Interaction Between the EU Common Fisheries Policy and the Habitats and Birds Directives

Briefing by

Daniel Owen
Fenners Chambers

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Institute for European Environmen Policy

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Abbreviations

In this briefing, various abbreviations have been used. Some are explained in the course of the briefing, while others are set out below:

Full Term	Abbreviation
European Community	EC
Treaty Establishing the European Community	EC Treaty (articles of the EC Treaty are referred to as, say, Art 6 EC)
European Court of Justice and Court of First Instance (taken together)	the Court
European Commission	the Commission
Common Fisheries Policy	CFP
Common Agricultural Policy	CAP
Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (92/43/EEC)	habitats Directive
Council Directive of 2 April 1979 on the conservation of wild birds (79/409/EEC)	birds Directive
Special area of conservation	SAC
Special protection area	SPA

Foreword

The EU and its Member States have repeatedly committed themselves to protecting Europe's marine biodiversity. This has included political agreement between the Member States to apply the habitats and birds Directives throughout Europe's marine waters. Despite Member States' apparent readiness to act, however, progress in conserving Europe's marine biodiversity has been rather limited. This is particularly apparent in terms of the impacts of fisheries, which are widely perceived as posing one of the main threats to the marine environment.

The limited progress is partly the result of uncertainty as to where competence for placing restrictions on fishing activities lies, namely with the EU or with the Member States. Unlike nature conservation policy, which remains indisputably in the domain of both the Member States and the EU, fisheries conservation is the preserve of the EU alone. The difficulty arises when fishing and nature conservation issues overlap.

Some argue that when there is an overlap between fishing and nature conservation, action to protect marine areas or species from the impacts of fishing should only be taken under the CFP. But this approach would potentially preclude the exercise by Member States of their rights in certain key areas of environmental protection. It would also seem to give Member States an excuse for not properly fulfilling their duties, notably those arising under EU habitats and birds Directives.

However, the matter is arguably less clear cut than this. This paper, written by Daniel Owen, seeks to shed light on the opaque legal situation governing the interaction between the CFP and nature conservation. The purpose of the paper is not to challenge the CFP as such, but to examine routes for implementation of the habitats and birds Directives.

In commissioning the report, IEEP's intention has been to inform ongoing discussions on what is a sensitive yet clearly crucial issue.

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Senior Fellow, IEEP

1

Introduction

Under the habitats Directive and birds Directive, the Member States of the EC have obligations regarding the protection of habitats and species. Member States are bound to implement such obligations, and potentially face censure by the Court for failure to do so.

The Member States' obligations extend at least to the Member States' internal waters and territorial seas. This is because both Directives refer to their application 'in the European territory of the Member States to which the Treaty applies'.[1] In practice, there is support for implementation of the Directives beyond the territorial sea from both the Commission and several coastal EC Member States.[2]

Under the Directives, the Member States are required to identify, establish and protect SACs and SPAs, thus contributing towards a network of sites known as Natura 2000. The Directives also place some species protection duties on the Member States, irrespective of whether or not such species occur in SACs or SPAs. This briefing will focus on the duties applicable to SACs and SPAs, but will also make some reference to the species protection duties.

The duty to protect marine SACs and SPAs in the face of threats from the activities of fishing vessels potentially poses some legal problems. The duty to protect such sites rests with the Member States. However, Member States have transferred legislative jurisdiction for fisheries conservation to the EC, such that the EC has exclusive jurisdiction in this area under its CFP (see further section 2.1 below).[3]

[1] See Art 2(1) of the habitats Directive and Art 1 of the birds Directive.

[2] In the case of the United Kingdom, the English High Court has ruled that the habitats Directive applies not only to the territorial sea but also 'to the UKCS [the UK's continental shelf] and to the superjacent waters up to a limit of 200 nautical miles from the baseline from which the territorial sea is measured' (see *R v Secretary of State for Trade and Industry ex parte Greenpeace Limited* [2002] 2 CMLR 94). The UK government has accepted this ruling.

[3] The term 'competence' has been avoided deliberately in this briefing. This is because, though commonly used, it can be misleading. For example, to state that the EC has exclusive 'competence' for fisheries conservation could lead the reader to think that such competence extends not only to rule making but also to rule enforcement. Yet that is not the case. Hence the term 'legislative jurisdiction', referring to the power to make rules, has been used

Imagine a SAC or SPA in a Member State's waters that is being threatened or damaged by the activities of fishing vessels. The need arises for a measure restricting the activities of those vessels primarily or solely for the purpose of nature conservation. Must that measure be taken under the auspices of the CFP? Or may the measure be taken outside the CFP, either at the EC level (under the EC Treaty's Environment title) or at the Member State level? This briefing considers both questions, first addressing the CFP and then addressing action outside the CFP.

instead.

2

Action Under the CFP

2.1 The basis for the EC's exclusive legislative jurisdiction in the field of fisheries conservation

The CFP has its origins in the EC Treaty. Art 3(1) EC states that '[f]or the purposes set out in Article 2, the activities of the [European] Community shall include, as provided in this Treaty and in accordance with the timetable set out therein ... (e) *a common policy in the sphere of* agriculture and *fisheries* ...' (emphasis added).

The list of tasks currently referred to in Art 2 EC is the net result of several amendments to the EC Treaty. Those tasks (or 'purposes', to use the term adopted in Art 3(1) EC) to which a common policy in the sphere of fisheries could be relevant include, *inter alia*, 'a harmonious, balanced and sustainable development of economic activities', 'a high level of employment and of social protection', 'a high level of protection and improvement of the quality of the environment' and 'the raising of the standard of living and quality of life'.

