

The impact of the Lisbon Treaty on EU fisheries policy - an environmental perspective

I. Introduction

Unlike under the 'old' Treaty Establishing the European Community (TEC), which made no express reference to a common fisheries policy, the Lisbon Treaty now explicitly mentions a common fisheries policy (as well as a common agricultural policy) in Article 38, TFEU, although there are still no separate or differentiated objectives for the two policies. This is discussed in section II below.

In addition to this, the Lisbon Treaty also changes other aspects of fisheries policy. For example, it introduces new and differentiated legislative procedures that both add and detract from the involvement of the European Parliament depending on the type of measure (and therefore legislative procedure) involved (this is discussed in section III below). It also imposes shared competence between the EU and Member States in relation to fisheries in general, with the exception of the conservation of marine biological resources. What exactly this means will be crucial to fisheries management in future and particularly in relation to the next Common Fisheries Policy reform. However, the issue of competence is also extremely important with regard to the inter-relationship between environmental and fisheries laws, at national and EU level (see section IV below).

Another issue discussed in this paper are some of the question surrounding the choice of legal base for fisheries management measures, particularly if fisheries management objectives become more and more environmental in outlook (see section V below).

In discussing all of these issues, the following paper will focus on the provisions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as amended by the Lisbon Treaty 2007. However, the paper also discusses general principle of EU law and secondary legislation, such as Regulation 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (the Basic CFP Regulation), where it is relevant or necessary to do so.

II. The objectives of the CFP

In order to be able to usefully address all of the issues discussed in this paper, it is helpful first to establish the CFP's objectives and scope.

As already mentioned, the TFEU now makes express reference to a common fisheries policy (CFP), (as well as a common agricultural policy (CAP)) - in Article 38, TFEU.

However, both the CFP and the CAP still fall within the same Treaty title (Title III on Agriculture and Fisheries), have joint objectives (Article 39, TFEU) and the same legal basis (Article 38, TFEU and Article 43(2) and 43(3), TFEU). Moreover, there are still no separate or differentiated objectives for the two policies, and Article 38(1), TFEU makes clear that references to 'agriculture' are to be understood as also referring to fisheries.

The general objectives for the CAP (and thus also the CFP), as set out in Article 39(1), TFEU are all economic/market-related, such as increasing productivity, ensuring a fair standard of living, stabilising markets etc. In addition, Articles 40 – 42, TFEU aim to ensure the establishment of a common market.

All these goals are relevant to fisheries policy in the EU, but none have overtly environmental or even sustainability goals, although it could be argued that the 'rational development of agricultural production' and assuring the availability of supplies (paras (a) and (d) of Article 39(1), TFEU) could be interpreted as being partially linked to environmental and sustainability objectives - although with a firmly market/economic focus, rather than an environmental one. In effect, Title II on Agriculture and Fisheries deals with the economic and social aspects of the sustainable development objectives of the Treaty, but not with the environmental one.

However, it is now also necessary to include the environmental element of sustainable development in the CFP and, as will also be seen in section V of this paper, the nature of the CFP has changed substantially. What started as a common structural policy and a common market policy now also includes conservation and environmental goals. Therefore, the question arises how this relates to the objectives expressed for fisheries in the Treaty.

Two observations are relevant here. Firstly, Article 38(1), TFEU states that references to the CAP are to be understood to include fisheries, '**having regard to the specific characteristics of this sector**' (emphasis added), and secondly, Article 43(2), TFEU, which establishes one of the legal bases for CFP instruments (see section V below), mentions '**the pursuit of the objectives** of the common agricultural policy and **the common fisheries policy**' without specifically referring to the objectives of the CAP and CFP **as set out in the**

Treaty, which would usually be expected and is the norm in relation to other EU policy areas.¹

In the light of the lack of separate, clear fisheries-related objectives in the Treaty, and considering the qualifying language used in relation to the 'specific characteristics' of the fisheries sector in Article 38(1), TFEU and the open wording in the general reference to the objectives of the CFP, it is therefore necessary to go to the relevant secondary legislation for guidance on interpreting what the Treaty means when it refers to the objectives of the CFP or its 'specific characteristics'.

