Note prepared for Baltic Sea 2020 on some legal issues relating to regionalisation of the European Union's Common Fisheries Policy, in the light of the Treaty of Lisbon

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Summary

This note considers a model of regionalisation in which the Member States in a given region of EU waters are enabled to legislate and adopt legally binding acts in the area of fisheries conservation. The principal question addressed in this note is whether the Treaty on the Functioning of the European Union (TFEU) presents any insurmountable legal barriers to the establishment of this model of regionalisation. It is suggested that the main potential challenges for the EU in this respect may be (a) the need to make sure that it remains able to meet its responsibilities under the TFEU and the Treaty on European Union and/or (b) the need to avoid its exclusive competence in the area of fisheries conservation being undermined. The note considers the kinds of safeguard that might be appropriate to meet these challenges. It also looks at which of the empowerment route or the implementation route under Article 2(1) of the TFEU might be more appropriate for enabling Member States to adopt regional measures. The note ends with a reminder that, in the area of fisheries, the EU's exclusive competence does not extend beyond fisheries conservation.

Introduction

1. This note does not seek to promote any particular model of regionalisation of the European Union's Common Fisheries Policy (CFP). However, a particular model of regionalisation will nonetheless be considered here, namely one in which the Member States in a given region of EU waters are enabled to legislate and adopt legally binding acts in the area of fisheries conservation. The reason for considering this particular model is that it brings to the fore certain potential legal issues that would not necessarily be in issue if Member States in a given region were instead merely given express powers to, say, make joint recommendations to the Commission in the hope that those recommendations would then be adopted by the relevant EU institution(s).

2. The Treaty of Lisbon[2] works by amending two pre-existing treaties, namely the Treaty on European Union and the Treaty establishing the European Community. It renames the latter as the Treaty on the Functioning of the European Union (TFEU).[3] This note will focus in particular on the TFEU. The TFEU, unlike its predecessor the Treaty establishing the European Community, states what areas are the exclusive competence of the EU. It also identifies the principal areas in which competence is shared between the EU and the Member States. Thus the TFEU, in Article 3(1), states that 'the conservation of marine biological resources under the common fisheries policy' is an area of *exclusive* competence of the EU and, in Article 4(2), adds that 'fisheries, excluding the conservation of marine biological resources' is an area of *shared* competence.

3. At first sight, the term 'marine biological resources' as used in the TFEU looks quite new and rather broad. However, evidence from an earlier instrument suggests that this 'new' phrase has a heritage going back quite a long way. Thus the 1972 Act of Accession,[4] governing the accession by Denmark, Ireland and the United Kingdom to what is now the EU, refers in its Article 102 to 'the biological resources of the sea'. As can be seen, this term is very similar to 'marine biological resources'.

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[2] OJ 2007 C306/1.

[3] OJ 2010 C83/47.

[4] JO 1972 L73.

Equally, the French version of the TFEU, for 'marine biological resources', uses 'ressources biologiques de la mer'; the latter term—word-for-word—is used in the French version of Article 102 of the 1972 Act. This evidence, although not representing a comprehensive tour of the relevant languages prevailing in 1972, suggests that the term 'marine biological resources' as used in the TFEU is merely intended to reflect the wording used in the 1972 Act. Perhaps at some risk of oversimplifying things, the phrase 'the conservation of marine biological resources under the common fisheries policy' as used in the TFEU will therefore be paraphrased for the purposes of this note as 'fisheries conservation'.

4. Article 2(1) of the TFEU (hereafter, 'Article 2(1)') explains *who* may legislate and adopt legally binding acts in areas of EU exclusive competence. It states that: 'When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.' This means that if Member States, whether in a regional context or otherwise, are to be able to legislate and adopt legally binding acts in the area of fisheries conservation, they can only do so if *either* they have been empowered to do so by the EU (hereafter, 'the empowerment route') *or* they are implementing EU acts (hereafter, 'the implementation route').