As noted above, the EC Treaty refers to 'a common policy in the sphere of ... fisheries'. However, there is no express reference to any 'common fisheries policy' in the EC Treaty. This contrasts with the situation for agriculture: the EC Treaty refers to 'a common policy in the sphere of agriculture ...' and then later, in Title II, refers expressly to a 'common agricultural policy'. Title II includes Art 37 EC, which provides the legal basis for EC instruments regarding the CAP and Art 33 EC, which sets out the objectives of the CAP.

The inclusion of fisheries under Title II of the EC Treaty arises (a) from Art 32(1) EC which states that ''Agricultural products' means the products of the soil, of stockfarming and of *fisheries* and products of first-stage processing directly related to these products' (emphasis added) and (b) from Art 32(3) EC which states that '[t]he products subject to the

provisions of Articles 33 to 38 are listed in Annex I to this Treaty', Annex I in turn including, *inter alia*, '[f]ish, crustaceans and molluscs'. The term 'Common Fisheries Policy' has arisen through practice, and Council regulations adopted under the CFP likewise use Art 37 EC as their legal basis. By implication, the objectives of the CFP are those of the CAP as set out in Art 33 EC.

It is to be noted that the EC Treaty does not at any point refer to the conservation of fisheries. Yet this is clearly an area which the EC has moved to occupy. The EC's conclusive move into this area was marked by the adoption of Council Regulation 170/83 'establishing a Community system for the conservation and management of fishery resources'. Council Regulation 170/83 was in due course repealed and replaced by Council Regulation 3760/92, which was in turn repealed and replaced only recently by Council Regulation 2371/2002 'on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy' (referred to here as 'the basic Regulation').

The EC's move into fisheries conservation can be justified by the objectives set out in Art 33 EC, notably the objectives 'to increase agricultural productivity ... by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production ...' and 'to assure the availability of supplies'. Conservation is also referred to expressly in Art 102 of the 1972 Act of Accession (relating to the accession to the (then) European Economic Community by Denmark, Ireland and the United Kingdom). Art 102 states that:

> From the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and *conservation of the biological resources of the sea.* [Emphasis added]

The move into fisheries conservation has been endorsed by the Court (see eg *Kramer*).[4] It is also clear from the case law of the Court that the EC's legislative jurisdiction in the area of fisheries conservation is exclusive. For example, in *Commission v United Kingdom*[5] the Court held that:[6]

> ... since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the [1972] act of accession, power to adopt, as part of the common fisheries policy, measures relating to the conservation of the resources of the sea has belonged *fully and definitively* to the Community.

[4] Joined cases 3, 4 & 6/76 [1976] ECR 1279.
[5] Case 804/79 [1981] ECR 1045.
[6] See paras 17 & 18 of judgment.

> Member States are therefore no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction. The adoption of such measures, with the restrictions which they imply as regards fishing activities, is a matter, as from that date, of Community law. ... [Emphasis added]

Thus it is clear that the EC has exclusive legislative jurisdiction in the area of fisheries conservation. However, legislative jurisdiction regarding fisheries conservation does not necessarily mean that the EC has a power to deal with every aspect of a fishing vessel's activities. More specifically, it does not necessarily mean that the EC has a power to adopt any nature conservation measure affecting the activity of fishing vessels or that any such power should be exclusive. The remainder of this section will examine the case for legislative jurisdiction of the EC under the CFP in the area of nature conservation, from the point of view of both the case law of the Court and the legislative practice of the EC. It will also consider the power of Member States to act unilaterally under the CFP.

2.2 The case law of the Court

As noted in section 2.1 above, it is clear that the EC has exclusive legislative jurisdiction in the area of fisheries conservation. This section will address the influence of Art 6 EC in extending the EC's legislative jurisdiction under the CFP to nature conservation.

Art 6 EC states that: '[e]nvironmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development'.

As noted in section 2.1 above, Art 3(1)(e) EC in turn refers to 'a common policy in the sphere of ... fisheries', ie the CFP. Therefore, environmental protection requirements are to be integrated into the definition and implementation of the CFP.

A fundamental question is whether the influence of integration under Art 6 EC is sufficient to allow the EC to lawfully adopt a regulation restricting the activity of fishing vessels for the primary or sole purpose of nature conservation on the basis of Art 37 EC. This question can in part be addressed by analysing the case law of the Court. Two strands of case law will be examined here: one relating to legal basis in general, and one relating to the influence of integration. The Court's case law on legal basis is well-established and is set out in numerous judgments. For example, in *Austria v Huber*,[7] the Court held that:[8]

[7] Case C-336/00 [2002] ECR I-07699.
[8] See paras 30 & 31 of judgment.

> ... it should be borne in mind that, according to the settled case-law of the Court, the choice of the legal basis for a Community measure must rest on *objective factors* which are amenable to judicial review, including *in particular the aim and the content of the measure* ...
>
> If examination of a Community act shows that it has a twofold purpose or twofold component and if one of these is identifiable as main or predominant, whereas the other is merely incidental, *the act must be founded on a sole legal basis, that is, the one required by the main or predominant purpose* or component ... Exceptionally, 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* ... [Emphasis added]

Therefore, for a given EC measure, it is necessary to look, in particular, at its aim and content in order to decide the appropriate legal basis. Thus a measure with the aim and content of fisheries conservation should be founded on Art 37 EC. Alternatively, the legal basis of a measure with nature conservation as its aim and content should be Art 175 EC, under the Environment title of the EC Treaty. Adaptation of this approach is required when a measure has 'a twofold purpose or twofold component'. For a measure with the main purpose of fisheries conservation, and which features nature conservation as a merely incidental purpose, the measure must in principle be founded on Art 37 EC. In the case of a measure with the main purpose of nature conservation, and which has fisheries conservation as a merely incidental purpose, the measure must in principle be founded on Art 175 EC.