(i) The Basic CFP Regulation

Article 1(1) of the Basic CFP Regulation, describes the scope of the CFP as encompassing

'conservation, management and exploitation of living aquatic resources, aquaculture, and the processing and marketing of fishery and aquaculture products',

and Article 1(2) provides (still in relation to the scope of the CFP) that the CFP is to provide for coherent measures concerning a number of factors. Some of these are based on common market and economic goals or are related to the objectives set out in Article 39ff, TFEU (e.g. para (d) regarding structural policy or para (g) regarding the common organisation of the markets). However, others go further, for example, by covering the conservation (and management) of fisheries resources (para (a)), not simply fisheries productivity and the availability of supplies, and by requiring measures that limit the environmental impact of fisheries.

Distinguishing scope and objectives

It is important to distinguish the CFP's broad scope from its actual objective, which is much more specific. The Basic CFP Regulation sets out the CFP's fundamental objective in Article 2(1) as the

'exploitation of living aquatic resources ...'.

In order to reach this fundamental objective, Article 2(1) also requires a precautionary approach to be taken in 'taking measures designed to':

- 'protect and conserve living aquatic resource';
- 'provide for their sustainable exploitation'; and
- 'minimise the impact of fishing activities on marine eco-systems'.

In addition, it requires the EU to aim

¹ e.g. Article 192 refers to the objectives set out in Article 191; Article 194(2) refers to the objectives in Article 194(1) etc.

'at a progressive implementation of an ecosystem based approach to fisheries management'; and

'to contribute to efficient fishing activities within an economically viable and competitive fisheries and aquaculture industry, providing a fair standard of living for those who depend on fishing activities and taking into account the interests of consumers.'

The nature of the **CFP and its objectives will be hugely relevant to the examination of issues surrounding exclusive and shared competence and surrounding the choice of legal base.**

III. Legislative procedures for EU fisheries laws after the Lisbon Treaty

As already seen above, unlike the old Article 37, TEC, the Lisbon Treaty explicitly establishes a legal base for a common EU fisheries policy in Article 43, TFEU, although, as also seen above, both the CAP and the CFP continue to be dealt with under the same legal base. What is new for both agriculture and fisheries, however, is the introduction of two different legislative procedures. Thus:

- **Article 43(2), TFEU** applies in relation to:
 - the establishment of the **common organisation of agricultural markets** (which includes fisheries under Article 38(1) – see above);
 - **'the other provisions necessary for the pursuit of the objectives** of the common agricultural policy and the **common fisheries policy'** (emphasis added).

Measures subject to Article 43(2), TFEU will be subject to the **ordinary legislative procedure** (formerly the co-decision procedure, now set out in Article 294, TFEU), fully involving the Commission, the Council and the European Parliament.

- **Article 43(3), TFEU** relates to proposals from the Commission regarding measures:
 - on **'the fixing and allocation of fishing opportunities'**; and
 - in relation to **pricing, levies, aid and quantitative limitations.**

Measures under Article 43(3) will be subject to a **special legislative procedure**, although in this case the relevant procedure is not expressly referred to as a 'special legislative procedure', and in contrast to some of the other special legislative procedures under the Lisbon Treaty, **there is**

no consultation or indeed any involvement of the European Parliament whatsoever in relation to the decision-making process under Article 43(3), TFEU.

A measure under Article 43(3), TFEU is proposed by the Commission and passed by the Council by qualified majority vote (see Article 16, TEU), without any consultation of Parliament. However, it should be noted in this context that Article 293, TFEU applies to Article 43(3), which means that **although qualified majority voting will be needed to pass proposals by the Commission in Council, Council will only be able to amend such proposals by unanimity.**

Measures which will fall within Article 43(3), TFEU will, for example, include:

- the setting of annual total allowable catch limits (TACs);
- public aid under a reformed Fisheries Fund (or similar); and
- any taxes or levies that may be introduced as part of a reformed CFP.

Clearly, because of the different legislative procedures that follow from the choice between the two legal bases in Article 43, the question as to what exactly falls within the process of 'fixing and allocating fishing opportunities' will now become extremely important from a political point of view. TACs clearly fall within this definition, as would any other method which defined the amount of fish (and other relevant) species that Member States and/or fishers were allowed to harvest.