5. The principal question for consideration in this note is whether the TFEU presents any insurmountable legal barriers to the establishment of the model of regionalisation referred to in paragraph 1 above, i.e. a model in which Member States are enabled to legislate and adopt legally binding acts in the area of fisheries conservation. A suitable starting point in this analysis is the exclusive competence of the EU in the area of fisheries conservation, as provided for by Article 3(1) of the TFEU (hereafter, 'Article 3(1)'). There are at least two different ways of considering the role of the EU's exclusive competence and these are set out below:

Approach (a): Article 2(1) clearly envisages that Member States can be provided with powers to adopt legally binding acts in areas of EU exclusive competence, albeit only by the empowerment route or the implementation route. In turn, it is

arguable that the EU, given that it has exclusive competence for fisheries conservation, is free to decide how much of that power it wishes to provide to the Member States, so long as (a) any such provision of powers is done either by the empowerment route or by the implementation route and (b) the EU remains able to meet its responsibilities under the TFEU and the Treaty on European Union (hereafter, 'the Treaties').

Approach (b): The TFEU, in Article 3(1), is clear that it is conveying exclusive competence for fisheries conservation to the *EU*. Despite the fact that Article 2(1) establishes the empowerment route and the implementation route in respect of Member States, it is arguable that the EU must nonetheless be careful to avoid providing too many powers for fisheries conservation by either or both of these routes to the Member States on the grounds that to do so might undermine the exclusivity of the EU's competence in that area, contrary to the TFEU's conveyance of that exclusivity to the EU.

6. It can be seen that in the case of approach '(a)' above, the challenge for the EU would be to make sure that it remained able to meet its responsibilities under the Treaties, whereas in the case of approach '(b)', the EU's challenge would be to avoid its exclusive competence in fisheries conservation being undermined. (In principle, these two challenges are not mutually exclusive.) It is strongly arguable that the types of safeguard needed to meet either of these challenges are the same. Therefore this note does not seek to decide which of approaches '(a)' and '(b)' above has more merit. Instead, it assumes for current purposes that either of the approaches could be correct and moves on to consider the kinds of safeguard that might be appropriate to meet these challenges. Before considering safeguards, the note will investigate the meaning of empowerment and implementation as referred to in Article 2(1); after considering safeguards, the note will consider which of the empowerment route or the implementation route might be more appropriate for enabling Member States to adopt regional measures.

Meaning of empowerment and implementation as referred to in Article 2(1)

7. As noted in paragraph 4 above, pursuant to Article 2(1), Member States may legislate and adopt legally binding acts in the area of fisheries conservation *only* 'if so empowered by the Union' or 'for the implementation of Union acts'. Turning initially to the phrase **'empowered by the Union'**, the TFEU does not elaborate on the meaning of 'empowerment' in the context of Member States. The language of 'empowerment' of Member States seems to be a new development arising from the Treaty of Lisbon and may be seen as the equivalent of what was hitherto referred to, at least informally, as 'delegation of powers' to Member States. On that basis, examples of empowerment of Member States existing *before* the Treaty of Lisbon entered into force include Articles 8, 9 and 10 of the current Basic Regulation.[5] In summary, these Articles enable Member States to adopt: emergency measures (Article 8); measures within 12 nm of the baseline (Article 9); and measures for own-flag fishing vessels (Article 10). An example of empowerment of Member States that came into existence *after* the entry into force of the Treaty of Lisbon is Article 6 of Regulation 57/2011[6] (the current principal annual fishing opportunities Regulation), whereby in cases where a total allowable catch (TAC) is allocated to just one Member State, that Member State is 'empowered' to determine the level of that TAC (rather than the level being determined by the Council).[7]

8. Turning next to the phrase **'for the implementation of Union acts'** as used in Article 2(1), the TFEU *does* contain an Article on this theme (Article 291—see paragraph 20 below) but does not elaborate on the meaning of the term 'implementation'. Must 'implementation' be very narrow in scope, perhaps being restricted to, say, national measures establishing sanctions for breach of the EU act in question? Or could it be wider, so that 'implementation' could mean national measures adopted

[5] Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ 2002 L358/59, as amended and corrected.