The case law also provides for the exceptional case of a measure that 'simultaneously pursues a number of objectives, indissociably linked, without one being secondary and indirect in relation to the other'. In such a case, the measure may be founded on the various legal bases corresponding to such objectives.

The rest of this section will consider how the Court's case law on legal basis has been applied in practice, in view of the influence of integration. It is necessary to bear in mind that Art 6 EC was introduced to the EC Treaty by the 1997 Treaty of Amsterdam. Before that, the principle of integration was provided for in a somewhat different form in Art 130r(2) EC and then in Art 174(2) EC, and the corresponding legal bases for environmental protection measures were Art 130s EC and (as is still the case) Art 175 EC, respectively. The legal basis for CAP measures, and hence CFP measures, was originally Art 43 EC.

In *Greece v Council*,[9] the Court considered a EC regulation that had been adopted in response to the Chernobyl nuclear incident; the regulation required that certain agricultural products originating in non-Member States should be subject to compliance with maximum permitted levels of radioactive contamination prior to free circulation within the EC. The regulation had been adopted under the common commercial policy; Greece argued, *inter alia*, that it should instead have been based on Art 130s EC.

The Court considered the objective and content of the regulation, and concluded that it fell within the common commercial policy on the basis that it was intended to regulate trade between the EC and non-Member States.[10] The Court considered the influence of Arts 130r & 130s EC and concluded that '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 any of the objectives of environmental protection'.[11] It corroborated this view by reference to the principle of integration in Art 130r(2) EC.[12]

Thus the Court in *Greece v Council* erred in favour of the use of integration and against automatic recourse to Art 130s EC (now Art 175 EC) merely because of some environmental protection purpose. On the other hand, the Court in that case had been able to conclude that the objective and content of the measure in question was intended to be trade regulation. The case does not therefore serve to indicate the Court's response in the case of a measure with the primary or sole purpose of nature conservation.

In *Armand Mondiet*,[13] the Court considered the correct legal basis for a EC regulation that, *inter alia*, restricted the use of driftnets. The regulation had been adopted under the CFP. A fishing enterprise argued that it should have been adopted under Arts 130r & 130s EC. The Court considered the objective and content of the regulation, and 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' (emphasis added).[14] Therefore the regulation had been validly adopted under the CFP.

The Court considered the nature conservation component of the measure, evidenced by some of the recitals in its preamble. It reiterated the approach of the Court in *Greece v Council* and concluded that 'even if considerations of environmental protection were a contributory factor in

[9] Case C-62/88 [1990] ECR I-1527.
[10] See para 16 of judgment.
[11] See para 19 of judgment.
[12] See para 20 of judgment.
[13] Case C-405/92 [1993] ECR I-6133.
[14] See para 24 of judgment.

the decision to adopt the regulation at issue, that does not of itself mean that it must be covered by Article 130s of the Treaty'.[15] Thus, again, the Court erred in favour of integration and against automatic recourse to Art 130s EC. But, in that the measure in question was deemed to have been adopted primarily for fisheries conservation purposes, the judgment does not indicate how the Court would consider a measure adopted primarily or solely for nature conservation purposes.

In *Austria v Huber*, the Court considered a regulation adopted under the CAP 'on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside'. The Court considered whether the regulation should have instead been adopted under Art 130s EC.[16] The Court held that: 'the main purpose of the support measures for which that regulation provided was to regulate the production of agricultural products within the meaning of Annex II to the Treaty, in order to promote the transition from intensive cultivation to a more extensive cultivation, of better quality ...'.[17]

The Court noted that the regulation's objective of promoting more environmentally-friendly forms of production was 'a genuine objective, but an ancillary one, of the common agricultural policy'. As such, this could not justify the legal basis of the regulation being constituted by both the CAP and Art 130s.[18] Thus, in *Greece v Council*, *Armand Mondiet* and *Austria v Huber*, the Court has consistently erred in favour of integration but has been able to do so by virtue of deeming the primary purpose to be, respectively, trade regulation (under the common commercial policy), fisheries conservation (under the CFP) or agricultural production (under the CAP). In all three cases, the Court has, impliedly or expressly, deemed nature conservation (or environmental protection) to be merely an ancillary purpose.[19]

Two other cases indicate the Court's approach where environmental protection is deemed to be the primary purpose of the measure. In *Parliament v Council*,[20] the Court was faced with judging whether Art 43 EC or Art 130s EC was the appropriate legal basis for EC regulations aimed at protecting forests from fire and atmospheric pollution.

The Court concluded that the regulations' purpose was twofold, ie partly to safeguard the productive potential of agriculture and partly to maintain and monitor forest ecosystems,[21] and noted that '[w]ith ... reference to the common agricultural policy and the Community

[15] See para 28 of judgment.
[16] See para 29 of judgment.
[17] See para 35 of judgment.
[18] See para 36 of judgment.
[19] See also Case 281/01 *Commission v Council* [2002] ECR I-12049.
[20] Joined cases C-164/97 & C-165/97 [1999] ECR I-1139.
[21] See para 13 of judgment.

environmental policy, there is nothing in the case-law to indicate that, in principle, one should take precedence over the other'.[22]

It reiterated the approach of the Court in *Greece v Council* regarding the limitation of Art 130s EC as a legal basis, but added that: 'In contrast, Article 130s of the Treaty must be the basis for provisions which fall specifically within the environmental policy ... even if they have an impact on the functioning of the internal market ... or if their objective is the improvement of agricultural production ...'.[23]

The Court concluded that:

> although the measures referred to in the regulations may have certain positive repercussions on the functioning of agriculture, those indirect consequences are incidental to the primary aim of the Community schemes for the protection of forests, which are intended to ensure that the natural heritage represented by forest ecosystems is conserved and turned to account, and does not merely consider their utility to agriculture.[24]

The appropriate legal basis was therefore Art 130s EC.

