

LEGAL PRECAUTIONARY APPROACHES IN TAKING MEASURES TO PROTECT AND CONSERVE LIVING AQUATIC RESOURCES

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Abstract

The paper analyzes the European Union Court of Justice interpretation of: 1) Commission Regulation no. 530/2008 establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45°W, and in the Mediterranean Sea and 2) the validity of Article 7(2) of Council Regulation no. 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (CFP). The two aspects are seen both in the context of CFP as a policy of the European Union which aims at ensuring exploitation of living aquatic resources, providing, in the same time, sustainable economic, social and environmental conditions, and also in wider context of international law, namely it is International Convention for the Conservation of Atlantic Tunas (which was signed in Rio de Janeiro on 14 May 1966).

Key words: aquatic resources, conservation, regulation, precautionary principle

INTRODUCTION

The present paper discusses the main European Union (EU) legal and policies provisions regarding sustainable use of the aquatic resources and some international stipulations in this respect. We bring forward the objectives of the Common Fisheries Policy (CFP), as they are reflected under the EU treaties and Basic CFP Regulation. These CFP objectives emphasize the cross-cutting nature of EU environmental policy, term upon which we will focus through out the entire analyze. Our scientific approach is complemented by presenting a case law from the Court of Justice of the European Union (CJEU), being more precisely a procedure of preliminary ruling. But, what is the procedure of preliminary ruling? According to article (art.) 267 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of treaties,

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies. If such a question is raised before any court of a Member State (MS), the court may, if it considers that a decision on the question is necessary to give judgment, request the Court to rule on this issue. If such a question is raised in a case pending before a national court against whose decisions there is no judicial remedy under national law, that court shall bring the matter before the Court [11].

MATERIAL AND METHOD

Methodological stages and their main tools consist of: 1. setting the research topic, 2. documentation, 3. explain legal and political phenomena, 4. drafting the work. The choice of topic (1) was made considering authors' scientific background, available scientific resources, theoretical and practical importance of the research topic. We emphasize that documentation was essential prior to choosing the topic. Systematic documentation was developed on the entire front of the issues mentioned and it took place after the setting the research topic. In this regard, we have used legal and political

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The manuscript was received: 14.02.2013
Accepted for publication: 11.04.2013

documents, CJEU jurisprudence and scientific articles. Within stage number 3, we used the method of data interpretation (deductive, comparative). For legislation analyses, we used the method of juridical comparative research, comparing legal provisions that exist at EU level and at international level. The third stage is the most complex one, being composed of two important moments: the creative moment and critical-valued moment. For evaluation of methodological framework we had in mind indicators as (by way of illustrative): determining the importance of subject and of research activities; choosing research methods and techniques according to the field and objectives.

THE COMMON FISHERY POLICY AND THE RELATION WITH THE ENVIRONMENTAL POLICY

The TFEU, in article 38, makes express reference to a Common Fisheries Policy (as well as a Common Agricultural Policy (CAP). 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, alignment 1 TFEU: (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilization of the factors of production, in particular labor; (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; (c) to establish markets; (d) to assure the availability of supplies; (e) to ensure that supplies reach consumers at reasonable prices] and the same legal basis stated in 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” [12]. As we showed before, the general objectives for the CAP and the CFP are all economic/market-related, and in addition, articles 40-42, aim at ensuring the establishment of a common market. Therefore,

the environmental requirements, which are so present today, are almost missing. It may be argued that the objectives named in article 39, alignment 1, point a) and d) are, in some extent, connected to the objectives of environmental protection and conservation. Nevertheless, we go further and we must make reference to article 11 TFEU. This article consecrates the EU environmental policy as a cross policy, in the sense that: “Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development” [12]. Art. 191 (1) defines the objectives of the EU environmental policy: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change. Art. 191 (3) underlined that, in preparing its policy on the environment, the Union shall take account of: available scientific and technical data, environmental conditions in the various regions of the Union, the potential benefits and costs of action or lack of action, the economic and social development of the Union as a whole and the balanced development of its regions. Out of these provisions, we see that environmental objectives must be taken into account in developing CFP (and CAP) new strands. Very helpful in identifying the real aims and objectives of CFP, is so called Basic CFP Regulation - Council Regulation no 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy. According to it, CFP shall cover conservation, management and exploitation of living aquatic resources, aquaculture, and the processing and marketing of fishery and aquaculture products where such activities are practiced on the territory of MS or in Community waters or by Community fishing vessels or, without prejudice to the primary responsibility of the flag State, nationals of Member States. Moreover, the CFP shall provide for coherent