[6] Council Regulation (EU) No 57/2011 of 18 January 2011 fixing for 2011 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in EU waters and, for EU vessels, in certain non-EU waters, OJ 2011 L24/1.

[7] Reg 57/2011, Art 6 and recital (4).

by Member States to implement, say, high level objectives set by the Council and the European Parliament? It is arguable that the meaning of 'implementation' should not be set rigidly as being always narrow or always wide but should instead be determined by the context. For example, if the EU act to be implemented is highly prescriptive, such as a Regulation establishing a minimum mesh size, there may be little that a Member State can do to implement it beyond establishing sanctions. But if the EU act instead sets high level objectives, there could be much scope for implementation by a Member State. However, Article 291 of the TFEU may impose some limitations in this respect, and this is discussed in paragraph 20 below.

Safeguards that could be applied by the EU institutions

9. As already noted above, the principal question for consideration in this note is whether the TFEU presents any insurmountable legal barriers to the establishment of the model of regionalisation referred to in paragraph 1 above, i.e. a model in which Member States are enabled to legislate and adopt legally binding acts in the area of fisheries conservation. Paragraph 6 above, in discussing the role of the EU's exclusive competence for fisheries conservation, suggested that whether the challenge for the EU is to make sure that it remains able to meet its responsibilities under the Treaties or is to avoid its exclusive competence in fisheries conservation being undermined, the types of safeguard needed to meet either of these challenges are the same. This section of the note considers what these safeguards might look like. Those that will be considered are as follows: **(a)** careful delimitation by the EU institutions of what Member States are enabled to do; **(b)** retention by the EU institutions of sufficient powers to intervene if need be; and **(c)** the need to ensure that the ability of the Commission to bring infraction proceedings against one or more Member States for breach of EU law is not impeded.

10. **Careful delimitation of what Member States are enabled to do.** The scope of the Member States' empowerment or the terms of the objectives to be implemented by the Member States could, depending on the subject matter, be set either by the Council and European Parliament under Article 43(2) of the TFEU or by the Council alone under Article 43(3) of the TFEU. For example, the scope of the empowerment

under Article 6 of Regulation 57/2011 (see paragraph 7 above) was set by the Council alone under Article 43(3). Either way, the EU institutions involved could carefully delimit the scope of the empowerment or the objectives to be implemented. In the abstract, it is of course hard to consider what threshold amount of discretion would be unacceptable or what constitutes 'careful' delimitation. Furthermore, in deciding how far Member States can go, it would be necessary to take into account what powers of intervention the EU institutions have retained (see paragraphs 11–15 below) because, arguably, greater intervention powers might justify Member States being given more discretion.

11. **Intervention powers for the EU institutions**. In principle, in any EU secondary legislation empowering the Member States or setting objectives for the Member States to implement, the EU institutions adopting that legislation could give themselves powers to intervene in order to deal with situations where the Member States either were failing to act at all or were acting in ways inconsistent with the scope of the empowerment or the terms of the objectives. For example, Article 6 of Regulation 57/2011 (see paragraph 7 above) requires that each Member State concerned must, by a given date, inform the Commission of the TACs adopted and goes on to imply that in the absence of action by the Member State the Commission may well use its the emergency powers under Article 7 of the Basic Regulation.

12. Intervention powers for the EU institutions could take various forms. An example of EU secondary legislation providing a *pre-determined* outcome if a Member State fails in its obligations is Regulation 1100/2007 establishing the eel recovery plan.[8] In that case, a fishing effort reduction target determined by the Council and already set out in the Regulation itself is to apply if the Member State fails to submit an 'eel management plan' to the Commission for approval by a given date.[9] Although this example is not strictly relevant to a model of regionalisation that envisages the Member States adopting fisheries conservation measures

[8] Council Regulation (EC) No 1100/2007 of 18 September 2007 establishing measures for the recovery of the stock of European eel, OJ 2007 L248/17.