Thus in *Parliament v Council*, the Court erred against the influence of integration in favour of Art 130s EC, on the grounds that the provisions in question fell specifically within the EC's environmental policy and that any positive effects on agricultural production were indirect and incidental. At first glance, the implication is that a EC measure adopted primarily for nature conservation purposes, but with indirect and incidental benefits for fisheries conservation, should have Art 175 EC as its legal basis.

Significantly, however, the measures in question in *Parliament v Council* were intended to reduce the risk of damage to forests by fire and atmospheric pollution, rather than damage by agricultural practices. In *Parliament v Council*, it was not an agricultural practice under the CAP that led to the need for the regulations in question. Instead it was the risk of fire and atmospheric pollution. However, where species and habitats are being damaged by fishing activities, it would clearly be a fisheries practice under the CFP that was causing the problem. This difference makes it arguable that *Parliament v Council* should be distinguished in a fisheries case.

Furthermore, the Court in *Parliament v Council* was unconvinced that trees and forests as a whole constitute 'agricultural products' for the

[22] See para 15 of judgment.
[23] See para 15 of judgment.
[24] See para 16 of judgment.

purposes of the CAP.[25] This point contributed to the Court's decision to move away from Art 43 EC as the appropriate legal basis.[26]

In *Biosafety Protocol*,[27] the Court was asked to rule on the appropriate legal basis for a Council measure concluding the Cartagena Protocol on Biosafety on behalf of the EC. It considered, on the one hand, the common commercial policy and, on the other hand, Art 175 EC. The Court concluded that the Protocol's main purpose or component was 'the protection of biological diversity against the harmful effects which could result from activities that involve dealing with LMOs [ie living modified organisms], in particular from their transboundary movement'[28] and that Art 175 EC was the appropriate legal basis for conclusion of the Protocol.[29]

The Commission had argued that the control measures set up by the Protocol 'are applied most frequently, or at least in terms of market value preponderantly, to trade in LMOs'.[30] However, the Court did not accept that as a reason for the legal basis being the common commercial policy. It also noted that even if the Protocol's preventive measures were liable to affect trade relating to LMOs, the finding that the Protocol was an instrument falling principally within environmental policy should not be called into question despite the Court's broad interpretation of the common commercial policy.[31]

Indeed, the Court went so far as to state that:

> The Commission's interpretation, if accepted, would effectively render the specific provisions of the Treaty concerning environmental protection policy largely nugatory, since, as soon as it was established that Community action was liable to have repercussions on trade, the envisaged agreement would have to be placed in the category of agreements which fall within commercial policy.[32]

Thus, in *Biosafety Protocol*, the Court appears to be putting the brakes on the influence of integration, in order to avoid the EC Treaty provisions concerning environmental protection policy becoming 'largely nugatory'. By implication, a measure with the primary purpose of nature conservation, but which is liable to have repercussions on fishing activities, need not automatically be adopted under Art 37 EC.

[25] See paras 9, 10, 11, 17 & 18 of judgment.
[26] See para 19 of judgment.
[27] Opinion 2/00 [2002] 1 CMLR 28.
[28] See para 34 of opinion.
[29] See para 44 of opinion.
[30] See para 37 of opinion.
[31] See para 40 of opinion.
[32] See para 40 of opinion.

However, it is significant that the control measures in the Protocol did not relate exclusively to trade. Indeed the Court states that the definition of the term 'transboundary movements' in the Protocol 'is particularly wide [and] is intended to cover any form of movement of LMOs between States, whether or not the movements are for commercial purposes'.[33] In contrast, a measure intended primarily or solely to protect species and habitats from fishing activities would be solely applicable to fishing activities (such activities having been authorised under the CFP). The scope for using *Biosafety Protocol* in the current context may therefore be limited. However, it can at least be said that the Court is clearly reluctant to endorse an overly expansive application of Art 6 EC.

In conclusion, objective factors, in particular the aim and content, should be used to chose the appropriate legal basis for a particular measure. Unfortunately, however, there is no case law that clearly points the way to the appropriate legal basis for a EC measure that restricts the activities of fishing vessels primarily or solely for the purpose of nature conservation.

Thus in *Greece v Council*, *Armand Mondiet* and *Austria v Huber*, the Court has, impliedly or expressly, deemed nature conservation (or environmental protection) to be merely an ancillary purpose. In *Parliament v Council*, the Court deemed environmental protection to be the primary purpose, but the threat to the forest environment did not arise from agricultural practices specifically and, furthermore, the Court was unconvinced that trees and forests as a whole constitute 'agricultural products' for the purposes of the CAP. In *Biosafety Protocol*, the Court also found environmental protection to be the primary purpose, but the control measures in the Protocol did not relate exclusively to trade.

If the main aim and content of a EC measure were to be identified as nature conservation, then the Court would potentially need to resolve a conflict between, on the one hand, its case law on legal basis (which would point away from Art 37 EC as being the correct legal basis) and, on the other hand, the influence of integration under Art 6 EC (which would point towards Art 37 EC as a permissible legal basis). However, if the main aim and content could somehow be identified as fisheries conservation, then there would be no conflict.

For example, consider a EC regulation adopted under the CFP that places restrictions on the use of a fishing gear, for the purpose of fisheries conservation. The main aim and content of that regulation is then fisheries conservation. Imagine that a new EC regulation, also adopted under the CFP, then adds further conditions on the gear's use, for the primary or sole purpose of nature conservation. Can that latter regulation be seen as having fisheries conservation as its main aim and content, in that it is a response to a fisheries conservation measure? If so, this could

[33] See para 38 of opinion.

solve a dilemma. However, this could also be seen as a somewhat contrived way of placing fisheries conservation at the heart of the latter regulation.

