape policy must remain with the legislator.[97] The Köster doctrine nevertheless presents a difficulty, namely that the precise scope of legislative discretion cannot be clearly defined in advance, as the material identification of a policy's essential elements may vary according to the specific policy area and legal framework.[98]

It is evident from the case law of the EU Courts that this fluidity appears particularly pronounced within technically complex policy areas such as the CFP and the CAP.[99] The Court has on multiple occasions held within the CFP that the Council, in allocating fishing opportunities under Article 43(3) TFEU, has to evaluate a complex economic situation and therefore has

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[94] C-103/12 and C-165/12 *European Parliament and European Commission v Council of the European Union*, EU:C:2014:2400, para. 50.

[95] C-124/13 and C-125/13 *European Parliament and European Commission v Council of the European Union*, EU:C:2015:337, paras. 79-80.

[96] Ritleng (2016), pp. 139-140.

[97] C-25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Köster and Berodt & Co,* EU:C:1970:115, para. 6.

[98] Ritleng (2016), pp. 154-155.

[99] Craig (2019), p. 475.

discretion in determining the basic facts.[100] According to Craig, these factual assessments must not be understood as neutral, as they often involve evaluative and political judgements because they are based on complex scientific, economic, or technical material that leaves room for interpretation.[101] As Craig observes:

> "There is no simple dichotomy between principle and detail. There is no ready equation between detail and absence of political controversy. Secondary norms may deal with uncontroversial detail. They may often address points of principle, or involve issues of political choice, which are every bit as controversial as those dealt with in the primary legislation".[102]

This means that it is impossible for legislative acts to capture all points of principle while leaving only insignificant questions of detail to non-legislative acts.[103] This understanding is also reflected in the Court's own characterization of measures adopted under Article 43(3) TFEU as being of a "primarily technical nature", rather than purely technical in nature.[104] While it is clear that the Council under Article 43(3) TFEU cannot adopt "general mechanisms", since such measures are reserved for the legislator under Article 43(2) TFEU,[105] it nevertheless remains conceptually unclear which questions of principle have already been resolved by the legislator and which normative choices remain to be addressed by the Council when regulating matters of detail.

3.2.2 Constraints imposed by Article 43(2) TFEU

The second limit to the Council's power under Article 43(3) TFEU, as identified by the Court, is that acts adopted under Article 43(3) must remain within the limits of the legal framework established by the basic policy choices under Article 43(2).[106] Legal frameworks such as those adopted under Article 43(2) TFEU bind decision-makers through a conditional structure of the form "if X, you may or shall do Y". This conditional

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[100] C-128/15 *Kingdom of Spain v Council of the European Union,* EU:C:2017:3, para. 46; C-4/96 *NIFPO and Northern Ireland Fishermen's Federation v Department of Agriculture for Northern Ireland*, EU:C:1998:67, paras. 41-42; C-304/01 *Kingdom of Spain v European Commission*, EU:C:2004:495, para. 23.

[101] Craig (2019), pp. 438-439.

[102] Ibid, p. 112.

[103] Ibid p. 112.

[104] C-124/13 and C-125/13 *European Parliament and European Commission v Council of the European Union*, EU:C:2015:337, para. 48.

[105] Ibid, para. 79.

[106] Ibid, para. 48.

structure may bind the decision-maker to different degrees depending on the requirements it sets.[107]

The Court's review will also differ accordingly, as the degree of intervention varies depending on the nature of the issue in a particular case.[108] The Court itself must also respect the institutional balance and, in exercising judicial review of an institution's use of power, it seeks to avoid encroaching upon the prerogatives of the political institutions. This reflects a broader principle of restraint in a democratic system designed to avoid blurring the line between law and politics.[109]

The intensity of judicial review varies depending on whether the condition in question raises a matter of law or discretion. Where the condition entails a matter of law, such as the meaning of a legal provision, the Court will generally substitute the judgment of the administrative body with its own by determining the correct meaning of the disputed legal term. If the administrative body's interpretation is inconsistent with that meaning, the act will be annulled.[110] By contrast, where the condition entails a matter of discretion, the Court will normally not substitute its judgment. Instead, the applicant must demonstrate a manifest error of assessment, misuse of powers, or a clear excess of the limits of discretion in order for the Court to intervene.[111]

The concept of discretion is complex and has been the subject of considerable philosophical debate, and Member States often apply their own conceptions of it.[112] Within the EU Courts' jurisprudence, Craig has identified three situations in which discretion arises. First, "classic discretion", where a provision provides that if X, the decision-maker may do Y, leaving a choice of whether to act. Second, "jurisdictional discretion", where the condition X is framed in vague or broad terms, giving the decision-maker freedom in determining whether it is met. Third, Craig identifies situations in which legislation provides that "if X, you shall do Y", but where the content of Y, namely the mandatory obligation, is framed in general rather than specific terms. This leaves some measure of discretion to the decision-maker in determining how Y is to be fulfilled and which legal outcome is appropriate.[113]

According to Craig, this third type of discretion is exemplified in the common policies of fisheries and agriculture, as they ultimately are intended to achieve the objectives in Article 39. These objectives can in many cases

[107] Craig (2019), p. 437.
[108] Ibid, pp. 444-445.
[109] Lenaerts (2023), p. 593.
[110] Craig (2019), p. 441.
[111] Ibid, pp. 444-445.
[112] Mendes (2017), p. 459.
[113] Craig (2019), pp. 439-441.

conflict, such as achieving a fair standard of living for farmers and ensuring reasonable consumer prices. It has therefore become a recurring pattern for legislative acts adopted under Article 43(2) to be coupled with a broad range of objectives set at a high level of generality, thereby leaving the Commission or Council discretion to determine the priority between these objectives when adopting non-legislative acts under the framework established by Article 43(2) TFEU.[114]

In the specific context of the Council's competence under Article 43(3) TFEU, the Court has on multiple occasions held that the Council has discretion as to the nature and scope of the measures, and that the Court, when reviewing the exercise of this power, will confine itself to "examining whether there has been a manifest error or misuse of power or whether the authority in question has clearly exceeded the bounds of its discretion".[115] As noted by Craig, the decision-maker can only retain such discretion if the conditional structure in the legal framework is framed in sufficiently general terms.[116] If that structure were changed to impose more specific obligations, the decision-maker's discretion in choosing an appropriate legal outcome would either be reduced or removed entirely, and the Court would review its exercise of power with greater scrutiny.[117]

The immediate consequence is that the institutional balance within the CFP, as it exists in practice, is reflected only partially in the Treaties and is further shaped through secondary legislation and the Court's case law, since the legislator under Article 43(2) TFEU establishes the nature of the conditional structure, which the Court then interprets. This may entail that, although the Council's formal competence under Article 43(3) TFEU remains unchanged, the practical scope of that competence may expand or contract depending on how detailed the legislative framework adopted under Article 43(2) TFEU is, thereby making the de facto institutional balance rather uncertain and open to change. To assess whether this is in fact the case, it is necessary to examine how the Council actually exercises its competence under Article 43(3) TFEU, and how the legal framework established under Article 43(2) TFEU has been defined and implemented. It is further necessary to examine how the EU Courts have defined and controlled the Council's discretion under Article 43(3) TFEU.

[114] Ibid, pp. 440-441, 464, 475.

[115] C-128/15 *Kingdom of Spain v Council of the European Union,* EU:C:2017:3, para. 46; C-4/96 *NIFPO and Northern Ireland Fishermen's Federation v Department of Agriculture for Northern Ireland*, EU:C:1998:67, paras. 41-42; C-304/01 *Kingdom of Spain v European Commission*, EU:C:2004:495, para. 23.

[116] Craig (2019), p. 440.

[117] Ibid, p. 441.

4 Institutional Balance in Practice

4.1 Allocation of Fishing Opportunities under Article 43(3)

Each year, the Council, acting under Article 43(3) TFEU, allocates fishing opportunities between the Member States on the basis of a predetermined share of fish stocks for each species in Union waters, which the Member States then implement through national notices. These individual shares are expressed in the form of TACs.[118] In determining and distributing annual TACs, the Council is required, as previously established, to refrain from making policy decisions reserved for the legislator and to act within the framework of the policy choices necessary for pursuing the objectives of the CFP, as established by the legislator under Article 43(2) TFEU.[119]

4.2 The Legislative Framework under Article 43(2)

The main legal framework used by the legislator under Article 43(2) TFEU for making these policy choices is Regulation (EU) No 1380/2013 on the Common Fisheries Policy (CFP Basic Regulation). It lays down the general framework for the conservation and sustainable exploitation of fishery resources under the CFP.[120] In adopting this regulation, the legislator has made a range of policy choices regarding how the CFP is to be managed and implemented. This includes policy choices regarding how the Council is to allocate fishing opportunities under Article 43(3) TFEU.[121] These policy choices are ultimately intended to attain the objectives of the CAP under Article 39 TFEU within a fisheries context.[122]

4.2.1 The CFP Basic Regulation

One of these policy choices concerns how the objectives set out in Article 39 TFEU are to be understood and achieved in the specific context of fisheries.[123] This policy choice is set out in Article 2 of the CFP Basic Regulation, which sets out a number of objectives pursuant to which the CFP is to be managed, including when the Council sets TACs under Article 43(3) TFEU.[124] Article 2(1) of the CFP Basic Regulation broadly translates the objectives set out in Article 39 TFEU into the fisheries context, stating that:

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[118] Churchill (2022), p. 15.

[119] C-124/13 and C-125/13 *European Parliament and European Commission v Council of the European Union*, EU:C:2015:337, para. 48.

[120] Regulation (EU) No 1380/2013 on the Common Fisheries Policy, arts 1–2; COM(2011) 425 final, 13 July 2011, pp. 1–2.