[9] Reg 1100/2007, Art 4(2); see also Art 5(4).

themselves (as opposed to coming up with proposals for approval by, say, the Commission), it does illustrate the concept of a pre-determined intervention.

13. However, in many cases a pre-determined outcome may not be sufficiently flexible and the EU institutions may prefer that, in cases of poor performance by the Member States, the matter is placed back in the institutions' hands for an appropriate decision to be made. Whether the intervention at the EU level is to be pre-determined or otherwise, the EU secondary legislation would need to establish a trigger for the intervention. That trigger would need to be carefully defined, not least to provide adequate certainty both to the Member States and to the EU institutions. Ideally, in the terms of legal certainty, the trigger would be based entirely on objective criteria related to the Member States' performance. However, in practice, it may be that a blend of both objective and subjective criteria would be required. The legislation could define who has the task of deciding whether the criteria had been met; for example that task could be given to the Commission.

14. In the case of empowerment specifically, the EU secondary legislation establishing the empowerment could potentially provide for the Member States to be *dis*empowered in the event that they were failing to use their powers or were using them inconsistently with the scope of the empowerment. As above, the secondary legislation would need to establish a trigger for that disempowerment to occur. When thinking about disempowerment in the context of regionalisation, it is important to bear in mind that, depending on the region in question, a group or sub-group of Member States in a region, if reluctant to be disempowered, might be large enough to block the establishment of a pro-disempowerment qualified majority in the Council. One way around this might be to provide not only for empowerment to be withdrawn at any time but also for any empowerment to anyway be time-limited, whereby the empowerment would automatically expire after a given amount of time unless renewed on the basis of a legislative proposal by the Commission.

15. Assuming that any EU secondary legislation providing for regionalisation permitted regional fisheries conservation measures to be adopted by the Member States *only* by unanimity (as opposed to by any form of majority voting) amongst the Member States concerned, the existence of intervention powers for the EU

institutions would presumably act as an incentive for the Member States in a particular region to reach unanimous agreement on measures for that region. This is because the Member States would be aware that failure to reach unanimity on a measure would mean that the measure could not be adopted, hence potentially providing the EU institutions with a justification to intervene and adopt their own measure instead.

16. **Infraction proceedings by the Commission.** A preliminary point is that infraction proceedings are in general a fairly blunt instrument, and it would probably be preferable from the point of effective fisheries conservation for the EU institutions to have intervened (for example as discussed in paragraphs 11–15 above) well before it became necessary to rely on legal proceedings to solve the problem. However, whatever model of regionalisation is adopted, it is important that the ability of the Commission to bring infraction proceedings under Article 258 of the TFEU against one or more Member States for breach of EU law should not be impeded by that model.

17. One question that arises is whether Article 258 of the TFEU, as it is currently worded, would enable the Commission to bring proceedings against all the Member States in a region *collectively*. If not, it would clearly be important to design the model of regionalisation to allow the Commission to identify any *single* Member State within a region as being in breach. A further point arises on the matter of demonstrating a breach. If, for example, the objective to be implemented by Member States was set at a high level and was to be achieved over the long term, the question arises as to how a breach could then be demonstrated by the Commission. One solution might be for the institutions to specify a step-wise methodology for attaining the objective in question (as has been done in the case of the Marine Strategy Framework Directive[10] in respect of achieving good environmental status), with scope for specific breaches to arise along the way.

[10] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ 2008 L164/19.

Choosing between the empowerment and implementation routes

18. If Member States were to be enabled to legislate and adopt legally binding acts in the area of fisheries conservation in a regional context, the question arises as to what these acts, or measures, would look like. It was assumed in paragraph 15 above that any EU secondary legislation enabling Member States to act in this way would permit regional fisheries conservation measures to be adopted by the Member States concerned *only* by unanimity. Following unanimous adoption of a measure, each Member State concerned would presumably need to enact the agreed measure through its own domestic legislative process. To ensure consistency across the region in question, and hence to ensure a level playing field, care would need to be taken to ensure that one Member State did not enact wording that was different in meaning to that enacted by any other Member State.