It is also interesting to consider how the Court would take into account the overall context of the measure in question. For example, Council Regulation 602/2004 provides for a ban on bottom-trawling or the use of similar towed nets in a specified area, in order to protect aggregations of the deep-water coral *Lophelia pertusa* (see section 2.3.2 below). But it will do this by inserting a new paragraph into Art 30 of Council Regulation 850/98. The majority of the provisions in Council Regulation 850/98 are fisheries conservation measures. Would the Court consider the bottom-trawl ban on its own or as part of a framework consisting largely of fisheries conservation measures?

It is strongly arguable that the former approach should be the correct one. The *Armand Mondiet* case is interesting in this respect. As noted above, the Court considered the correct legal basis for a EC regulation that, *inter alia*, restricted the use of driftnets. Art 1(8) of Council Regulation 345/92 provided for the restriction, by inserting a new Art 9a into Council Regulation 3094/86.[34] On the one hand, the Court focused exclusively on Regulation 345/92 (ie apparently not taking Regulation 3094/86, and its broad fisheries conservation context, into account).[35] But, on the other hand, the Court did note that Regulation 345/92 was not just about driftnets, but instead 'lays down certain technical measures for the conservation of fishery resources, including in particular a limitation on the use of driftnets'.[36] In other words, the Court did appear to take some context into account, though it is not clear what weight it placed on this.

Were the Court to find that Art 37 EC was indeed the appropriate legal basis for a measure restricting the activities of fishing vessels for the primary or sole purpose of nature conservation, it would then be necessary to consider whether the EC should in turn have exclusivity in that area. This is likely to be a sensitive issue. It is arguable that such exclusivity would (a) remove an entire category of environmental protection measures from the influence of the EC Treaty's provisions on environmental protection and (b) in doing so, offend against the Member States' powers to act regarding environmental protection and against the principle of subsidiarity. The specific question of exclusivity regarding environmental protection is also discussed briefly in section 2.4 below.

[34] See para 4 of judgment.
[35] See paras 17-28 of judgment.
[36] See para 18 of judgment.

2.3 The legislative practice of the EC

2.3.1 The basic Regulation

The basic Regulation itself provides for limitation of the environmental impact of fishing: see, *inter alia*, Arts 1, 2 & 4-9. Some of these provisions can readily be viewed as the result of the implementation by the EC of the integration duty in Art 6 EC (eg Arts 1, 2, 4, 5 & 6). However, Arts 8 & 9 appear to go further in that they provide the Member States with powers to adopt measures to minimise the effect of fishing on the marine ecosystem, but then constrain the use of these powers by reference to an onerous EC consultation procedure. The possible implications of this are discussed briefly in section 2.4 below.

2.3.2 Other EC regulations

Other EC regulations contain provisions that appear to be motivated at least in part by nature conservation. For example:

(a) Council Regulation 973/2001: Art 17 states, in respect of 'every vessel flying the flag of a Member State or registered in a Member State, in whatever waters' that '[t]he encircling of schools or groups of marine mammals with purse seines shall be prohibited, except in the case of the vessels referred to in Article 14';

(b) Council Regulation 600/2004 provides for measures to reduce the incidental mortality of seabirds in the course of longline fishing (see also Arts 9 and 12(3), as well as Council Regulation 601/2004);

(c) Council Regulation 850/98: Art 29a provides for restrictions on fishing for sandeels;

(d) Council Regulation 894/97: Art 11 (as amended by Council Regulation 1239/98) provides for a ban on the use of specified driftnets (see also Arts 11a, 11b & 11c);

(e) Council Regulation 1626/94 states (in Art 3(3)) that '[f]ishing with bottom trawls, seines or similar nets above the Posidonian beds (*Posidonia Oceanica* [sic]) or other marine phanerogams shall be prohibited';

(f) Council Regulation 602/2004: Art 1 provides for a ban on bottom-trawling or the use of similar towed nets in a specified area, in order to protect aggregations of the deep-water coral *Lophelia pertusa* (see 3rd recital of preamble).[37]

[37] This regulation will enter into force on 23 August 2004 (see Art 2). It will amend Council Regulation 850/98. This regulation was preceded by two other regulations, each adopted by the Commission using its emergency powers under Art 7 of the basic Regulation (see Commission Regulations 1475/2003 &

Space does not permit a systematic analysis of the aim or content of these various provisions. However, a cursory glance through the provisions suggests that at least some of them have been adopted primarily or solely for the purpose of nature conservation.

Each of the EC regulations listed above refers expressly to Art 37 EC (or to Art 43 EC) as its legal basis. In other words, all of the EC regulations listed above have been adopted under the CFP.

Actual adoption by the EC of measures under the CFP for the sole or primary purpose of nature conservation does not necessarily mean that such measures have been adopted using the appropriate legal basis. The ultimate arbiter of the appropriate legal basis for such measures is the Court. Yet, with one exception, none of the measures listed above has come before the Court.

The one exception is Council Regulation 1239/98, on driftnets, which amended Art 11 of Council Regulation 894/97. However, the case did not proceed to matters of substance (see *Armement Cooperatif Artisanal Vendeen*).[38] Another case on driftnets (see *Armand Mondiet*, in section 2.2 above) did proceed to matters of substance, but the Court implied that nature conservation was merely an ancillary purpose of the measure, rather than its primary or sole purpose.

In the absence of a judgment of the Court on whether or not the CFP is the correct legal basis for a measure adopted primarily or solely for the purpose of nature conservation, the EC's legislative practice in this area should be seen as persuasive evidence of its power to act in this way, rather than as determinative of the issue.

2.4 Member State powers to act unilaterally under the CFP

2.4.1 Introduction

Though the EC has exclusive legislative jurisdiction regarding fisheries conservation, it has delegated certain fisheries conservation powers to the Member States. This section will address powers expressly delegated to Member States under the basic Regulation. The relevant provisions are Arts 8, 9 & 10.