[121] SEC(2011) 891 final, pp. 6, 10-11.

[122] Ibid, p. 26.

[123] Churchill (2010), pp. 29-30.

[124] Regulation (EU) No 1380/2013, art 2; SEC(2011) 891 final, 13 July 2011, pp. 18–20.

> "The CFP shall ensure that fishing and aquaculture activities are environmentally sustainable in the long term and are managed in a way that is consistent with the objectives of achieving economic, social and employment benefits, and of contributing to the availability of food supplies."[125]

As noted by Lado, fisheries management under the CFP, similar to agriculture and the organization of common agricultural markets, is a "multi-objective policy" reflecting competing priorities of environmental sustainability and socio-economic considerations within the EU. This means that fisheries management requires balancing different, and sometimes conflicting, ways of valuing and using marine resources.[126] However, the objectives of the CFP can also be viewed as mutually supportive. This perspective is expressed in the Commission's Green Paper, which states that "ecological sustainability is … a basic premise for the economic and social future of European fisheries."[127]

The objectives of Article 39 TFEU are further specified in the fisheries context. For example, Article 2(5) of the CFP Basic Regulation provides, inter alia, that the CFP shall (a) progressively eliminate discards, (c) ensure economically viable conditions for the fishing and processing industry, and (f) contribute to a fair standard of living for those dependent on fishing. In addition, Article 2(3) of the CFP Basic Regulation requires the implementation of an ecosystem-based approach to fisheries management. Nevertheless, the Commission identified in its 2009 Green Paper a key deficiency of the CFP to be the absence of a clear target for the management of fish stocks.[128]

As a result, management decisions, including the Council's allocation of fishing opportunities, were often driven by short-term political considerations. [129] In response, the 2013 reform of the CFP introduced, for the first time, a more precise objective in Article 2(2) of the CFP Basic Regulation: achieving MSY "at the latest by 2020 for all stocks", in order to better realize the objectives of Article 39 TFEU within the context of the CFP.[130] The introduction of Article 2(2) of the CFP Basic Regulation is of considerable significance for the institutional balance within the CFP. As previously established, the Council, when acting under Article 43(3) TFEU, must act within the legal framework established by the legislator under

[125] Regulation (EU) No 1380/2013, art 2(1).
[126] Penas Lado (2020), p. 26.
[127] COM (2009) 163 final, p. 9.
[128] Churchill (2010), pp. 29-30.
[129] COM (2009) 163 final, pp. 9-10.
[130] Regulation (EU) No 1380/2013, art 2(2); SEC(2011) 891 final, 13 July 2011, pp. 35–39.

Article 43(2) TFEU, and the extent of its discretion depends on how specifically that framework is defined.[131]

As Craig has observed, the EU Courts have in their jurisprudence only recognized discretion for the decision-maker where the legal framework does not prescribe a specific outcome.[132] The legislator's decision in the 2013 reform to introduce a binding requirement to achieve MSY for all stocks by 2020 could therefore, depending on how that objective is defined and implemented, significantly constrain the Council's ability to set TACs freely under Article 43(3) TFEU and thereby alter the practical configuration of institutional balance within the CFP in favor of the legislator under Article 43(2) TFEU.

4.2.2 Defining the MSY Objective

MSY is a harvest strategy widely used in fisheries management at both the international and national levels. It is reflected in international instruments such as the United Nations Convention on the Law of the Sea, as well as in the regulatory frameworks of numerous states, and has formed part of the CFP since its 2013 reform.[133] A commonly cited definition, provided by the Organisation for Economic Cooperation and Development, describes MSY as:

> "the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological and environmental conditions."[134]

In essence, MSY is based on the assumption that there exists a level of fishing that can be sustained without compromising the long-term viability of a fish stock. The underlying idea is that only the natural surplus produced by a stock at or near its equilibrium should be harvested. By removing this surplus, reproduction rates remain maximised, allowing the stock to replenish itself annually without jeopardising its long-term sustainability.[135] Under the CFP, what constitutes the MSY for a certain stock and how to achieve it is calculated based on the "best available scientific advice" provided by the International Council for the Exploration of the Sea (ICES),

[131] C-103/12 and C-165/12 *Parliament and Commission v Council,* EU:C:2014:2400, paras. 48–50; C-124/13 and C-125/13 *Parliament and Commission v Council* EU:C:2015:790, paras. 54–58.

[132] Craig (2019), p. 440.

[133] Penas Lado (2020), p. 43.

[134] OECD Glossary of Statistical Terms, 'Maximum Sustainable Yield (MSY)', https://stats.oecd.org/glossary/detail.asp?ID=1644 (accessed 8 May 2026).

[135] Food and Agriculture Organization of the United Nations, 'Maximum Sustainable Yield (MSY)', FAO Fisheries Glossary (accessed 23 May 2026).

and in the absence of adequate scientific data it is based on the precautionary approach.[136]

The MSY objective as defined in Article 2(2) of the CFP Basic Regulation could therefore constrain the Council in a significant manner when allocating fishing opportunities under Article 43(3) TFEU. The Council was after 2020 required to adopt TACs consistent with what ICES has determined to be MSY for all stocks. If interpreted literally, this would leave the Council with little or no practical discretion under Article 43(3) TFEU when setting TACs. In turn, this would substantially alter how the institutional balance established in Article 43(2) and (3) TFEU functions in practice, since the Council's role would effectively be reduced to approving the TAC levels established by ICES. Such a reduction of the Council's competence would arguably diminish the very rationale for maintaining a separate Treaty-based competence in the first place.

4.2.2.1 Multiannual Plans

The notion of MSY is not a singular, clearly defined concept, as there are several different strategies which can be employed to implement it. In adopting the MSY objective under Article 43(2) TFEU, the legislator addressed some of these uncertainties through extensive negotiations. [137] These concerned both the temporal framework for achieving MSY and the extent to which the objective should apply across different fish stocks. The final compromise ultimately specified, inter alia, that MSY is to be achieved for "all stocks" and "at the latest by 2020" under Article 2(2) of the CFP Basic Regulation. [138] However, other questions, such as whether MSY should operate as a limit or as an objective, and whether it should be expressed through point values or ranges, were not addressed during the legislative process under Article 43(2) TFEU. As a result, even if Article 2(2) of the CFP Basic Regulation is essential, it does not resolve all questions concerning the implementation of the MSY objective.[139]

The manner in which the objective of achieving MSY by 2020 has been defined is therefore, according to Penas Lado, also the result of how it has been implemented in specific regulations, notably the different MAPs. MAPs are legal instruments adopted under Article 43(2) TFEU. They have therefore undergone the ordinary legislative procedure and have been preceded by a transparent process that received contributions from Member States, the Advisory Councils, industry representative organisations, Non-

[136] Article 3(c) and Article 4(1)(8) in the CFP Basic Regulation; Penas Lado (2020), p. 44.

[137] Earle (2021), pp. 2175-2176.

[138] European Parliament legislative resolution of 6 February 2013 on the proposal for a regulation on the Common Fisheries Policy, P7_TA(2013)0040, recitals 5–5c; Council of the European Union, Proposal for a Regulation on the Common Fisheries Policy – General Approach, 6108/1/13 REV 1, recital 5.

[139] Penas Lado (2020), p. 44.

Governmental Organisations (NGOs), and the general public.[140] They are designed to implement the various objectives of the CFP, including the MSY objective, in specific fisheries and sea basins across Europe. Because different fisheries have different ecological compositions and face different challenges, the plans also differ from one another.[141]

Nevertheless, all MAPs adopted or amended following the CFP reform define MSY not as a fixed point value, but rather as a range. MSY is therefore not expressed through a precise formula.[142] Instead, it operates through ranges within which fishing opportunities may be determined under Article 43(3) TFEU. As a consequence, TACs are not determined exclusively under Article 43(2) TFEU. Arguably, this would have been the case had MSY been defined as a fixed value. Instead, TACs are determined jointly under both Article 43(2) and Article 43(3) TFEU. The Council thus retains a degree of discretion within the limits established by the legislator. In terms of institutional balance, this establishes a framework in which both the Council and the European Parliament retain meaningful prerogatives regarding the allocation of fishing opportunities.

Moreover, the Regulation (EU) 2019/472 (Western Waters Plan) and the in Regulation (EU) 2018/973 (North Sea Plan) distinguish between target stocks, namely stocks which fisheries primarily aim to exploit, and by-catch stocks, meaning stocks caught incidentally.[143] Under Articles 4 and 5 respectively, target stocks are managed in accordance with MSY ranges, whereas by-catch stocks are not subject to the same MSY targets but are instead managed in accordance with the objectives set out more generally in Article 2 of the CFP Basic Regulation (Article 3 Western Waters and North Sea Plans). The Council can therefore, in the case of by-catch stocks, operate outside such ranges altogether, thereby enjoying a broader margin of discretion.[144] Furthermore, this means that TACs for by-catch stocks are, to a greater extent, determined under Article 43(3) TFEU rather than Article 43(2) TFEU. This is true not only in comparison with target stocks, but also in comparison with stocks regulated under other MAPs, such as the Baltic Plan, which does not operate with a differentiated management system.

This distinction has generated legal uncertainty. The issue concerns not merely the clarification of an undefined element of MSY, but also a potential departure from the CFP Basic Regulation itself, since Article 2(2)

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[140] Cf. COM (2018) 149 final, pp. 5-9; SWD (2014) 291 final, pp. 4-5, 9-13; SWD (2016) 272 final), pp. 8-13.

[141] Articles 9 and 10 of the CFP Basic Regulation; Penas Lado (2020), p. 58.