19. Clearly, the practicalities of a system of this kind would need to be given further thought. However, one question that arises at this point is whether the challenge of establishing uniform conditions for fisheries conservation across the region in question would present any issues as far as the TFEU is concerned. The answer may be different depending on whether one is looking at the empowerment route or the implementation route. As observed in paragraph 7 above, the TFEU has nothing to say about the empowerment route beyond its being mentioned in Article 2(1). The TFEU is therefore silent about how, under this route, uniform conditions are to be achieved. This suggests that there would be scope for the EU secondary legislation establishing the empowerment to set out the rules on the achievement of such conditions.

20. For implementation, on the other hand, the TFEU does have something more to say—in the form of Article 291. This Article relates to implementation of legally binding EU acts. The general rule, as set out in paragraph (1), is that it is for the Member States to implement legal binding EU acts. However, paragraph (2) goes on to provide that '[w]here *uniform conditions* for implementing legally binding Union acts are *needed*' (emphasis added), those acts 'shall' (not 'may') confer implementing powers on the Commission (or exceptionally on the Council). Is the effect of paragraph (2) that, in the context of implementation of EU acts (including acts setting high level objectives), only the Commission may be given the relevant

implementing powers if uniform conditions are needed? The text of paragraph (2) itself suggests the answer is 'yes'. If that is so, paragraph (2) would constrain the ability of Member States to make use of the implementation route under Article 2(1) except where uniform conditions are *not* needed. That would in turn mean that the empowerment route (see previous paragraph) would take on a greater prominence in the context of regionalisation.

Conclusions

21. This note has considered a model of regionalisation in which the Member States in a given region of EU waters are enabled to legislate and adopt legally binding acts in the area of fisheries conservation, and has looked at whether the TFEU presents any insurmountable legal barriers to the establishment of this model of regionalisation. Paragraphs 5 and 6 above, in considering the role of the EU's exclusive competence in the area of fisheries conservation, identified two potential challenges for the EU, namely to make sure that it remains able to meet its responsibilities under the Treaties and/or to avoid its exclusive competence in fisheries conservation being undermined. A good argument can be made that if the various kinds of safeguard discussed in paragraphs 11–15 above were to be adopted, these challenges could be adequately met. Paragraphs 18–20 above suggest that the empowerment route, rather than the implementation route, may have a more prominent role to play in the establishment of the model of regionalisation in question.

22. The discussion in this note has been about 'fisheries conservation'. As stated in paragraph 3 above, the term 'fisheries conservation' is used in this note to paraphrase the words 'the conservation of marine biological resources under the common fisheries policy' as used in the TFEU. In a fisheries context, the exclusive competence of the EU, and hence the limitations applied by Article 2(1) of the TFEU to law-making by Member States, applies *only* to 'the conservation of marine biological resources under the common fisheries policy'. The area of 'fisheries' as a whole is broader than this, and those parts of 'fisheries' that are not 'the conservation of marine biological resources under the common fisheries policy' do not fall within the EU's exclusive competence. This is reflected by Article 4(2) of the TFEU which states that 'fisheries, excluding the conservation of marine

biological resources' is an area in which competence is shared between the EU and the Member States. In areas of shared competence, such as those parts of 'fisheries' that are not 'the conservation of marine biological resources under the common fisheries policy', the scope for Member State action is in principle much greater since it is not constrained by Article 2(1).[11] However, the value of this for the purposes of regionalisation of the CFP will depend on the extent to which those parts of 'fisheries' that are not 'the conservation of marine biological resources under the common fisheries policy' have practical relevance in the context of regionalisation.

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[11] See further Art 2(2) TFEU.