Of note, Arts 8 & 9 not only provide Member States with powers to adopt fisheries conservation measures, but also with powers to adopt measures to minimise the effect of fishing on the marine ecosystem. Looked at one way, this can be seen as an attempt by the EC to implement Art 6 EC. But,

263/2004). Of these, Commission Regulation 263/2004 extends the application of Commission Regulation 1475/2003 until 22 August 2004.

[38] Case T-138/98 [2000] ECR II-341.

alternatively, it can be seen as an attempt by the EC to limit the powers of the Member States to adopt such measures. This is corroborated by the fact that all such measures under Art 8 and some such measures under Art 9 are subject to an onerous EC consultation procedure.

As such, it is arguable that Arts 8 & 9 of the basic Regulation indicate an assertion by the EC that its exclusivity regarding fisheries conservation extends to measures taken to restrict the activity of fishing vessels for nature conservation purposes. However, this particular issue has yet to come before the Court.

2.4.2 Art 10 of the basic Regulation

Under Art 10 of the basic Regulation, a Member State may take 'measures for the conservation and management of stocks in waters under [its] sovereignty or jurisdiction' in respect of (a) vessels flying the Member State's flag and which are registered in the EC or (b) persons established in the Member State (in the case of fishing activities which are not conducted by a fishing vessel). The reference to waters under the Member's State 'sovereignty or jurisdiction' is a reference to (a) waters landward of the seaward limit of the territorial sea and (b) waters in the Member State's EEZ (or exclusive fishing zone).[39] Such measures must be compatible with the objectives set out in Art 2(1) of the basic Regulation and must be no less stringent than existing EC legislation.

There is no reference in Art 10 to a power to adopt measures to minimise the effect of fishing on the conservation of marine ecosystems. This is surprising in view of the fact that both Arts 8 & 9 (see below) do refer to such a power. It is not clear whether the omission of a reference to marine ecosystems in Art 10 represents some form of intentional concession by the EC regarding the limits on any purported exclusivity regarding environmental protection, or whether some other factor is responsible for the omission.

Art 10 of the basic Regulation may be contrasted with Art 46 of Council Regulation 850/98. Art 46(1) states that:

> Member States may take measures for the conservation and management of stocks:
>
> (a) in the case of strictly local stocks which are of interest solely to the Member State concerned; or
>
> (b) in the form of conditions or detailed arrangements designed to limit catches by technical measures:
>
> (i) supplementing those laid down in the Community legislation on fisheries; or

[39] The reference to 'waters' in Art 10 raises questions about whether the geographical scope of Art 10 includes the Member State's continental shelf. This point also applies in respect of Art 8 of the basic Regulation.

(ii) going beyond the minimum requirements laid down in the said legislation;

provided that such measures apply solely to fishing vessels flying the flag of the Member State concerned and registered in the Community or, in the case of fishing activities which are not conducted by a fishing vessel, to persons established in the Member State concerned.

Thus Art 46(1) provides for measures applicable solely to (a) fishing vessels flying the flag of the Member State concerned and registered in the Community or (b) persons established in the Member State concerned (in the case of fishing activities which are not conducted by a fishing vessel). However, it is narrower in scope than Art 10 of the basic Regulation in that it relates only to (a) 'strictly local stocks ...' or (b) 'conditions or detailed arrangements designed to limit catches by technical measures ...'. Furthermore, Art 46(2) provides for the Commission to be consulted and gives the Commission powers to suspend or prohibit application. Art 46 was not repealed by the basic Regulation, and must therefore be regarded as still in force. For current purposes, it will be assumed that Art 10 should follow Art 10.

2.4.3 Art 8 of the basic Regulation

Under Art 8(1) of the basic Regulation, a Member State may take 'emergency measures' if (a) 'there is evidence of a serious and unforeseen threat to the conservation of living aquatic resources, or to the marine ecosystem resulting from fishing activities, in waters falling under the sovereignty or jurisdiction of a Member State' and (b) 'where any undue delay would result in damage that would be difficult to repair'. Thus, like Art 10, such measures may apply to waters landward of the seaward limit of the territorial sea and to waters in the Member State's EEZ (or exclusive fishing zone). But, unlike Art 10, (a) they may apply to, *inter alia*, foreign-flagged vessels and (b) there is express provision for them to apply in the event of threat to, *inter alia*, the marine ecosystem.

In principle, the measures may have a duration of up to three months (Art 8(1)). However, Art 8 also establishes a procedure whereby the Member State intending to take emergency measures must notify its intention to the Commission, the other Member States and concerned Regional Advisory Councils, 'by sending a draft of those measures ... before adopting them' (Art 8(2)). The Commission has a power to confirm, cancel or amend the measure within 15 working days of the date of notification (Art 8(3)). Any of the Member States concerned may refer the Commission's decision to the Council (within 10 working days of notification of the decision) (Art 8(5)) and the Council, acting by qualified majority, may take a different decision within one month of the date of receipt of the referral (Art 8(6)).

The references to notifying an 'intention' and 'sending a draft' suggest that the measure should not be allowed by the Member State to take effect until the Commission has reached its decision. In that respect, Art 8 of the basic Regulation may be contrasted with Art 45 of Council Regulation 850/98. Art 45(2) states that:

> Where the conservation of certain species or fishing grounds is seriously threatened, and where any delay would result in damage which would be difficult to repair, a Member State may take appropriate non-discriminatory conservation measures in respect of the waters under its jurisdiction.