[142] Regulation (EU) 2016/1139 (Baltic Plan), art 4 and Annex I; Regulation (EU) 2018/973 (North Sea Plan), arts 4–5 and Annexes I–II; the Regulation (EU) 2019/472(Western Waters Plan), arts 2–4 and Annexes I–II; and the, Regulation (EU) 2019/1022) (Mediterranean Plan), arts 2–4 and Annexes I–II; Penas Lado (2020), pp. 57-58.

[143] Articles 4(1), 5, 1(4) of the 5 Western Waters and North Sea Plans

[144] Task Force on Multiannual Plans, Final Report (April 2014), ANNEX 1.

provides that MSY is to be achieved for “all stocks” rather than only certain categories of stocks.[145] The Commission and the Council have argued that the MAPs, being both more recent and more specific legislative acts, prevail over the CFP Basic Regulation pursuant to the interpretative principles “lex posterior derogat legi priori” and “lex specialis derogat legi generali”.[146] By contrast, others such as Meeus, as well as AG Ćapeta, have argued that such an interpretation raises rule of law concerns and is therefore problematic from the perspective of legal certainty.[147] This was also the central issue before the Court in *Friends of the Irish Environment.*[148]

4.2.2.2 Interinstitutional Compromise

The background to the current MAPs is that there was for a long time a political deadlock during which no MAPs were adopted or amended. Following the entry into force of the Treaty of Lisbon, it took the two co-legislators more than six years to adopt a MAP.[149] The fundamental disagreement between the European Parliament and the Council concerned, according to Penas Lado, Directorate-General for Maritime Affairs and Fisheries at the Commission during this legislative deadlock, how MSY should be defined in the MAPs and, consequently, what that definition would mean for the institutional balance in practice.[150]

The European Parliament favored a strict and detailed definition of MSY that would function as a precise “harvest control rule”, effectively determining annual TACs in advance. On this view, the Council's role under Article 43(3) TFEU would have been reduced to a form of “rubber-stamping”, leaving it with little or no discretion, an outcome that would risk depriving Article 43(3) TFEU of practical effect for the stocks covered by MAPs. The Council, by contrast, regarded the determination of annual TACs as a core prerogative that it was not prepared to relinquish and therefore insisted on a less prescriptive definition of MSY that would preserve meaningful discretion under Article 43(3) TFEU. Neither institution was willing to concede, and since both are required to approve

[145] Cf Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others,* EU:C:2023:487; C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19.

[146] Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, para. 48.

[147] Meeus (2025), p. 5-6; Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others,* EU:C:2023:487, paras. 55-59.

[148] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, para. 40.

[149] Task Force on Multiannual Plans, Final Report (April 2014), ANNEX 1.

[150] Penas Lado (2020), p. 57.

MAPs through the ordinary legislative procedure under Article 43(2) TFEU, this created a deadlock.[151]

This institutional deadlock was ultimately resolved through an interinstitutional task force composed of representatives from the Council, the European Parliament, and the Commission. Under this compromise, MAPs would implement the MSY objective as a range rather than as a fixed-point value, thereby providing a framework within which different TAC outcomes remained possible. The parties further agreed that, in the context of mixed fisheries, by-catch stocks would not be subject to the MSY objective but instead managed through alternative conservation measures, thereby allowing the Council greater flexibility under Article 43(3) TFEU when allocating fishing opportunities for those stocks.[152]

According to Penas Lado, who led the Commission's delegation in the task force, this arrangement ensures that the European Parliament retains influence over key biological and socio-economic parameters such as mortality limits and timelines, while preserving a degree of discretion for the Council when setting annual TACs under Article 43(3) TFEU.[153] Although the conclusions of the task force were never formally adopted by the co-legislators, Penas Lado confirms that they nevertheless proved instrumental in shaping the subsequent MAPs implementing the MSY objective within the CFP. [154] I would, however, argue further that the interinstitutional agreement was not merely instrumental, but constituted the moment in which the policy choice to treat MSY as a range, together with the introduction of a differentiated management regime for mixed fisheries, was de facto made.

Two considerations support this interpretation. First, the six-year interinstitutional deadlock demonstrates that compromise on these issues could not be reached within the ordinary legislative procedure itself. The Commission acknowledged that no progress on the plans could be made due to the dispute concerning management competences under Article 43 TFEU, and that work could only resume once the Inter-Institutional Task Force had presented its conclusions, thereby creating a "new political context".[155] Second, the Commission's subsequent working documents show that these conclusions were directly incorporated into the later MAPs. Both the plans and their accompanying impact assessments were "updated accordingly" following publication of the task force report.[156]

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[151] Ibid, pp. 57-58.
[152] Task Force on Multiannual Plans, Final Report (April 2014), ANNEX 4.
[153] Penas Lado (2020), pp. 56-57.
[154] Ibid, p. 57.
[155] SWD(2016) 272 final, p. 13.
[156] SWD(2014) 291 final, p. 9.

This is, however, problematic from a democratic perspective. The task force operated through informal discussion documents, while each delegation kept separate minutes and reported independently to its respective authority. Although a final report summarising the task force's conclusions was produced, no joint record of the deliberations themselves exists, and the outcomes were never formally adopted by the co-legislators pursuant to Article 43(2) TFEU. As a result, while the conclusions are publicly available, there is no accessible record of the arguments advanced, the positions taken, or the trade-offs underlying the eventual compromise.[157]

While it may be argued that defining MSY as a range rather than a single fixed value is less problematic, since Article 2(2) of the CFP Basic Regulation leaves room for operational specification within the institutional framework established by Articles 43(2) and 43(3) TFEU, the differentiated management regime for mixed fisheries raises more significant concerns. Unlike the use of MSY ranges, the distinction between target stocks and by-catch stocks appears difficult to reconcile with the wording of Article 2(2), which provides that all stocks are to be managed in accordance with MSY by 2020. This wording formed part of an explicit political compromise struck between the European Parliament and the Council concerning how the MSY objective should be defined within the CFP.[158] The subsequent interinstitutional agreement and the later adoption of the Western Waters and North Sea plans therefore raise not only questions of legal certainty, but also broader concerns relating to democratic legitimacy. The relevant policy choices were made in a closed forum far removed from the European citizen, thereby raising concerns under Article 10(3) TEU.

[157] Task Force on Multiannual Plans, Final Report, ANNEX 3.

[158] European Parliament legislative resolution of 6 February 2013 on the proposal for a regulation on the Common Fisheries Policy, P7_TA(2013)0040, recitals 5–5c; Council of the European Union, Proposal for a Regulation on the Common Fisheries Policy – General Approach, 6108/1/13 REV 1, recital 5.

5 Enforcement of Institutional Balance: The CJEU's Ruling in Friends of the Irish Environment

5.1 The legal issue

The current implementation of the MSY objective in the CFP through MAPs is, however, contested, particularly in the context of mixed fisheries. Several NGOs have argued that the respective competences of the legislator under Article 43(2) TFEU and the Council under Article 43(3) TFEU cannot overlap to this extent. In their view, since the legislator has provided in Article 2(2) of the CFP Basic Regulation that "all" stocks are to be managed in accordance with the MSY approach, the Council lacks competence under Article 43(3) TFEU to subject any stocks to management regimes other than the MSY approach.[159]

5.1.1 Mixed Fisheries and the Choke Species Problem

As pointed out in the interinstitutional agreement between the Council, the European Parliament, and the Commission, one of the central sources of interinstitutional tension between the European Parliament and the Council concerns how fish stocks in mixed fisheries are to be managed.[160]It is, however, widely recognised that mixed fisheries, such as those covered by the Western Waters Plan, pose particular challenges within the framework of the CFP.[161]

The CFP is fundamentally based on a single-stock management approach, whereby the Council allocates TACs for individual stocks under Article 43(3) TFEU, each of which is expected to meet specific management objectives, such as MSY under Article 2(2) of the Basic Regulation.[162] In a multi-species context, however, this approach becomes inherently problematic. It is well established that there is no single combination of fishing mortality rates capable of achieving MSY for all stocks concurrently.[163] At the very least, doing so with current fishing techniques would be extremely costly. The central question, therefore, is whether the CFP can realistically deliver MSY for all stocks at the same time and, if so, at what cost.[164]

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[159] BirdLife, ClientEarth, FishSec, Oceana, Our Fish, Seas At Risk and WWF, *Common Fisheries Policy: Mission Not Yet Accomplished* (2021) https://www.clientearth.org/media/4cnpu0ex/common-fisheries-policy_mission-not-yet-accomplished.pdf (accessed 12 May 2026).

[160] Task Force on Multiannual Plans, *Final Report* (April 2014), ANNEX 4.

[161] COM (2018) 149 final, p. 2.

[162] Penas Lado (2020), p. 141.

[163] Gaichas et al. (2017), pp. 552-565.

[164] Penas Lado (2020), pp. 71-72.