measures concerning: conservation, management and exploitation of living aquatic resources, limitation of the environmental impact of fishing, conditions of access to waters and resources, structural policy and the management of the fleet capacity, control and enforcement, aquaculture, common organization of the markets, and international relations. Article 2 of the same regulation sets the objectives of CFP. It has to ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions. Therefore, three outcomes are anticipated to be delivered: a commercially viable industry, sustainable environmental conditions and support for poor coastal communities dependent on fishing. For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimize the impact of fishing activities on marine eco-systems. It shall aim at a progressive implementation of an eco-system-based approach to fisheries management. It shall aim 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 [3]. The Marine Strategy Framework Directive (MSFD) is the environmental pillar of the integrated maritime policy, designed to 'protect and preserve the marine environment, prevent its deterioration or, where practicable, restore marine ecosystems in areas where they have been adversely affected, and aims to achieve 'good environmental status' for European seas by 2020 [4]. Although fisheries receive a specific attention under the MSFD, fisheries are not subject to its direction and the MSFD notes that they will continue to be regulated exclusively through the CFP [13].

PRECAUTIONARY PRINCIPLE AND ITS REFLECTION IN A CASE LAW

Article 15 of the Rio Declaration explained the precautionary principle, as agreed by the signatory states, to mean that lack of full

scientific certainty of serious damage should not postpone cost-effective preventive measures, so that erring on the side of caution to exclude risk is justified according to the precautionary principle. The precautionary principle is detailed in article 191 of the Treaty on the Functioning of the European Union, and it aims at ensuring a higher level of environmental protection through preventative decision-taking in the case of risk. However, in practice, the scope of this principle is far wider and also covers consumer policy, European legislation concerning food and human, animal and plant health. The Communication from the Commission of 2 February 2000 on the precautionary principle [6] establishes common guidelines on the application of the precautionary principle. The Commission stresses that the precautionary principle may only be invoked in the event of a potential risk and that it can never justify arbitrary decisions. The precautionary principle may be invoked when the three preliminary conditions are met: identification of potentially adverse effects; evaluation of the scientific data available; the extent of scientific uncertainty. The general principles of risk management remain applicable when the precautionary principle is invoked. These are the following five principles: proportionality between the measures taken and the chosen level of protection; non-discrimination in application of the measures; consistency of the measures with similar measures already taken in similar situations or using similar approaches; examination of the benefits and costs of action or lack of action; review of the measures in the light of scientific developments [6]. Emergency measures may be adopted by the Commission on its own initiative or at the request of a MS, first, if there is evidence of a serious threat to the conservation of living aquatic resources, or, secondly, if fishing activities have caused a threat to the marine ecosystem, in either case requiring immediate action (art. 7, al. 1 of Basic CFP Regulation). The preamble to the 2002 Basic Regulation requires that, while pursuing an objective of sustainable development, decision-makers

shall take into account economic, environmental and social aspects in a balanced manner. Article 2(1) goes on to add further context to the objective: "For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources..." While the above subparagraph of article 2(1) does use the term "shall" in reference to application of the precautionary approach, this appears to be mitigated by the subsequent aims linked to the economic and social dimensions of sustainable development [8]. However, the actual mechanisms for achieving precautionary and ecosystem-based approaches to fisheries management were not clearly outlined, nor was it specified how they would integrate with existing legislation. More usually, emergency measures are deployed to control the import of fish from outside the EU on the ground that their import poses a potential threat to human health [13]. Although emergency measures are used to control fishing, only one measure is in force to control fishing inside EU waters: Commission Regulation no 677/2003 establishing emergency measures for the recovery of the cod stock in the Baltic Sea. Emergency measures are more often used to control the import of fish, such as: Commission Decision of 12 November 2008 on emergency measures suspending imports from Peru of certain bivalve mollusks intended for human consumption; Commission Decision of 30 September 2009 on emergency measures applicable to crustaceans imported from India and intended for human consumption or animal feed; Commission Decision of 12 July 2010 amending Decision 2008/630/EC on emergency measures applicable to crustaceans imported from Bangladesh and intended for human consumption.