Art 45(3) provides for a slightly different procedure to that set out in Art 10 of the basic Regulation. Notably, there is an obligation on the Member State to communicate the adopted measures, rather than the draft measures, to the Commission and the other Member States. The reference to communicating the adopted measures, rather than the draft measures, suggests that the measures may be allowed by the Member State to take effect pending the Commission's decision. Art 45 was not repealed by the basic Regulation, and must therefore be regarded as still in force. However, for current purposes, it will be assumed that Member States should follow Art 8.

Art 8 makes no reference to Art 10. The question is therefore which article should apply in the event of emergency measures for own-flag vessels that meet the requirements set out in Art 10. Is it Art 8 (with its time limit, its test for damage and its requirement to consult the Commission) or is it Art 10 (with no such requirements)? For current purposes, it will be assumed that Member States should follow Art 10.

2.4.4 Art 9 of the basic Regulation

Under Art 9(1) of the basic Regulation, a Member State 'may take non-discriminatory measures for the conservation and management of fisheries resources and to minimise the effect of fishing on the conservation of marine eco-systems' but only (a) 'within 12 nautical miles of its baselines', (b) if the EC 'has not adopted measures addressing conservation and management specifically for this area', (c) if the measures are compatible with the objectives set out in Art 2 of the basic Regulation and (d) if the measures are no less stringent that existing EC legislation.

Measures adopted under Art 9 may include measures 'liable to affect the vessels of another Member State' (Art 9(1)). However, such measures are subject to the same procedure as that laid down in Art 8(3)-(6) (Art 9(2); see above).

Art 9 makes no reference to Art 10. The question is therefore which article should apply in the event of measures for own-flag vessels operating within the 12 nautical mile limit. Is it Art 9 (with its requirement that the EC has not adopted measures specifically for that area and its broader reference to Art 2 EC) or is it Art 10 (with no such requirement and its narrower reference to Art 2(1) EC)? For current purposes, it will be assumed that Member States should follow Art 10.

2.4.5 Summary and conclusion

Arts 8, 9 & 10 of the basic Regulation expressly provide coastal Member States with opportunities to act in various ways. The need for express delegation of powers to act in relation to fisheries conservation is not surprising, in view of the EC's exclusive competence in this area. However, the need for express delegation of powers to act to protect the marine ecosystem from fishing activities is more surprising and perhaps indicates that the EC is asserting exclusivity in this area as well.

The express powers provided by Arts 8, 9 & 10 are all limited in significant ways. The power to act under Art 10 is particularly limited in that it cannot be applied to foreign-flagged vessels and cannot, expressly at least, be used to minimise the effect of fishing on the conservation of marine ecosystems. The power under Art 8 is restricted to situations where there is 'a serious and unforeseen threat'. It does extend to foreign-flagged vessels and to all waters under the Member State's sovereignty or jurisdiction, and it can expressly be used in the event of threat to the marine ecosystem. But the lifespan of measures adopted under Art 8 is likely to be limited to the short term.

The power to act under Art 9 is restricted to measures within 12 nautical miles of the Member State's baselines. It does apply to foreign-flagged vessels and it may expressly be used 'to minimise the effect of fishing on the conservation of marine eco-systems'. But the lifespan of measures adopted under Art 9 in relation to foreign-flagged vessels may well be limited to the short term. Overall, it can be seen that the express powers of the Member States to act under the basic Regulation in relation to foreign-flagged vessels for nature conservation purposes is subject to strict limitations and, because of this, is unlikely to constitute a means for coastal Member States to fulfil their obligations under the habitats and birds Directives.

This analysis of Member States' powers leaves open the possibility that the EC's exclusivity regarding fisheries conservation may not extend to measures restricting the activities of fishing vessels for the primary or sole purpose of nature conservation. If the jurisdiction to adopt such measures were instead shared between the EC and the Member States, then this would potentially provide a way for Member States to act unilaterally regarding nature conservation beyond the constraints placed on them by

Arts 8 & 9 of the basic Regulation, but still under the auspices of the CFP. Space does not permit further elaboration of this scenario in this briefing, but it deserves further attention.

3

Action Outside the CFP

Let us assume, for the sake of argument, that measures restricting the activities of fishing vessels for the primary or sole purpose of nature conservation cannot be taken under the auspices of the CFP. In other words, let us assume (a) that at the EC level, Art 37 EC is not the appropriate legal basis for such measures and (b) that at the Member State level, powers to take such measures under the auspices of the CFP do not exist.

As such, the measure must instead be taken outside the CFP. In view of its focus on nature conservation, the aim and content of the measure would relate to environmental protection. In this field, the EC and the Member States share legislative jurisdiction. However, in the area of protection of habitats and species, the EC has already acted to adopt the habitats and birds Directives. These Directives in turn impose obligations on the Member States.

Therefore, where a measure was required in order to protect a specific SAC or SPA in a Member State's waters, it is arguable that the most suitable actor to adopt such a measure would be the Member State itself. In such a case, however, the Member State would be acting to implement EC law, ie the habitats Directive or the birds Directive. As such, it is strongly arguable that the Member State should ensure that its actions are compatible with the general principles of EC law (notably proportionality, protection of legitimate expectation, equal treatment and protection of fundamental rights).[40]

In contrast, where a measure was required to protect widely-distributed species (eg cetacean species, as listed in Annex IV of the habitats Directive), and where the threat to such species occurred by virtue of a widely-used fishing gear, it is arguable that the measure would be more appropriately taken at the level of the EC. Based on the working

[40] Regarding English case law on this point, see, *inter alia*, *R v Ministry of Agriculture, Fisheries and Food and Another, ex p First City Trading Limited and Others* [1997] 1 CMLR 250 (QBD), at paras 39 & 43.

assumption above that Art 37 EC is not the appropriate legal basis for a measure restricting the activities of fishing vessels for the primary or sole purpose of nature conservation, the alternative legal basis would be Art 175 EC, under the Environment title of the EC Treaty. In this respect, the discussion of the Court's case law in section 2.2 above is relevant, though it should be reiterated that there is currently no case squarely on the point.