The issue is straightforward in practice: in mixed fisheries, fishers cannot fully control which species they catch or in what proportions. Given that fishing fleets consist of multiple vessels targeting different species to varying degrees, it becomes practically impossible to achieve MSY for all stocks simultaneously.[165] As a result, managing each stock in isolation creates a structural trade-off: either some stocks are overexploited in order to achieve MSY for others, or, in order to avoid overexploitation, MSY is not achieved for all stocks.[166]

This problem is further exacerbated by the phenomenon known as "choke species."[167] The term is defined by ICES as a "species with a low quota that can force a vessel to cease fishing even where quota for other species remains available".[168] Choke species arise as a consequence of fisheries management based on single-stock catch limits, such as the CFP system of stock-specific TACs, combined with restrictions on discarding, notably under Article 2(3) of the CFP Basic Regulation. The practical effect is that, once the quota for a choke species has been exhausted, the fishery must effectively close. Vessels are no longer permitted to land or discard catches of the affected stock and must therefore cease operations regardless of any remaining quotas for other stocks.[169]

5.1.2 The Legislative Framework

The significance of the choke species issue was already recognised by the co-legislators in the 2013 reform of the CFP.[170] Although the Regulation identifies increased selectivity in fishing gear as the primary solution, it also acknowledges that such measures may not always be sufficient. In particular, recital 8 of the CFP Basic Regulation states that:

> "Management decisions relating to maximum sustainable yield in mixed fisheries should take into account the difficulty of fishing all stocks in a mixed fishery at maximum sustainable yield at the same time, in particular where scientific advice indicates 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* (emphasis added)."[171]

[165] Gaichas et al. (2017), pp. 552-565.
[166] Penas Lado (2020), p. 79.
[167] Ibid, p. 72.
[168] International Council for the Exploration of the Sea (ICES). *In Other Words: Choke Species*. Available at: https://www.ices.dk/news-and-events/Blogs/Inotherwords/Lists/Posts/Post.aspx?ID=13 (accessed 4 May 2026).
[169] Penas Lado (2020), p. 72.
[170] Ibid p. 73.
[171] Recital 8 of the CFP Basic Regulation.

Moreover, the legislator explicitly acknowledges the challenges posed by mixed fisheries in Article 9(5) of the CFP Basic Regulation and provides for specific considerations in this regard within the framework of MAPs:

> "Multiannual plans may contain specific conservation objectives and measures based on the ecosystem approach in order to address the specific problems of mixed fisheries in relation to the achievement of the objectives set out in Article 2(2) for the mixture of stocks covered by the plan in cases where scientific advice indicates that increases in selectivity cannot be achieved. Where necessary, the multiannual plan shall include specific alternative conservation measures, based on the ecosystem approach, for some of the stocks that it covers."[172]

The legal issue arises from the fact that the legislator's considerations regarding mixed fisheries and the choke species problem must nevertheless be applied within the framework of Article 2(2) of the Basic Regulation. [173] As previously established, this provision requires that MSY be achieved "for all stocks".[174]

5.1.3 Competing Interpretations of the MSY Objective

Several NGOs argue that Article 2(2) of the CFP Basic Regulation should be interpreted in accordance with its literal meaning, requiring that MSY be achieved for "all stocks". On this view, there is no scope for the Council, when allocating fishing opportunities under Article 43(3) TFEU, to depart from setting TACs in line with the MSY objective for any stock.[175] An example of this line of reasoning is provided by Meeus, who argues that allowing the Council to depart from the MSY objective without formally amending the legislation would be contrary to the principle of legal certainty. In his view, such an approach would conflict with the Court's settled case law.[176] Notably, the Court itself has previously ruled that "the effect of EU legislation must be clear and predictable for those who are subject to it".[177]

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[172] Article 9(5) of the CFP Basic Regulation.

[173] Opinion of AG Ćapeta in in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, para. 2.

[174] Article 2(2) of the CFP Basic Regulation.

[175] ClientEarth, 'Taking Stock 2022 - Are TACs Set to Achieve MSY?' <https://www.clientearth.org/latest/documents/taking-stock-2022-are-tacs-set-to-achieve-msy/> accessed 2026, p. 35; Baltic Waters, 'Are EU Fisheries Ministers Breaking the Law?' <https://balticwaters.org/wp-content/uploads/2024/04/Are-EU-fisheries-ministers-breaking-the-law_BalticWaters.pdf> accessed 2026, p. 5.

[176] Meeus, pp. 5-6.

[177] *212–217/80 Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others, EU:C:1981:178*, para. 10.

However, others, such as Lado, have taken a different view. He argues that, although the wording of Article 2(2) of the CFP Basic Regulation may, at first glance, suggest that all stocks in a mixed fishery must be managed strictly in accordance with the MSY approach, such an interpretation is not necessarily compatible with the broader objectives of the CFP and the system within which the provision operates. Lado contends that the MSY objective should be understood and applied in a more flexible manner in order to achieve both the objectives set out in Article 2 as a whole and the broader objectives set out in Article 39 TFEU, which the objectives in Article 2 are intended to attain.[178]

First, he argues that, in the context of the CFP as implemented through MAPs, MSY is not treated as a fixed value but rather as a range. This inherently suggests some degree of flexibility regarding how MSY is to be achieved within the CFP. Second, he emphasises the need to ensure that the two main objectives of the CFP, namely the MSY objective and the landing obligation, are achieved simultaneously.[179] A rigid application of MSY would, in practice, undermine the implementation of the landing obligation. In such cases, the policy objectives would not be properly balanced, since both objectives must be pursued in parallel and neither should undermine the other.[180] Finally, Lado argues that a strict and literal interpretation of the MSY objective would not necessarily achieve the objectives set out in Article 39 TFEU and may even operate to their detriment. On this basis, he concludes that Recital 8 and Article 9(5) of the CFP Basic Regulation support a more flexible interpretation, whereby the requirement to achieve MSY "for all stocks" under Article 2(2) is adapted in the context of multiannual plans.[181]

5.2 Factual background

This uncertainty has given rise to litigation. At the time of writing, a case is pending before the General Court in *Coalition Clean Baltic v Council*. The General Court also delivered its judgment in *ClientEarth v Council* in June 2025.[182] The first judgment in this line of litigation was, however, *Friends of the Irish Environment* decided by the CJEU in January 2024.[183]

The case arose from the Council's adoption of TACs under Article 43(3) TFEU for cod in the West of Scotland and the Celtic Sea, whiting in the Irish Sea, and plaice in the Celtic Sea South in Annex IA to Council

[178] Penas Lado (2020), p. 45.
[179] Ibid, pp. 55-57.
[180] Ibid, p. 120.
[181] Ibid, pp. 83-84.
[182] T-342/24 *Coalition Clean Baltic V. Council of the European Union* (pending); T-577/22 and T-648/22 *ClientEarth AISBL v Council of the European Union,* EU:T:631.
[183] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19.

Regulation (EU) 2020/123 (Contested Regulation). For each of these stocks, ICES had issued zero-catch advice, establishing MSY at zero.[184] According to material provided by the Commission, however, the choke effect of zero-catch TACs and the subsequent closure of the entire sea basin around Ireland would have had severe social and economic consequences for the Irish fishing industry, impacting 6,000 fishing vessels, with potential damages of approximately EUR 1 billion. The Council therefore choose to set the TACs for those four stocks above MSY in order to avoid closure.[185]

The Irish-based NGO Friends of the Irish Environment subsequently challenged the domestic allocation of those TACs by the Irish authorities before the Irish High Court. It argued that the contested regulation, on which those allocations were based, was invalid in light of the legal framework adopted under Article 43(2) TFEU, in particular Article 2(2) of the CFP Basic Regulation. Since only the CJEU may declare Union acts invalid, the Irish High Court referred the matter to the Court under Article 267 TFEU. It asked whether the contested regulation adopted under Article 43(3) TFEU was invalid in light of the legal framework adopted under Article 43(2) TFEU.[186]

5.3 The Opinion of Advocate General Ćapeta

In June 2023, AG Ćapeta delivered her Advisory Opinion on how the Court should rule in the case at hand, in particular whether the Council had exceeded its powers under Article 43(3) TFEU, and therefore recommended that the Court declare Annex IA to the contested regulation invalid.[187]

In support of this conclusion, AG Ćapeta first recalled the Court's settled case law on the institutional balance established by the Treaties in the field of fisheries. In particular, she emphasised that the Council's powers are directly based on Article 43 TFEU. However, Article 43(3) TFEU does not empower the Council to adopt policy choices necessary for the pursuit of the objectives of the CFP.[188] Such choices must be made by the legislator under Article 43(2) TFEU. Accordingly, the policy choices adopted under Article 43(2) TFEU bind the Council when exercising its powers under Article 43(3) TFEU.[189] Legislative acts such as the CFP Basic Regulation

[184] Ibid, paras. 26-31.
[185] Opinion of AG Ćapeta in in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, para. 70.
[186] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, paras. 26-31.
[187] Opinion of AG Ćapeta in in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, para. 78.
[188] Ibid, paras. 19-20.
[189] C-124/13 and C-125/13 *European Parliament and European Commission v Council of the European Union,* EU:C:2015:337.

and the Western Waters Plan therefore determine the framework within which the Council must operate when implementing the CFP.[190]

5.3.1 Article 2(2): "All Stocks"

Against this background, AG Ćapeta argued that, although Article 2 of the CFP Basic Regulation as a whole may previously have allowed for a balancing of the CFP's various objectives, the introduction of Article 2(2) which requires that MSY be achieved for all stocks by 2020 at the latest, fundamentally altered this position. In her view, the legislator thereby removed any discretion previously enjoyed by the Council to balance competing objectives when setting TACs under Article 43(3) TFEU.[191] Instead, the legislative framework now prescribes a single lawful outcome: fishing opportunities must be set in accordance with MSY for all stocks.[192]

According to AG Ćapeta, the purpose of this reform was precisely to limit the Council's prerogatives under Article 43(3) TFEU. In particular, the introduction of the MSY objective in Article 2(2) of the CFP Basic Regulation was intended to constrain the Council's ability to prioritise short-term economic considerations over long-term sustainability.[193] By establishing a binding objective, the legislator effectively determined how the objectives of the CFP are to be balanced, namely in accordance with the MSY approach. As she stated,

> "by setting a fixed deadline, the EU legislature aimed to prevent the Council from putting short-term economic interests before the overarching long-term goal of progressively restoring and maintaining populations of fish stock above biomass levels capable of producing MSY."[194]