The situation is already less obvious in relation to multi-annual management and recovery plans and fishing effort limitation. If, for example, fishing effort limitation became the main regulatory tool of a reformed CFP, and TACs, for example, were abolished, then it is likely that fishing effort limitation would be seen as the main process through which fishing opportunities were allocated. This is underlined by the fact that, currently, annual regulations allocating fishing opportunities (which were already subject to the provisions of the Lisbon Treaty) also encompass rules on fishing effort restrictions and on technical measures.²

However, compared to TACs for example, fishing effort regulation could be seen as more uncertain and indirect, and could be argued to fall more naturally within the objectives of Article 43(2), TFEU. The regulation of technical measures has an even more indirect effect on the allocation of fishing opportunities (although it could be argued that restricting the ability to catch certain sizes/species of fish by mesh size for example, is a way of allocating fishing opportunities). However, these are very indirect effects, and if this kind of argument is used, most fisheries management measures could potentially be seen as measures relating

² See for example Article 8, Article 9, Annex II and III of Regulation 1226/2009 fixing the fishing opportunities and associated conditions for certain fish stocks and groups of fish stock applicable in the Baltic Sea for 2010.

to the fixing and allocation of fishing opportunities, as most CFP rules ultimately affect the allocation of fishing opportunities in some way.

There is clearly a potential conflict between what has been an existing general rule and the future need to differentiate more, as the general rule is replaced by several more specific rules.

How this issue is dealt with will fundamentally determine the future importance of the European Parliament in fisheries regulation.

An additional point that should be made here is that in many cases the 'allocation of fishing opportunities' will coincide with fish stock conservation objectives, which means that, as well as falling under the relevant special legislative procedure, the allocation of fishing opportunities under Article 43(3), TFEU would also be subject to exclusive EU competence, so that Member States could not pass their own national legislation in this regard, even in the absence of EU legislation (see section IV below).

IV. Legal competences of the EU and Member States with regard to fisheries

For the first time, the Treaty defines the different **categories of the EU's competences** as being exclusive, shared and supporting. Exclusive competence means that the Union has the responsibility to legislate and Member States are only able to do so if they are empowered by the Union or for the implementation of Union acts (see Article 2(1), TFEU). Shared responsibility means that legislation and policy are formulated jointly by the EU and the Member States, but Member States can exercise their competence only to the extent that the Union has not exercised its competence or has decided to cease exercising its competence (see Article 2(2), TFEU) Articles 2 to 6 of the TFEU list the respective areas for each type.

The EU's policy in relation to the environment, for example, is subject to shared competence between the EU and Member States (see Article 4(2)(e), TFEU). On the other hand, the Union has exclusive competence, for example, in relation to the customs Union or the common commercial policy (both Article 3(1), TFEU) and

'for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope.' (Article 3(2), TFEU)

a) The question of legal competence in the EU fisheries policy

i) Shared competence for agriculture and fisheries

In a significant change to EU policy, instead of being generally subject to exclusive EU competence, agricultural and fisheries policy are now in principle subject to shared competence between the EU and Member States - except as regards the conservation of marine biological resources (see Article 4(2)(d), TFEU) in relation to which Article 3(1)(d) provides for EU exclusive competence, but restricted to the conservation of marine biological resources **under the CFP only**).

As already seen above, shared competence means that Member States can exercise their competence to the extent that the Union has not exercised its competence or has decided to stop exercising it.

Thus, Member States should now be able to pass and implement national fisheries management measures in areas that are not specifically covered by EU legislation - unless they fall within exclusive competence under Article 3(1)(d), as discussed below.

This will be extremely significant for law and policy development in a number of different areas, particularly:

- the interrelationship between environmental law and fisheries;
- the application of the principle of subsidiarity in the fisheries context;
- potential regionalisation goals for a reformed common fisheries policy (CFP);
- the potential reduction of the number of technical measures and of micro management in relation to fisheries under a reformed CFP;
- the possible increase of industry responsibility and participation in a reformed CFP;
- the powers and duties, and the legal position, of Member States in the context of international environmental and/or fisheries agreements.

However, as already mentioned, although shared competence is now the general rule for fisheries, exclusive competence continues to apply to the '**conservation of marine biological resources under the common fisheries policy**' (under Article 3(1)(d), TFEU)).

At first sight this provision may not appear to curb shared competence too much. After all, as explained below, the main objectives of the CFP as set out in the Treaty are of a commercial/market type nature, and the main stated goal of the CFP under the CFP Basic CFP Regulation³ relates to the '**exploitation**' of fisheries resources (see first paragraph of Article 2(1), Basic CFP Regulation). However, as will be explained below, because of the general nature of the CFP's

³ Regulation 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

scope and goals, there is also room for interpreting Article 3(1)(d), TFEU more broadly.