4

Summary and Conclusion

As noted in section 1 above, Member States are bound to implement their obligations under the habitats and birds Directives, and potentially face censure by the Court for failure to do so. However, faced with a need to protect a marine SAC or SPA against the damaging effects of fishing vessels, the Member State must decide how to act.

This briefing has considered the potential for action both within and outside the CFP. Regarding action within the CFP, it has been noted that the current case law of the Court does not clearly indicate whether Art 37 EC is an appropriate legal basis for measures restricting the activities of fishing vessels with the primary or sole purpose of nature conservation. Even if the Court were to hold that Art 37 EC was indeed an appropriate legal basis for such measures, it does not necessarily follow that the EC should have exclusive legislative jurisdiction in this regard.

It has also been noted that the EC has to date adopted various measures under the CFP motivated at least in part by nature conservation. However, in the absence of a judgment of the Court on whether or not Art 37 EC is the appropriate legal basis for measures adopted primarily or solely for the purpose of nature conservation, it remains possible that measures so adopted have used an inappropriate legal basis. As such, this legislative practice by the EC can only be regarded as persuasive, rather than determinative of the issue.

The briefing has also considered the powers of the Member States to act unilaterally under the CFP. It has been concluded that the express powers of the Member States to act under the basic Regulation in relation to foreign-flagged vessels for nature conservation purposes are subject to strict limitations and, because of this, are unlikely to constitute a means for coastal Member States to fulfil their obligations under the habitats and birds Directives. However, the possibility of shared jurisdiction between the EC and the Member States to adopt measures restricting the activities of fishing vessels for the primary or sole purpose of nature conservation has also been raised.

If it were found that measures restricting the activities of fishing vessels for the primary or sole purpose of nature conservation could not be taken under the auspices of the CFP, those measures required by the habitats or birds Directives would instead need be taken outside the CFP. It is arguable that where the measure was required in order to protect a specific SAC or SPA in a Member State's waters, the most suitable actor to adopt such a measure would be the Member State itself (albeit ensuring compatibility with the general principles of EC law). However, there are circumstances when action at the EC level founded on Art 175 EC may be more appropriate.

So where does this leave the coastal Member State? In *Marais Poitevin*,[41] the French government sought to explain the deterioration of a SPA by arguing that 'Community aid measures for agriculture [under the CAP] are disadvantageous to agriculture compatible with the conservation requirements laid down by the Birds Directive'. In response, the Court held that 'even assuming that this were the case and a certain lack of consistency between the various Community policies were thus shown to exist, this still could not authorise a Member State to avoid its obligations under that directive ...'.[42]

The implication of *Marais Poitevin* is that in the face of threats to nature conservation posed by activities of fishing vessels permitted under the CFP, a coastal Member State is still not entitled to avoid its obligations under the habitats or birds Directive.

The Member State is therefore faced with a choice. On the one hand, should it try action under the auspices of the CFP, either by seeking to persuade the Commission or Council to adopt a measure or by seeking to act unilaterally? (In seeking to act unilaterally, should it use its limited powers under the basic Regulation or should it argue shared jurisdiction under the CFP for measures primarily or solely concerned with nature conservation?) On the other hand, should it try action outside the CFP, either by seeking to persuade the Council to adopt a measure based on Art 175 EC or by seeking to act unilaterally?

The question is: which of these options is correct in law? This briefing has indicated that the answer is currently not clear. Yet the issue is a topical one. Member States are showing an increasing amount of interest in designating marine SACs and SPAs, and the threat from fishing to such sites will need to be addressed promptly and with certainty.

Of course, there is always the possibility that issues such as the appropriate legal basis or the sharing of jurisdiction between the EC and the Member States will come before the Court. For example, imagine a

[41] Case C-96/98 [1999] ECR I-8531.
[42] See para 40 of judgment.

new Council regulation restricting activities of fishing vessels for the sole or primary purpose of nature conservation, founded on Art 37 EC. The flag Member State of the affected vessels might challenge the use of Art 37 EC as the regulation's legal basis, by bringing the matter directly before the Court under Art 230 EC. Or, in the event that a vessel interest was prosecuted in the coastal Member State for breach of the restriction, the matter might reach the Court by the domestic criminal court making a reference for a preliminary ruling under Art 234 EC.

Alternatively, imagine that a coastal Member State decides to adopt a unilateral measure restricting activities of fishing vessels for the sole or primary purpose of nature conservation. Let us say that it does this by acting outside its express powers under the basic Regulation, by arguing shared jurisdiction under the CFP for the adoption of this kind of measure. Again, in the case of a vessel interest prosecuted in the coastal Member State for breach of the restriction, the matter might reach the Court by a request for a preliminary ruling under Art 234 EC by the domestic criminal court. Alternatively, there is at least scope for enforcement action against the Member State by the Commission under Art 226 EC.

It is important to mention the possible consequences of unilateral measures by Member States, whether these are taken outside the CFP or by arguing shared jurisdiction under the CFP. First, a Member State may be wary of such unilateral action in view of the uncertainty about whether or not this is the correct approach in law. Notably, a Member State may understandably be reluctant to risk incurring liability for harm caused to individuals, such as fishermen, by what may in due course be deemed a breach of EC law (see eg the *Factortame* litigation).

It is also necessary to bear in mind that such measures would potentially be adopted by all coastal Member States. The overall effect of such measures could be exclusion from certain areas of fishing vessels, such that those displaced vessels then sought to fish elsewhere. This type of situation may not be entirely new: it may also have occurred when oil and gas installations were established in the North Sea, with associated safety zones. However, if significant displacement of vessels were predicted, action at the appropriate level would potentially be needed to address this.

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