The case of law. The main proceeding and the questions referred for a preliminary ruling: AJD Tuna is a company established in Malta and it has as its main activity the farming and fattening of blue fin tuna caught alive in the Mediterranean Sea with a view to reselling them to traders. It owns two fish

farms for the breeding of tuna. One of these has a maximum fattening capacity of 2 500 tones while the other has a capacity of 800 tones. (Each Member State's quota is divided by the number of vessels flying the flag of or registered in that State. During 2008, the 131 purse seiners authorized to fish for bluefin tuna in the Eastern Atlantic and the Mediterranean were as follows: 1 Cypriot, 4 Maltese, 6 Spanish, 16 Greek, 36 French and 68 Italian. The individual quota for seiners more than 24 meters long was 110 to 120 tones for French seiners, 52 tones for Italian seiners and 251 to 352 tones for Spanish seiners). Following the adoption of the Commission Regulation no. 530/2008 of 12 June 2008 establishing emergency measures as regards purse seiners fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45°W, and in the Mediterranean Sea ('the Regulation'), the Direttur tal-Agricoltura u s-Sajd prohibited AJD Tuna from buying in or importing into Malta bluefin tuna for the purposes of its activities. AJD Tuna brought proceedings before the Prim'Awla tal-Qorti Ċivili seeking compensation for damage it claims to have suffered as a result of that prohibition, which it alleges is excessive, unlawful and unreasonable. It claimed that it was impossible for it to acquire the quantities of tuna to which it considered it was entitled (AJD Tuna claims that, for the year 2008, it was authorized by ICCAT to acquire 3 200 tones of bluefin tuna for the purposes of its activities and that, consequently, it had bought that quantity from French and Italian fishermen before the opening of the fishing season). Consequently, the national court took the view that the outcome of the case was dependent on the validity of the Regulation. In those circumstances, the Prim'Awla tal-Qorti Ċivili (the Maltese court) decided to stay the proceedings and to refer ten questions to the Court of Justice for a preliminary ruling. We mention further, only two of them, namely those related to the existence of a serious threat to the conservation of living aquatic resources or to the marine eco-system caused by fishing activities and the need to take immediate action. These questions were [7]:

(1) Is [the Regulation] invalid because it infringes article 253 EC in so far as it does not state sufficiently the reasons for the adoption of the emergency measures established [in articles 1, 2 and 3 of the said regulation], and in so far as it does not give a clear enough picture of the reasoning behind these measures?

(2) Is [the Regulation] invalid because it infringes article 7(1) of the Basic Regulation-Council Regulation no 2371/2002 in so far as, in its recitals, it does not establish adequately (i) the existence of a serious threat to the conservation of living aquatic resources or to the marine eco-system caused by fishing activities and (ii) the need to take immediate action? By these two questions, the referring court seeks to ascertain from the Court whether the Regulation satisfies the obligation to state reasons laid down in article 296(2) TFEU and, in particular, whether the statement of reasons provides an adequate description of the circumstances in which the Commission may act on the basis of article 7(1) of the Basic Regulation.

Legal context:

1. Article 7 of the Basic Regulation states that: “1. If there is evidence of a serious threat to the conservation of living aquatic resources, or to the marine eco-system resulting from fishing activities and requiring immediate action, the Commission, at the substantiated request of a Member State or on its own initiative, may decide on emergency measures which shall last not more than six months. The Commission may take a new decision to extend the emergency measures for no more than six months. 2. The Member State shall communicate the request simultaneously to the Commission, to the other Member States and to the Regional Advisory Councils concerned. They may submit their written comments to the Commission within five working days of receipt of the request (...). 3. The emergency measures shall have immediate effect. They shall be notified to the Member States concerned, and published in the Official Journal” [3].