(ii) The legal interpretation of Article 3(1)(d)

In order to be able to interpret Article 3(1)(d) properly, it is helpful to examine the meaning of:

- (i) marine biological resources;
- (ii) marine biological resources, but **under the common fisheries policy**; and
- (iii) **conservation** of marine biological resources, but under the common fisheries policy.

We will examine each of these points individually:

- (i) The expression '**marine biological resources**' appears to be a new one in relation to the CFP.

According to the Convention on Biological Diversity 1992 (CBD), 'biological resources' include:

'genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems **with actual or potential use or value for humanity**'.⁴

Although this means that the term 'biological resources' is potentially very wide, including, for example, the living components of marine ecosystems, not just particular species, it only relates to **resources, not biodiversity in general**. There must be an '**actual or potential use or value for humanity**'. Therefore, species, habitats or living components of ecosystems are only covered by this definition if they are (i) living **marine** resources; and (ii) of use or of value, which in fisheries arguably means that they are **exploitable and harvestable** (especially when read in conjunction with the definition of 'living aquatic resources' in Article 3(b), Basic CFP Regulation – see next paragraph).

In addition, the entire meaning of Article 3(1)(d) is limited by the words 'under the common fisheries policy' (see next paragraph).

- (ii) Marine biological resources, but **under the common fisheries policy**.

As already seen, the Basic CFP Regulation restricts the CFP's fundamental objective in Article 2(1) to the '**exploitation of living aquatic resources**

⁴ The term 'biological resources' is defined in Article 2 of the Convention on Biological Diversity 1992 (CBD) as: 'genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity'.

that provides sustainable economic, environmental and social conditions' (emphasis added).

'Living aquatic resources' according to Article 3(b), Basic CFP Regulation means '**available and accessible living marine aquatic species...**' (emphasis added). This definition is very clearly restricted to '**marine aquatic species**' only, and to those species that are '**available and accessible**'.

This limits the potentially wider scope of living resources under the CBD definition to a strictly **species-based** definition. Read together, the CBD definition and Article 3(b), Basic CFP Regulation show that what is covered by Article 3(1)(d) is living exploitable (i.e. useful, valuable and available, accessible) fish (and other relevant) species. The definition does not include, for example:

- other living components of the marine ecosystem (e.g. other marine organisms);
- non-aquatic species, such as seabirds;
- species that are not useful/valuable and/or accessible (i.e. exploitable),

So it cannot include wider marine environmental protection goals. This is a crucial point relating to the way that marine environmental rules and laws can now be dealt with by Member States (see below).

Therefore, irrespective of how Article 3(1)(d) is otherwise interpreted, **it does not encompass conservation for the purposes of marine environmental protection generally**, even if such conservation necessitates the regulation of fishing activities.

(iii) **Conservation** of marine biological resources, but **under the common fisheries policy**.

As already mentioned, the CBD covers species and their ecosystems. In view of the additional duties imposed on the EU under the second paragraph of Article 2(1) Basic CFP Regulation (to take a precautionary approach, to protect and conserve living aquatic resources, to minimise the impact on marine ecosystems and to implement an ecosystems based approach to fisheries management), it may be argued that the living components of ecosystems that are crucial for fish stock conservation are also marine biological resources under the CFP.

Moreover, the types of measures that are currently regarded as 'conservation' measures under the CFP also include a wide range of management/economic/market-based measures of a much broader description. Thus, the Commission lists as 'conservation measures' under

the CFP total allowable catch limits (TACs), technical measures (e.g. on mesh sized, selective fishing gear, closed areas, landing sizes, bycatch limits etc), fishing effort limitation and fixing the number and type of fishing vessels authorised to fish.⁵ Moreover, it is not clear whether economic incentives are also included under the heading of conservation measures.⁶

Reading Article 2(1) and Chapter II together, it becomes clear that under the Basic CFP Regulation at least, CFP 'conservation measures' can include a wide range of quite general management measures, which include the management of fish stocks, but can also go further, for example measures to provide incentives to promote more low impact fishing. Therefore, on a wider interpretation of Article 3(1)(d), it may be possible to argue that the 'conservation of marine biological resources under the CFP' could include all of these 'conservation' measures.