In this respect, AG Ćapeta did not understand the MSY objective as an operational objective aimed at balancing several competing considerations, namely environmental, social, and economic objectives, but rather as a central organising principle of the CFP, reflecting a long-term rather than short-term approach to fisheries management. From this perspective, she did not regard there as being an inherent conflict between the environmental, social, and economic objectives of the MSY objective. Rather, she considered those objectives to be mutually reinforced by it, since "the MSY goal serves, in the long term, not only the environmental objectives of the CFP, but also its economic, social, employment and food-supply

[190] Opinion of AG Ćapeta in in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, paras. 22-23.
[191] Ibid, paras. 29–30.
[192] Ibid, para. 31.
[193] Ibid, para. 32.
[194] Ibid, para. 30.

objectives."[195] This interpretation is also consistent with the approach expressed in the Commission's Green Paper.[196]

On this basis, AG Ćapeta attached decisive weight to the "clear and specific" wording of Article 2(2) and adopted a strictly literal interpretation of the provision. The requirement that MSY be achieved for "all stocks" was thus understood to mean precisely that: no exceptions could be made, including in the context of choke species in mixed fisheries.[197] As AG Ćapeta considered that Article 2(2) did not confer any discretion on the Council under Article 43(3) TFEU to depart from the MSY objective, she also interpreted the term "stock" strictly in accordance with the definition provided in Article 4(4) of the CFP Basic Regulation, namely "a marine biological resource that occurs in a given management area". In her view, the requirement that MSY be achieved for "all stocks" therefore applied to all marine biological resources occurring within the relevant management area. Consequently, the Council was required to allocate TACs for all fish stocks in accordance with the MSY objective.[198]

5.3.2 The Western Waters Plan: A Democratic Change of Policy?

With this in mind, AG Ćapeta then turned to the question of how the multiannual plans, specifically the Western Waters Plan might affect the implementation of the MSY objective laid down in Article 2(2) of the CFP Basic Regulation when the Council acts under Article 43(3) TFEU.[199]

In her view, the MSY objective constitutes a policy choice made by the legislator under Article 43(2) TFEU, the effect of which is to remove the Council's prerogative to take broader political, economic, or social considerations into account when allocating fishing opportunities, as those considerations were considered too short-sighted to the detriment of attaining the overall objectives of the CFP.[200] Against this background, she reads Articles 4 and 5 of the Western Waters Plan, which provide that target stocks are to be managed in accordance with MSY ranges, while by-catch stocks are to be managed in light of the objectives set out in Article 2 as a whole, as effectively altering that policy choice by allowing the Council under Article 43(3) TFEU to take different political considerations into account when allocating fishing opportunities for by-catch species.[201]

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[195] Ibid, para. 34.
[196] COM (2009) 163 final, p. 9.
[197] Opinion of AG Ćapeta in in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, paras. 36-37.
[198] Ibid, paras. 38–42.
[199] Ibid, para. 43.
[200] Ibid, paras. 29–30.
[201] Ibid, paras. 44–45.

Multiannual plans are legislative acts adopted under Article 43(2) TFEU and are therefore intended to establish the provisions necessary for the pursuit of the objectives of the CFP.[202] As such, they are formally of the same hierarchical value as the CFP Basic Regulation.[203] However, in AG Ćapeta´s view, interpreting the Western Waters Plan as allowing for flexibility in the application of the MSY objective would amount to a change in the underlying policy choice established in Article 2(2) of the Basic Regulation. More specifically, it would imply an "implicit amendment" of the requirement that all stocks be managed in accordance with MSY and that the Council is not allowed to take political considerations into account when allocating fishing opportunities under Article 43(3) TFEU.[204]

In this regard, AG Ćapeta argued that implicit changes of legislative direction are problematic not only from the perspective of legal certainty, but also from a democratic standpoint. In her view, the legislator must be transparent about its intentions so that meaningful opposition can form during the legislative process, both within the institutions and among stakeholders and the broader public. An implicit amendment, by its very nature, obscures the fact that a policy change has occurred, thereby undermining the ability of citizens and affected parties to identify, contest, and engage with that change through representative democratic channels.[205]

As AG Ćapeta views Article 5 of the Western Waters Plan as implicitly changing the policy direction established in Article 2(2) of the CFP Basic Regulation, she therefore argues that such an implicit change, especially in the present case, would run contrary not only to the principle of legal certainty but also, more fundamentally, to important aspects of democratic society. She therefore concludes that Article 5 of the Western Waters Plan does not give the Council discretion under Article 43(3) TFEU to depart from the MSY approach established by ICES when setting fishing limits for by-catch stocks in mixed fisheries.[206]

5.4 The Judgment of the CJEU

In January 2024, the CJEU delivered its judgment. It departed from AG Ćapeta's advisory opinion that the Council had overstepped its competence.

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[202] Article 9 and 10 of the CFP Basic Regulation.

[203] Article 289(1) TFEU.

[204] Opinion of AG Ćapeta in in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, para. 51.

[205] Ibid, paras. 55–58.

[206] Ibid, paras. 59-69.

The Court instead held that Annex IA of the contested regulation was compatible with the Council's competence under Article 43(3) TFEU.[207]

In support of this conclusion, the Court, similarly to AG Ćapeta, recalled its settled case law on the institutional balance within the CFP, in particular the judgments in Joined Cases C-103/12 and C-165/12, and C-124/13 and C-125/13.[208] It reiterated that paragraphs 2 and 3 of Article 43 TFEU pursue different aims and have distinct fields of application. The Court confirmed that Article 43(2) TFEU governs the adoption of measures necessary for pursuing the objectives of the CFP, whereas measures adopted under Article 43(3) TFEU are "of a primarily technical nature and are intended to be taken in order to implement provisions adopted on the basis of Article 43(2) TFEU". [209]

5.4.1 Article 2(2): Part of a Broader Legal Framework?

Against this background, the Court agreed with AG Ćapeta that, in adopting the reformed CFP, the legislator made a clear policy choice to reorient the policy towards the objective of the long-term sustainability of fishing activities, in particular by managing fish stocks in accordance with the MSY approach.[210] In this regard, the Court further acknowledged the specific wording of Article 2(2) of the CFP Basic Regulation, noting that it leaves little latitude for interpretation, as the requirement that MSY be achieved for "all stocks" must be understood as referring to all biological resources occurring within the management area of the CFP, as defined in Article 4(4).[211]

However, in interpreting the meaning of Article 2(2), the Court chose to view the provision within the broader legal framework established under Article 43(2) TFEU rather than interpreting it literally, as argued by AG Ćapeta.[212] It emphasised that the CFP, including the management of fish stocks in accordance with the MSY approach, is designed to pursue multiple objectives simultaneously. These include not only the long-term environmental sustainability of fishing activities, but also social and economic objectives, such as ensuring employment benefits and contributing to the availability of food supplies (Article 2(1) of the CFP Basic Regulation).[213] Furthermore, the Court held that the overarching objective of long-term sustainability does not solely require fishing at MSY

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[207] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, para. 93.

[208] Ibid, paras. 56-58.

[209] C-124/13 and C-125/13 *European Parliament and European Commission v Council of the European Union,* EU:C:2015:337.

[210] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, para. 62.

[211] Ibid, paras. 63–64.

[212] Ibid, paras. 65, 67, 72.

[213] Ibid, para. 65.

levels. It also entails reducing the negative environmental impacts of fishing activities, including the elimination of discards and the reduction of by-catch.[214] In this context, the Court emphasised that the legislator has established that multiannual plans must contain objectives consistent with those set out in Article 2, as well as quantifiable targets, such as fishing mortality rates (Article 10(1)(b) and (c) of the CFP Basic Regulation). It further noted that such plans may include specific conservation measures designed to address the particular challenges posed by mixed fisheries in achieving the objectives laid down in Article 2(2) (Article 9(5) of the CFP Basic Regulation).[215]

In line with this reasoning, the Court held that Article 2(2) must be interpreted in light of Recital 8 of the Basic Regulation, which stipulates that management decisions regarding MSY in mixed fisheries must consider the challenge of harvesting all stocks within such a fishery at MSY simultaneously, especially when scientific advice indicates that avoiding the so-called choke species phenomenon is particularly difficult.[216] According to the Court, that recital makes clear that the legislator did not intend to exclude the possibility of adapting the MSY objective, namely achieving MSY for all stocks, in situations where it cannot be attained concurrently for all stocks within a mixed fishery.