However, the following should be borne in mind:

- The Basic CFP Regulation is merely secondary legislation and is subordinate to Treaty provisions. As discussed above, the CFP objectives listed in the Treaty are generally economic/market based and do not relate to conservation. In addition, the question arises whether it could really be the intention of the Treaty to introduce shared competence to fisheries management, but then to define it in such a way that it would virtually never apply.
- Even in the Basic CFP Regulation, there is no express definition or explanation of the meaning of 'conservation' or 'conservation measures', but there is a **definition of 'living aquatic resources'** (which, as seen above, when read in conjunction with the CBD definition basically limits the living marine resources in question to **exploitable** fish and other harvestable **species**), and the **clear primary objective** in the Basic CFP Regulation is expressed in terms of **exploitation, not conservation** of living aquatic resources.
- The conservation objectives in the second part of Article 2(1), Basic CFP Regulation, setting out the objectives of the CFP, are subordinated to 'the exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions' – see the use of the phrase '[f]or this purpose' in the second paragraph of Article 2(1).

⁵ See Articles 1 and 2 and in Chapter II (Articles 4 – 10), CFP Basic Regulation, and Commission explanations at

http://ec.europa.eu/fisheries/cfp/management_resources/conservation_measures_en.htm.

⁶ Ibid.: *'In addition to these conservation measures, economic incentives and measures may be used to promote more selective fishing, reduce fishing effort and to alleviate the economic consequences some of these measures may have on the livelihood of fishermen.'*

- The general conservation objectives referred to above (i.e. in Article 2(1), Basic CFP Regulation and Chapter II) are counter-balanced by (and treated as equal in importance with) the economic and social goals also set out in Article 2(1), Basic CFP Regulation (see above), in both the first and the second paragraphs of Article 2(1).

All of these considerations lend support to a narrower interpretation of Article 3(1)(d). However, as already mentioned above, this is by no means clear.

A wider interpretation encompassing all the various fisheries management measures that currently pass as 'conservation' measures under the CFP would **severely restrict the application of shared competence**, as the great majority of fisheries management measures under the CFP could be interpreted as conservation measures then. There appear to be only very few areas within fisheries management and fisheries policy that would not be regarded as conservation measures under such a view. Those few areas left would, for example, include control and enforcement, measures relating to social and economic issues, and fisheries management measures which are required for purposes outside the CFP itself (e.g. for environmental purposes – see below).

How this is going to be interpreted is going to crucially determine the future shape, decision-making and management structures of a reformed CFP, in particular, for example, as regards regionalised fisheries management and incentivising the fishing industry to operate more sustainably. In our view this may well turn into one of the major areas of political disagreement between Member States and the EU.

b) The relationship between fisheries and environmental law and policy

In the past (before the Lisbon Treaty), fisheries policy was strictly subject to EU competence, which meant that only the EU could prescribe (or specifically empower Member States to prescribe) **fisheries management measures**, irrespective of what these measures were, i.e. whether those measures were, for example, intended to deal with health and safety on fishing boats, or to conserve fish stocks or to conserve the marine environment more generally.

This highlights one of the fundamental problems with the CFP in the past: Although the general scope and objectives of the CFP included the conservation and protection of ecosystems and the marine environment in relation to fisheries (see above), those conservation objectives have only been secondary to the main goal of exploiting fish stocks (and other relevant species). Therefore, **no (or hardly any) management measures have actually been available under the CFP (or under EU environmental policy) to meet these**

objectives, even though this has meant that fisheries policy and practice has been in breach of EU environmental law and policy.⁷

Moreover, because fisheries policy was an area of exclusive competence, Member States were not allowed to impose their own environmental fisheries management rules.

Therefore, until now, there has been an almost complete lack of any fisheries management or fisheries conservation measures to protect the marine environment in general. The only effective fisheries management measures prescribed by EU law in this context were:

- under the CFP: the closure of areas to fishing (and rules on low impact/selective gear); and,
- under EU environmental law: the use of the appropriate assessment mechanism under Article 6(3) of the Habitats Directive.

Now that the Lisbon Treaty is in force, and fisheries policy is to be subject to shared competence between the EU and Member States, this should change.

As already stated, conservation measures and/or fisheries management measures required for the purposes of general marine conservation will not fall within the Article 3(1)(d) definition. Therefore, any fisheries management measures aimed at general environmental conservation and protection, as opposed to fish stock conservation, will be subject to shared competence between the EU and Member States.

In this context, please note that throughout this paper, reference is often made to 'fish stocks' or 'fish stock conservation' only, without necessarily referring to other commercially harvested/harvestable species. However, this is for ease of reference only, and, unless otherwise stated, other species that may be commercially exploited/exploitable are deemed to be included when these terms are used. This means that in all those cases where in the past there has been a failure to prescribe EU fisheries management measures to protect the environment, Member States can now pass national measures which could force fishers to take measures to protect the marine environment (either to comply with national or EU environmental law), as long as no specific EU measures are prescribed anyway.

This could become extremely important with regard to the Habitats Directive,⁸ the Marine Strategy Framework Directive⁹ and even the Environmental Liability Directive.¹⁰

⁷ Please also see ClientEarth individual response to the Commission's Green Paper on CFP Reform: <http://www.clientearth.org/reports/marine-conservation-cfp-green-paper-response-09.pdf>.

⁸ Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora.

⁹ Directive 2008/56/EC establishing a framework for Community action in the field of marine environmental policy.

Competence

Exclusive

Shared

Wide interpretation:
can include many
'conservation'
measures under
current CFP: how
manage
regionalisation?

Narrow interpretation:
only harvestable
species stock
management; all other
management
measures shared:
regionalisation easier

Definitely
environmental
protection, but
general fisheries
management depend
on interpretation of
exclusive competence

c) Conclusion

In conclusion, whatever meaning of Article 3(1)(d) is finally agreed on, from an environmental point of view, the extension of shared competence under Article 4(2)(d), TFEU means that Member States are now no longer prevented from passing national measures to ensure that fishing activities comply with EU and national environmental rules where no specific EU fisheries management measures exist to ensure this. This could be achieved either under fisheries (applying the integration principle) or environmental policy (which is discussed further in section V below).

The pending CFP Reform could help to promote clarity in this regard and set clear rules, but, the pre-Lisbon Treaty gap in relation to compliance with environmental law has been eliminated.

In addition, Article 4(2)(d), TFEU introduces shared competence in relation to fisheries in general, but what is covered by shared and what by exclusive competence, will depend in great part on whether there will be a narrow or a wide interpretation of Article 3(1)(d), TFEU.

¹⁰ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

Applying a narrow interpretation of the wording of Article 3(1)(d), TFEU and relying on the CFP's primary objectives, Article 3(1)(d), TFEU would apply only to measures regarding fish stock conservation (meaning the conservation of commercial fish stocks and other commercially harvested species). This interpretation would probably make it easier for a reformed CFP to be built on the principles of regionalisation and increased industry responsibility and participation.

On a wider interpretation of Article 3(1)(d), TFEU a much broader view of what constitutes 'conservation measures' under the CFP may be taken, in which case Article 3(1)(d), TFEU would be capable of covering a vast range of different fisheries management measures. If a wider interpretation is applied, then some of the potential CFP reform goals would probably be much harder to achieve.

In our view a narrow interpretation of Article 3(1)(d) (meaning the conservation of fish and other harvestable/exploitable species), and therefore the general application of shared competence to fisheries management would make more sense legally and would enable the CFP to meet important reform goals, such as regionalisation and more responsibility and incentives for sustainable practices in the fishing industry.

V. The legal basis for an EU fisheries policy

a) The choice of legal bases between the Fisheries and the Environment Policies

(i) Environmental objectives

At first glance then, apart from the allocation of fishing opportunities, whatever that might be interpreted to include, all other fisheries-related measures should theoretically fall under Article 43(2), TFEU.

However, there is a distinct lack of clarity in Article 43(2), TFEU regarding the objectives of the measures in relation to which Article 43(2), TFEU should be used as a legal base. Thus, as already mentioned, it is to be used as a legal base for:

- the establishment of the common organisation of agricultural markets (as provided for in Article 40(1), TFEU), which in turn refers to the objectives set out in Article 39, TFEU (see section II above); and,
- the 'other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy'.

As already discussed in section II above, even though the Lisbon Treaty refers to a CFP as well as a CAP, there are no differentiated objectives for the two policies, and the nature of the CFP has changed substantially since it was first

conceived. The CFP is no longer a pure common market based policy (see section II above).

Thus the situation facing fisheries is one where the Treaty itself sets market based/economic objectives, and the specific objective of the Basic CFP Regulation (and of related regulations, e.g. regarding multi-annual recovery plans¹¹) relates to exploitation, rather than conservation, but at the same time there is a strong emphasis on conservation and on environmental objectives within the scope of the CFP.