The Court thus concluded that, when Article 9(5) is read together with Recital 8, the legislative framework is intended to allow flexibility in the implementation of the MSY objective within multiannual plans. In particular, it permits the adaptation of the requirement to allocate fishing opportunities in accordance with MSY for "all stocks" in order to take account of the practical difficulties of achieving that objective simultaneously across multiple stocks.[217] Contrary to AG Ćapeta, the Court therefore did not regard the policy choices reflected in the multiannual plans as constituting a change in the underlying legislative framework. Rather, it held that, in adopting the MSY objective in Article 2(2), the legislator had already envisaged that its application would remain open to adaptation and specification within the context of the various multiannual plans adopted under Article 43(2) TFEU.[218]

5.4.2 The Western Waters Plan: A Built-In Instrument for Adaptation

In this context, the Court held that, by adopting the Western Waters Plan under Article 43(2) TFEU, the EU legislature gave effect to the MSY

[214] Ibid, para. 66.
[215] Ibid, paras. 67–68.
[216] Recital 8 of the CFP Basic Regualtion.
[217] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, para. 69.
[218] Ibid, para. 71.

objective and established a differentiated management regime. This regime distinguishes between target stocks, governed by Article 4(1), which are to be managed in accordance with MSY expressed as a range, and by-catch stocks, governed by Article 5(1), which are to be managed in line with Article 2 as a whole. As a consequence, the Court concluded that, in relation to target stocks, the Council is required to set TACs within the MSY ranges provided by ICES and thus retains discretion only within those limits. By contrast, in relation to by-catch stocks, the Council enjoys a "broad margin of discretion" when allocating fishing opportunities under Article 43(3) TFEU. [219]

This discretion is not confined to the nature and scope of the measures to be adopted, but also extends, to a certain extent, to the establishment of the relevant factual basis, as the Court emphasised in its case law in Case C-128/15 *Spain v Council*, where it held that, when allocating fishing opportunities among Member States, the Council must carry out complex economic and scientific assessments.[220] Accordingly, the Court held that the Council was entitled to depart from the MSY approach reflected in ICES advice when setting TACs for the stocks at issue, insofar as they constituted by-catch stocks in mixed fisheries. Such stocks were therefore not required to be managed strictly in accordance with MSY.[221]

5.4.3 The Scope of Judicial Review

The Court therefore confined its review to examining whether there had been a manifest error or misuse of power, or whether the Council had clearly exceeded the bounds of its discretion under Article 43(3) TFEU. The Court began by recalling that, according to ICES scientific advice, applying a strict zero-catch approach would give rise to the choke species phenomenon in mixed fisheries, since fishing for target stocks at MSY levels would inevitably result in incidental catches of the stocks concerned. The Court accepted that the Council's finding in this regard was not vitiated by a manifest error of assessment.[222]

It then examined whether the Council had sought to reconcile the competing objectives of the CFP, namely the continuation of fisheries and the restoration of stocks to a good biological status. The Court noted that several TACs had been set at or below the estimated by-catch levels identified by ICES and that the Council had relied on the best available scientific advice, or, where data was insufficient, the precautionary

[219] Ibid, paras. 72–75.

[220] Case C-128/15 Kingdom of Spain v Council of the European Union EU:C:2017:3, para. 46.

[221]C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, paras. 79-80.

[222] Ibid, paras. 81–82.

approach. It further observed that the contested TACs were expected to contribute to biomass recovery despite not being set at zero.[223]

In addition, the Court referred to several accompanying remedial measures aimed at limiting by-catches, including quota exchanges, reductions of TACs for target stocks, restrictions on targeted fishing, and stricter selectivity requirements.[224] In light of these considerations, the Court concluded that the contested TACs were not manifestly inappropriate for reconciling the continuation of mixed fisheries with the objective of restoring stocks to a good biological status. The Council had therefore not manifestly exceeded the bounds of its discretion under Article 43(3) TFEU, and the validity of the contested regulation was upheld.[225]

5.5 The CJEU's Approach: An Analysis

5.5.1 Defining and Controlling the Council's Discretion under Article 43(3) TFEU

My conclusion is therefore that the Court adopted a fundamentally different approach from AG Ćapeta in defining and controlling the scope of the Council's discretion under Article 43(3) TFEU, and that this difference in approach was the reason why the two reached different conclusions. The divergence was, however, neither conceptual nor structural in nature. Both the Court and AG Ćapeta agreed on the nature of the Council's competence under Article 43(3) TFEU, namely that the Council cannot make basic policy choices reserved for the legislator and that it is required to act within the legal framework established under Article 43(2) TFEU.[226] Both further agreed, consistently with the pattern identified by Craig in the EU courts' jurisprudence, that the conditional structure established by the legislative framework must be sufficiently general in order for the Council to retain discretion when acting under Article 43(3) TFEU. The difference was, as Craig has observed is often the case,[227] ultimately analytical.

The disagreement was, in my view, how specific or general the relevant conditional structure actually was. While AG Ćapeta attached decisive weight to the wording of Article 2(2) of the CFP Basic Regulation itself, which she found to be clear and specific, requiring MSY to be achieved for "all stocks" within a fixed deadline and without textual exceptions, she considered that the legislative framework left no room for discretion. On

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[223] Ibid, paras. 83–86.

[224] Ibid, paras. 87-91.

[225] Ibid paras. 92-93.

[226] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, paras. 56-58; Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, paras. 19-22.

[227] Craig (2019), p. 437.

that reading, the Council was bound to set TACs in accordance with MSY for every stock, including by-catch stocks in mixed fisheries.[228] The Court did not dispute that Article 2(2), read in isolation, was worded with precision, leaving "no latitude" for the Council under Article 43(3) TFEU to depart from MSY.[229]

However, rather than treating the provision in isolation, the Court adopted what I would describe as a contextual and relatively flexible approach to defining how the legislative framework under Article 43(2) TFEU constrained the Council's power under Article 43(3) TFEU. It read Article 2(2) in light of the legislative framework as a whole, encompassing the broader objectives set out in Article 2, other provisions of the CFP Basic Regulation including Article 9(5) and Recital 8, and in particular the differentiated management regime established in Articles 4 and 5 of the Western Waters Plan. Read in this broader context, the legislative framework therefore retained, in my view, sufficient generality to preserve a meaningful margin of discretion for the Council when allocating fishing opportunities for by-catch stocks in mixed fisheries under Article 43(3) TFEU.

Moreover, it is unsurprising that, having found discretion to exist, the Court applied a correspondingly less intensive standard of review than AG Ćapeta. This is consistent with a general pattern Craig has identified in the EU courts' jurisprudence: where political institutions enjoy discretion in making complex scientific, economic, or political assessments, judicial review will generally be confined to manifest error review.[230] In practical terms, this distinction manifested itself in the following way. AG Ćapeta, having found no discretion, substituted her own interpretation of "all stocks" under Article 2(2) for that of the Council and assessed directly whether MSY had in fact been achieved for every stock.[231] The Court, by contrast, examined not what the Council had decided, but how it had reached its decision, asking only whether the Council had committed a manifest error of assessment or had clearly exceeded the bounds of its discretion. This meant reviewing whether the Council had sought to balance the competing objectives of the CFP, had relied on the best available scientific advice, and had adopted accompanying remedial measures, rather than scrutinising the substantive outcome of the TAC decisions themselves.[232]

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[228] Opinion of AG Ćapeta in in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, para. 37.

[229] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, paras. 64.

[230] Craig (2019), pp. 450-452.

[231] Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, para. 60.

[232] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, paras. 80-91.

5.5.2 What the Judgment Reveals about Institutional Balance within the CFP

The Court's approach reveals that the institutional balance within the CFP cannot be determined against a single objective, as AG Ćapeta argued, but must instead be assessed in light of the legislative framework as a whole,[233] and in particular the specific management regimes established in the applicable multiannual plans. This means that the allocation of decision-making power is inherently variable depending on the relevant sea basin, as different multiannual plans establish different management regimes to address the specific characteristics of each fishery and ecosystem.

On a constitutional level, this means that the Council under Article 43(3) TFEU retains real competence within the institutional balance to independently choose between different legal outcomes when setting TACs. These choices are, as the Court itself acknowledged, primarily technical in nature,[234] yet they are simultaneously deeply political, as illustrated by the implications of the choke species problem in the present case. Setting the TAC required the Council to strike a balance between protecting depleted fish stocks on the verge of collapse and the economic and social consequences of fishery closure, estimated at approximately EUR 1 billion in damages and affecting some 6,000 fishing vessels in Ireland.[235]

This stands in contrast to what would have been the case had the Court adopted AG Ćapeta's approach, under which the Council's power to allocate fishing opportunities would in many instances have been reduced to rubber-stamping the MSY levels identified by ICES, an outcome that would, first, have run contrary to the interinstitutional agreement reached between the European Parliament, the Commission, and the Council on the practical allocation of competence within the CFP, thereby upsetting a compromise that had taken over six years to reach.[236] More fundamentally, such an outcome may also have undermined the constitutional choice embedded in the Treaties themselves as to how representative democracy is to function within the CFP, namely the coexistence of different models of democratic legitimacy, each representing distinct interests at different levels of decision-making.[237]

The reservation of competence to allocate fishing opportunities exclusively to the Council under Article 43(3) TFEU arguably reflects a deliberate

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[233] Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, paras. 29-31.

[234] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, para. 57.

[235] Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, para. 70.

[236] Task Force on Multiannual Plans, *Final Report* (April 2014), ANNEX 4; Penas Lado (2020), pp. 56-57.

[237] Lenaerts (2013), pp. 279-281.

choice by the Member States to retain meaningful control over decisions that directly and significantly affect their fishing industries and coastal communities. Reducing that competence to mere rubber-stamping would therefore have diminished the very rationale for maintaining a separate Treaty-based competence in the first place and may therefore have upset the balance established by the Treaties.

However, I would also argue that the approach adopted by the Court raises significant concerns regarding the democratic legitimacy of the institutional balance within the CFP. First, the interinstitutional agreement upon which all subsequent multiannual plans are based was never formally adopted by the co-legislators, meaning that it never underwent the democratic procedure required for basic policy choices under Article 43(2) TFEU, namely a procedure through which both the European Parliament and the Council formally approve the act, thereby giving citizens and national parliaments the opportunity to hold the legislators accountable.[238] Second, I agree with AG Ćapeta that interpreting Article 2(2) of the Basic Regulation in light of the legislative framework as a whole means that a provision whose wording is, by all accounts, both clear and specific, in practice entails something quite different from what it formally states. This concerns a substantial policy choice.[239] If citizens cannot readily ascertain what a legislative choice means in practice, or even whether it has been substantively altered, it becomes difficult, if not impossible, for them to meaningfully exercise their right to participate in the democratic life of the Union under Article 10(3) TEU. It also becomes difficult for them to express agreement or disagreement at the ballot box, both at the national and the European level.

Before drawing broader conclusions from the foregoing analysis, it is important to acknowledge certain factors that may limit the authoritative weight of the judgment. First, the judgment was not delivered by the Grand Chamber, composed of fifteen judges, or by the Court sitting in plenary session. Instead, it was delivered by an ordinary chamber composed of five judges.[240] Second, AG Ćapeta reached a fundamentally different conclusion from that of the Court.[241] This, highlights the lack of consensus even within the judicial process. Finally, as the preceding discussion of the academic commentary by Lado and Meeus demonstrates, the legal doctrine on this

[238] Task Force on Multiannual Plans, *Final Report* (April 2014), ANNEX 1; Penas Lado (2020), pp. 56-57.

[239] Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, para. 56.

[240] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, p. 1.

[241] C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2024:19, paras. 79, 93; Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487, paras. 60, 78.

issue remains divided.[242] Taken together, these factors suggest that the judgment should be approached with some caution, particularly when drawing broader conclusions regarding the overall configuration of institutional balance within the CFP.

[242] Meeus (2025), pp. 5-6; Penas Lado (2020), p. 83-84.

6 Developments following Friends of the Irish Environment

Following the Court's ruling in *Friends of the Irish Environment*, the question of how the Council may allocate fishing opportunities under Article 43(3) TFEU in light of Article 2(2) of the CFP Basic Regulation has continued to generate litigation. At the time of writing, two further cases have been brought challenging specific allocations of fishing opportunities by the Council on the basis that they infringe the MSY objective.[243]Unlike *Friends of the Irish Environment*, which reached the CJEU through a preliminary reference under Article 267 TFEU, these subsequent cases were brought by environmental NGOs through actions for annulment under Article 263 TFEU before the General Court.[244]

6.1 ClientEarth v Council (Joined Cases T-577/22 and T-648/22)

The first of these cases is *ClientEarth v Council*, in which the General Court delivered its judgment in June 2025. The Council had set several TACs above the levels recommended by ICES. ClientEarth challenged those allocations on the basis that they exceeded the Council's competence under Article 43(3) TFEU in light of the MSY objective in Article 2(2) of the CFP Basic Regulation. The Court's review concerned cod in the Kattegat, governed by the North Sea Plan, and common hake, pollack, Norway lobster, and common sole in the Western Waters.[245]

The Court first recalled the established case law on the relationship between Articles 43(2) and 43(3) TFEU, holding that the extent of the Council's discretion in setting TACs depends on the leeway afforded to it by the legislative framework adopted under Article 43(2) TFEU. On that basis, the General Court explicitly adopted the reasoning of the CJEU in *Friends of the Irish Environment*. It applied the same contextual interpretation of Article 2(2) in light of the broader objectives set out in Article 2, Article 9(5), and Recital 8 of the CFP Basic Regulation. The General Court thus reached the same conclusion as the CJEU: the legislative framework was intended to allow for flexibility in the application of the MSY objective within multiannual plans.[246]

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[243] T-342/24 *Coalition Clean Baltic v Council of the European Union* (pending); T-577/22 and T-648/22 *ClientEarth AISBL v Council of the European Union,* EU:T:2025:631.

[244] Council of the European Union, ‘Reply to ClientEarth request for internal review of Council regulation (EU) 2022/515; Council of the European Union, ‘Reply to Coalition Clean Baltic (CCB) request for internal review of Regulation (EU) 2023/194.

[245] T-577/22 and T-648/22 *ClientEarth AISBL v Council of the European Union,* EU:T:2025:631, paras. 50, 77-78.

[246] Ibid, paras. 56-76.

The Court found that cod in the Kattegat, pollack, and common sole constituted by-catch stocks under their respective multiannual plans. Those stocks were therefore subject to the broader management objectives in Article 2 rather than strict MSY ranges. As regards common hake and Norway lobster, the Court acknowledged that those species were classified as target stocks under the Western Waters Plan. However, it held that where ICES is unable to determine MSY ranges due to insufficient scientific data, such stocks may nevertheless be managed as by-catch stocks pursuant to Article 4(6) of that regulation. The Council therefore retained a broad margin of discretion in setting TACs for all the contested stocks. The Court further clarified that this discretion is not confined to situations involving zero-catch advice. It also extends to situations in which quotas are set at levels low enough to risk the premature closure of the fishery. On that basis, the Court found that the Council had neither made a policy choice reserved for the legislator under Article 43(2) TFEU nor exceeded the limits of its discretion. The application was therefore dismissed. The General Court further applied the same differentiated management logic to the North Sea Multiannual Plan. It noted that Articles 4 and 5 of that plan are identical in substance to the corresponding provisions of the Western Waters Plan. In doing so, the Court extended the approach adopted in *Friends of the Irish Environment* to that context as well.[247]

The General Court's ruling in *ClientEarth v Council* is significant for two reasons. First, the use of an extended composition, a formation reserved, according to Bobek, for cases of particular complexity, political sensitivity, or legal importance, lends additional authority to the judgment and,[248] by extension, to the approach adopted by the CJEU in *Friends of the Irish Environment*.[249] The General Court's explicit endorsement of that reasoning in an extended composition removes much of the uncertainty surrounding its precedential value. Second, the extension of the differentiated management logic to the North Sea Regulation confirms that the underlying approach is not confined to the Western Waters context, but instead reflects a more general feature of the CFP framework as shaped by the interinstitutional agreement. Together, these two developments strengthen the grounds for treating *Friends of the Irish Environment* as authoritative regarding the configuration of institutional balance within the CFP. At the same time, it should be acknowledged that the analysis currently rests on only two judgments. Moreover, several aspects of the framework,

[247] Ibid paras. 77-93.

[248] Bobek (2021), pp. 2-3, 11-12.

[249] Opinion of AG Ćapeta in C-330/22 *Friends of the Irish Environment CLG v Minister for Agriculture Food and the Marine and Others*, EU:C:2023:487; *Friends of the Irish Environment CLG v Minister for Agriculture, Food and the Marine and Others*,:EU:C:2024:19.

particularly under multiannual plans that differ more significantly from the Western Waters and North Sea models, continue to lack full clarity.

6.2 Coalition Clean Baltic v Council (T-342/24)

A second case in this line of litigation, brought by the Swedish-based NGO Coalition Clean Baltic, is at the time of writing still pending before the General Court. The applicant challenges the Council's allocation of TACs for Bothnian and Central Baltic herring under Article 43(3) TFEU, arguing that the Council exceeded its competence by overstepping the limits of its discretion as defined by the policy choices laid down under Article 43(2) TFEU.[250]

The case concerns the Baltic Plan, which differs in important respects from the North Sea and Western Waters Plan. Designed to cover a smaller number of stocks in a context where the choke species problem is less prevalent, the Baltic MAP contains more stringent and prescriptive management rules. A key example is Article 4(7), which introduces a quasi-trigger rule incorporating a 5% risk threshold expressed as the probability of the spawning stock biomass falling below a biological safeguard indicating a critical level below which a stock risks impaired reproductive capacity and potential collapse.[251] The core conflict in the present case therefore concerns not Article 2(2) of the Basic Regulation, as in the two earlier cases, but rather the extent to which Article 4(7) of the Baltic MAP restricts the Council's discretion under Article 43(3) TFEU. The applicant argues that the provision establishes a hard legal threshold that effectively eliminates that discretion. The Council, by contrast, contends that the provision must be interpreted systemically within a broader set of management tools, thereby preserving a margin of discretion even where the threshold is triggered.[252]

The Court's ruling in this case will therefore be of particular interest. At its core, the case raises the same underlying constitutional question as the two preceding cases, namely how specifically the legislative framework under Article 43(2) TFEU must be framed in order to constrain the Council's discretion under Article 43(3) TFEU. What differs, however, is the regulatory context and the specific provision at issue.[253] The extent to which the Court relies on, or departs from, the precedent established in *Friends of the Irish Environment* and confirmed in *ClientEarth v Council* will therefore be significant. Addressing the same constitutional question in a different

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[250] T-342/24 *Coalition Clean Baltic v Council of the European Union* (pending).

[251] SWD(2014) 291 final, pp. 13, 15, 31; Penas Lado (2020), p. 58.

[252]Council of the European Union, 'Reply to Coalition Clean Baltic (CCB) request for internal review of Regulation (EU) 2023/194.

[253] T-342/24 *Coalition Clean Baltic v Council of the European Union* (pending). C-330/22, *Friends of the Irish Environment CLG v Minister for Agriculture, Food and the Marine and Others*,:EU:C:2024:19.

regulatory context may therefore allow for broader conclusions to be drawn regarding what the Court's approach to judicial review of measures adopted under Article 43(3) TFEU reveals about the configuration of institutional balance within the CFP.

7 Conclusion: Final reflections

7.1 A balance defined outside the Treaties

As this thesis has sought to demonstrate, the institutional balance within the CFP cannot be adequately understood through the Treaty framework alone. Although Article 43 TFEU establishes two formally distinct models of democratic legitimacy, namely the dual basis of legitimacy under Article 43(2) TFEU, combining the representation of citizens through the European Parliament with the representation of Member States through the Council, and the sole basis of legitimacy under Article 43(3) TFEU, reserved exclusively to the Council, the Treaties do not capture the entirety of the institutional balance as it exists in practice.

In practice, the scope of the Council's competence under Article 43(3) TFEU is not determined by the Treaties alone, but is shaped through a combination of the Court's case law, secondary legislation adopted under Article 43(2) TFEU, and an interinstitutional agreement that has never been formally adopted through the ordinary legislative procedure. As demonstrated through the analysis of the MSY objective and the subsequent multiannual plans, an interinstitutional agreement concluded outside the formal legislative process has been instrumental in defining how the central legislative choice embodied in Article 2(2) of the CFP Basic Regulation applies in practice. The Court's ruling in *Friends of the Irish Environment* subsequently confirmed and extended by the General Court in *ClientEarth v Council* further entrenches this dynamic by reading Article 2(2) in light of a framework that was itself shaped outside the ordinary legislative procedure.