With the pending reform of the CFP, environmental objectives are very likely to become even more important, and it is possible that environmental goals will be set above economic and social goals. This is further compounded by the need for the CFP to:

- achieve EU environmental objectives in accordance with the integration objective under Article 11, TFEU and under international law;¹²
- comply with requirements of the Marine Strategy Framework Directive, which in turn is based on the Environment Chapter, and especially on Article 191(2) (which includes in particular the application of the precautionary principle, principle of preventive action, rectification at source and polluter pays principle, and which requires fisheries to comply with and meet its aims and objectives);
- comply with international law requirements relating to the marine environmental protection and conservation;¹³
- be consistent with other Community policies, including on the environment (according to Article 2(2)(d), Basic CFP Regulation).

Given the absence of any specifically fisheries related objectives in the TFEU itself and the increasing weight of the environmental objectives in the CFP, the question arises, whether the CFP in future may serve a dual purpose, one related to common market goals and one to ensure the protection of the environment. It would be logical to conclude that, except for provisions clearly related to the Common Market, for example with regard to competition and pricing, or to the allocation of fishing opportunities, fisheries legislation should be based on the Environment Chapter of the Treaty, rather than the provisions relating to the CAP. Alternatively, and more probably, this could mean either that there could be a joint legal basis in relation to certain CFP instruments, or

¹¹ See for example, reference only to 'exploitation' and not 'conservation' in Article 3(1) of Regulation 1300/2008 establishing a multi-annual plan for the stock of herring distributed to the west of Scotland and the fisheries **exploiting** that stock (emphasis added).

¹² See e.g. Chapter 17, Agenda 21, Article 2(1)(a) OSPAR Convention, Article 3(1) Helsinki Convention, Para 30(b) and (e) of the Johannesburg Plan of Implementation under the WSSD.

¹³ See for example, Articles 21(d), 56(1)(a), 56(1)(b)(iii), 61, 62(4), 192 and 193, Law of the Sea Convention, Article 6b and 10a, CBD.

that there could be separate fisheries-related instruments under Article 43(2), TFEU and Article 192, TFEU.

(ii) Environmental policy legal basis

Considering whether the Environmental Chapter may be an appropriate legal basis for fisheries management measures that impact on environmental protection and conservation is important because a joint (or even single environmental) legal base could resolve or add clarity to a number of issues which have arisen or may otherwise arise as regards:

- the possibility of putting ecological sustainability, and therefore environmental considerations, first in a reformed CFP, including in particular the true application of an ecosystems based approach, as well as the application in practice of the precautionary and preventive principles, as well as the polluter pays principles;
- the potential (subject to the additional considerations set out at the end of this section in relation to legislative procedures) to apply stricter national rules in relation to environmental measures under Article 193, TFEU.
- additional emphasis and clarity in the application and enforcement of EU environmental rules in relation to fisheries (although see also section II and IV above in relation to new powers of Member States in this regard).

In order to establish whether a (partial) environmental legal basis for fisheries related measures is possible, it is also necessary to examine general EU legal principles:

It is settled EU case law that the choice of the legal basis for a Community measure 'must be based on objective factors which are amenable to judicial review' and that those factors 'include in particular the aim and content of the measure.'¹⁴

Generally, a measure that has a dual purpose, where there is one main and one incidental purpose, must be based on the legal basis that corresponds to the main or predominant purpose of the measure, and only:

'[e]xceptionally, if it is established that the act simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other, such an act may be founded on the various corresponding legal bases.'¹⁵

¹⁴ Both see for example, Case C-300/89 *Commission v Council* [1991] ECR I-2867 (the *Titanium Dioxide Case*) at para 10.

¹⁵ See e.g. Case C-336/00 *Republik Österreich v Martin Huber* [2002] ECR I-7699 (*Huber*) at para 31.

In addition, because according to the integration principle (see above) environmental protection requirements have to be a part of all EU policies, including fisheries,

'a Community measure cannot be part of Community action on environmental matters merely because it takes account of [environmental protection] requirements.¹⁶

Therefore, where environmental considerations are a contributory purpose for an EU measure, this does not mean that the measure must have an environmental legal basis.¹⁷

In fact, the question of the appropriate legal base was examined by the European Court of Justice in a fisheries-related case on limitations on the use of driftnets (imposed in Regulation 345/92). The Court concluded that:

'the limitation on the use of driftnets, imposed by the regulation at issue, was adopted primarily in order to ensure the conservation and rational exploitation of fishery resources and to limit the fishing effort. Those rules are [...] an integral part of the common agricultural policy, whose objectives [...] include ensuring the rational development of production and assuring the availability of supplies, and could therefore be validly adopted by the Council solely on the basis of the provisions governing the common fisheries policy';¹⁸ and,

'[t]he Court has consistently held [...] that Article 130r and 130s of the Treaty are intended to confer powers on the Community to undertake specific action on environmental matters. However, those articles leave intact the powers held by the Community under other provisions of the Treaty, even if the measures to be taken under the latter provisions pursue at the same time one of the objectives of environmental protection.¹⁹

However, this case pre-dates the last CFP reform, so environmental objectives were not yet quite so prevalent in the CFP. In addition, many of the conservation considerations which applied in relation to the relevant EU regulation related to fish stock conservation, rather than marine conservation in general.