The practical consequence is that, although the Council's formal competence under Article 43(3) TFEU is directly Treaty-based, the actual scope is variable, expanding or contracting depending on how detailed the legislative framework adopted under Article 43(2) TFEU is, and how broadly or narrowly the Court interprets it. The institutional balance within the CFP is therefore not a fixed constitutional arrangement but a moving target, defined as much in the "constitutional twilight zone"[254] identified by Lenaerts and Verhoeven as by the Treaties themselves.

7.2 The Council's prerogative: technically framed, politically charged

Within this framework, the Council, in the light of the Court's ruling in *Friends of the Irish Environment* and *ClientEarth v Council*, has a considerable prerogative under Article 43(3) TFEU, at least under both the Western Waters and the North Sea plans. Although the Court has consistently

[254] Lenaerts and Verhoeven (2002), p. 48.

characterised measures adopted under that provision as being of a ´primarily technical´ nature, the analysis has demonstrated that this characterisation obscures the deeply political dimension of TAC decisions. This was illustrated by the factual circumstances in *Friends of the Irish Environment*, where setting the TAC required the Council to balance the protection of stocks on the verge of collapse against the social and economic consequences of a fishery closure estimated at approximately EUR 1 billion. The allocation of fishing opportunities is therefore not a technical exercise but a normative one. It involves choices between competing environmental, social, and economic interests that are every bit as politically significant as the basic policy choices formally reserved for the legislator under Article 43(2) TFEU. Craig's observation that there is "no simple dichotomy between principle and detail"[255] is therefore particularly relevant in the CFP.

7.3 Democratic legitimacy in practice: a system falling short

This leads to the central normative question raised by this thesis: whether the configuration of institutional balance within the CFP as revealed in *Friends of the Irish Environment* adequately fulfils the democratic ideal enshrined in Article 10(3) TEU that decisions be taken as openly and as closely to citizens as possible. The analysis suggests that, measured against this standard, the CFP falls short and does so at both levels of its institutional framework.

Under Article 43(3) TFEU, the European Ombudsman's findings confirm that decision-making on the annual allocation of fishing opportunities has been systematically characterised by a lack of transparency, restricted access to documents, and inadequate accountability to national parliaments and the public. Decisions that directly and profoundly affect coastal communities, fishing industries, and marine ecosystems are taken in working groups and informal settings far away from the citizens and national parliaments whose interests they are intended to represent.

Under Article 43(2) TFEU, the picture is more nuanced but ultimately similarly troubling. Although the 2013 CFP reform demonstrated that the legislative process under Article 43(2) TFEU has the potential to function in a comparatively open and accountable manner involving extensive public consultation, broad institutional engagement, and substantive responsiveness to civil society input this potential has been significantly undermined in practice. The interinstitutional agreement that in practice shaped all subsequent MAPs and the subsequent implementation of the MSY objective was concluded outside the ordinary legislative procedure, without a joint record of deliberations and never formally adopted by the co-legislators. The practical consequence is that there is no publicly accessible

[255] Craig (2019), p. 112.

account of the arguments advanced, the positions taken, or the trade-offs made in reaching its conclusions. Furthermore, as the Court's ruling in *Friends of the Irish Environmen*t confirms, the wording of Article 2(2) formally unchanged now entails in practice something substantially different from what it states. Citizens and affected stakeholders are therefore left in a position where the meaning of a key legislative choice is determined by a combination of informal institutional agreements and judicial interpretation, while the formal text remains unaltered. As AG Ćapeta observed, where the intentions of the legislator cannot be clearly known, meaningful opposition cannot form neither within the European Parliament nor among affected stakeholders and citizens cannot reflect their agreement or disagreement at the ballot box, whether at the national or European level.

Taken together, these observations support the conclusion reached by Mendes, that both channels of representative democracy within the Union suffer from considerable deficiencies in ensuring that decisions are taken openly and closely to citizens, and that these deficiencies are particularly acute where decisions are adopted by the Council alone. In the CFP context, this concern is not merely theoretical. The structural weaknesses of representative democracy within the Union, combined with the sector-specific features of CFP decision-making identified throughout this thesis, produce an institutional configuration in which the gap between the formal democratic framework and its practical operation is both real and significant and in which the right to participate in the democratic life of the Union under Article 10(3) TEU risks becoming, for those directly affected, more formal than actual.

7.4 The efficiency argument and the tragedy of the commons reconsidered

One might object that this democratic deficit is the price of effective governance: that broader participation would slow an already cumbersome system and further hinder the CFP's capacity to achieve the objectives set out in Article 39 TFEU. On this view, the Council's practice of conducting key deliberations at sub-ministerial and informal levels, the informal interinstitutional negotiations that resolved the deadlock over multiannual plans, and the Court's contextual interpretation of Article 2(2) contrary to its literal meaning all reflect not failures of democratic legitimacy but deliberate and necessary efficiency gains, the pragmatic price of making a complex and technical politically sensitive policy work.

This thesis does not, however, find that argument persuasive. As the introductory discussion of Hardin's tragedy of the commons already anticipated, the top-down nature of CFP decision-making has in practice been a structural failing rather than an efficiency gain. In the Commission's own words, the fishing industry has been given “few incentives to behave as a responsible actor accountable for the sustainable use of a public resource”.[256] The consequence has been precisely what Hardin predicted: short-term overexploitation driven by individual actors pursuing their immediate interests, thereby eroding the very ecological and economic basis on which the objectives of Article 39 TFEU depend. This is not merely a historical diagnosis. Recent assessments of European fish stocks conducted by the EEA confirm that overfishing and stock depletion remain significant despite the reforms made to the CFP.

As Ostrom's empirical research demonstrated, the solution is not to maintain a system that insulates decision-making from those most affected by it, but rather to do the opposite. When communities of resource users are given effective institutional means to participate in setting the rules governing their shared resources, they develop stable and sustainable management systems, precisely the outcome the CFP has so often failed to achieve. When people genuinely participate in shaping the rules, they have a stake in following them. Responsibility follows participation. The Commission itself recognised this problem in its 2009 Green Paper, warning that “very little can be achieved if the CFP fails to motivate the catching sector, the processing and seafood chain as well as consumers to support the objectives of the policy and take responsibility for implementing them effectively”.[257] The Green Paper therefore explicitly called for co-management arrangements designed to strengthen participation and shared responsibility within the CFP.

Both the Commission and Ostrom point to the same conclusion: the answer to the tragedy of the commons in European fisheries is not less democratic participation, but more. The solution is therefore not a system in which national ministers negotiate shares behind closed doors, or in which representatives make decisions through informal interinstitutional task forces. Rather, it is a system in which those who depend on the resource, fishers, coastal communities, and ultimately European citizens, have genuine and effective institutional means to participate in decisions that shape its future. Far from being an obstacle to effective management, broader democratic engagement is, as both Ostrom's empirical research and the Commission's own analysis confirm, a precondition for it.

7.5 Looking forward: towards participatory democracy in the CFP

If representative democracy as currently configured is insufficient to ensure that CFP decisions are taken as openly and as closely to citizens as possible, and if the efficiency argument does not provide a convincing defence of the

[256] COM (2009) 163 final, p. 11.
[257] Ibid, p. 11.

status quo, the question that presents itself is where to look for a remedy. This thesis suggests that the answer, as also argued by Mendes and Marxsen, may lie in a part of the Union's democratic framework that has received comparatively little attention in the CFP context: the principle of participatory democracy enshrined in Article 11 TEU. In contrast to the representative model of Article 10 TEU, which channels democratic legitimacy through elected institutions, Article 11 TEU creates a direct relationship between the Union's institutions and citizens and civil society organisations, requiring the institutions to maintain an open, transparent, and regular dialogue with representative associations and civil society (Article 11(2) TEU), and to carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent (Article 11(3) TEU).

Participatory democracy under Article 11 TEU does not replace representative democracy but complements it, providing an additional channel through which those affected by Union decisions can engage with the institutions directly and at an earlier stage in the decision-making process. In the CFP context, decisions under Article 43(3) TFEU are adopted with limited transparency. Moreover, the practical meaning of legislative choices under Article 43(2) TFEU has been shaped by informal interinstitutional processes operating at a considerable distance from citizens. The effective operationalisation of Article 11 TEU could therefore offer a meaningful corrective. It would also align more closely with Ostrom's design principles, which emphasise precisely the kind of direct and structured participation by resource users that representative channels alone have failed to deliver.

This is not a complete solution. Participatory democracy mechanisms face well-documented limitations, including the risk of capture by well-organised interests, the challenges of ensuring genuinely representative participation across linguistic and geographic boundaries, and the difficulty of translating consultation inputs into substantive institutional outcomes. These limitations counsel caution. They do not, however, counsel inaction. The trajectory of the case law examined in this thesis, from *Friends of the Irish Environment* through *ClientEarth v Council* and towards the pending *Coalition Clean Baltic v Council,* suggests that questions of institutional balance within the CFP will continue to be litigated and judicially defined for years to come. The Court's role in shaping the practical scope of the Council's competence under Article 43(3) TFEU is significant and, as this thesis has demonstrated, not without democratic implications. But judicial clarification, however important, cannot substitute for the deeper democratic engagement that the management of the CFP ultimately demands.

The sea, as Grotius observed, is common to all. So too, I argue, should the decisions that determine its future.

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