In any case, as already seen, in theory at least, the scope of CFP already includes general environmental objectives, and the emphasis of the CFP is likely to change even more in this direction.

¹⁶ Ibid. at para 33, *Titanium Dioxide Case* at para 22, and see also Case C-405/92 *Etablissements Armand Mondiet SA v Armement Islais SARL* [1993] ECR I-6133 (*Mondiet*), at para 27.

¹⁷ See *Mondiet* at para 28.

¹⁸ Ibid. at para 24.

¹⁹ Ibid. at para 26.

b) Conclusion

If in a future reformed CFP, ecological sustainability is set above economic and social sustainability, if a true eco system based approach is applied, and if environmental conservation (not just fish stock conservation) are the main aims, then environmental objectives could become:

- **the CFP's main purpose, or**
- **one of the CFP's two main purposes, or**
- **a main purpose in relation to certain aspects of fisheries in certain instruments.**

In these cases, a joint, or in some cases even sole environmental legal basis would be possible in relation to fisheries related instruments, and should be considered.

The integration principle would need to be taken into account, but if environmental requirements were key to and a fundamental objective of a future CFP, rather than an incidental characteristic of fisheries policy, it should not be an obstacle in this context.

The following additional factors should be considered:

- As already mentioned above, the legislative procedures involved under Article 43(2) and (3) are different. As regards a potential joint (environmental/fisheries) legal basis this should not present a problem in relation to most measures, as many of the relevant measures would probably be based on Article 43(2), TFEU, which applies the ordinary legislative procedure, as does Article 192, TFEU (in relation to most environmental measures). Potential problems would only arise with reference to Article 43(3), which uses a different legislative procedure in relation to the allocation of fishing opportunities. In this case it would probably not be possible to use a joint legal case.
- It is a fundamental characteristic of environmental policy that Member States are allowed to maintain or introduce more stringent protective measures under Article 193, TFEU. No equivalent provision exists under the agriculture and fisheries Title of the Treaty. The existence of this right could be important in certain fisheries-related environmental measures. In the

case of a measure with a joint legal basis, it may - for the sake of clarity - be necessary to make this an express provision.



c) The potential importance of the integration principle

However, if the legal basis for the entire CFP, including any environmental provisions, continues to be Article 43 (for example because it is held that the objectives of the CFP legitimately include environmental and conservation goals²⁰), then the integration requirement will become crucially important in order to ensure that the CFP can satisfy the environmental objectives which are set by the Treaty and other environmental legislation, and it will be necessary for the CFP to include express measures or general provisions that enable it to comply with environmental objectives and requirements. It has already been explained that this is an obligation under Article 11, TFEU and under Article 37 of the Charter of Fundamental Rights, and that it is also necessary to meet the objectives of the Marine Strategy Framework Directive.

In this context, it is worth considering whether the absolute nature of the obligation to integrate environmental protection requirements into other EU policy areas, together with the aim to achieve a high level of environmental protection, and the fact that it is even included in the Charter of Fundamental

²⁰ e.g. due to the integration principle (as expressly referred to in Article 2(2)(d), CFP Basic Regulation) and due to the fact that even Article 3(1)(d), TFEU, for example, expressly refers to 'conservation', rather than management.

Rights, means that the integration 'principle' has now gathered such legal force that it is effectively an additional binding objective, rather than just a principle. This would make it even more necessary for the CFP to comply with it.

Additional note: Further details and discussion in relation to the legislative and decision-making procedures introduced by the Lisbon Treaty, including as regards comitology, the role of National Parliaments in the decision-making process, citizens' rights, changes in EU enforcement policy and new posts in the EU institutions can be found on ClientEarth's web-site in the following ClientEarth's briefing on the Lisbon Treaty: <http://www.clientearth.org/reports/clientearth-briefing-lisbon-treaty-march-2010.pdf>.