2. The Council, on the base of article 5 of the Basic Regulation, adopted Regulation no

1559/2007 of 17 December 2007 establishing a multi-annual recovery plan for bluefin tuna in the Eastern Atlantic and Mediterranean and amending Regulation no 520/2007. Article 1 of Regulation no 1559/2007 provides that the purpose of that regulation is to lay down general rules for the application of a multi-annual recovery plan for bluefin tuna in the Eastern Atlantic and the Mediterranean.

3. On the bases of article 7 (1) of the Basic Regulation, was adopted the Commission Regulation no. 530/2008 (“the Regulation”). Article 1: Fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean by purse seiners flying the flag of or registered in Greece, France, Italy, Cyprus and Malta shall be prohibited as from 16 June 2008. It shall also be prohibited to retain on board, place in cages for fattening or farming, transship, transfer or land such stock caught by those vessels as from that date; Article 2: Fishing for bluefin tuna in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean by purse seines flying the flag of or registered in Spain shall be prohibited as from 23 June 2008. It shall also be prohibited to retain on board, place in cages for fattening or farming, transship, transfer or land such stock caught by those vessels as from that date; Article 3: 1. Subject to paragraph 2, as from 16 June 2008, Community operators shall not accept landings, placing in cages for fattening or farming, or transshipments in Community waters or ports of bluefin tuna caught in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean Sea by purse seiners. 2. It shall be allowed to land, place in cages for fattening or farming and to transship in Community waters or ports of bluefin tuna caught in the Atlantic Ocean, east of longitude 45 °W, and the Mediterranean Sea by purse seiners flying the flag of, or registered in Spain until 23 June 2008 [2].

4. The International Convention for the Conservation of Atlantic Tunas, which was signed in Rio de Janeiro on 14 May 1966 and entered into force on 21 March 1969, aims at ensuring optimum conservation and management of resources of tunas in the

Atlantic Ocean and its adjacent seas. The Contracting Parties agreed to establish a commission - the International Commission for the Conservation of Atlantic Tunas ('ICCAT'), whose role is to ensure that the objectives of the Convention are carried out. In 2006, ICCAT adopted Recommendation 06-05 to establish a fifteen-year recovery plan for bluefin tuna (*Thunnus thynnus*) in the Eastern Atlantic and Mediterranean. In order to rebuild the stock, that plan provides for a graduated reduction in the total allowable catch ('TAC') level from 2007 to 2010, restrictions on fishing within certain areas and time periods, a new minimum size for bluefin tuna, measures concerning sport fishery and recreational fishery as well as control measures and the implementation of the ICCAT scheme for joint international inspection to ensure the effectiveness of that plan. European Union approved this convention by Council Decision no 86/238/EEC of 9 June 1986.

As regarding these two questions, the Court ruled the following: The regulation was adopted on the basis of article 7(1) of the Basic Regulation. According to that provision, the Commission may, inter alia on its own initiative, take emergency measures under three conditions. There must, first of all, be a serious threat to the conservation of living aquatic resources or to the marine ecosystem. Secondly, that threat must result from fishing activities. Thirdly, immediate action must be required in order to put an end to that threat. As regards proof of the existence of a serious threat to conservation of bluefin tuna stocks, recitals 1 to 3 in the preamble to the Regulation note the importance of the TACs fixed for bluefin tuna under the multi-annual recovery plan for that fish stock. Moreover, recital 6 in the preamble to the Regulation states that the information obtained by Commission inspectors shows that the fishing opportunities allocated to purse seiners were likely to be exhausted before the normal end of the fishing season. Consequently, the Commission satisfied the obligation to state reasons in the Regulation as regards the existence of a serious threat to the

conservation of the bluefin tuna stock in the Eastern Atlantic Ocean and the Mediterranean. As regards the urgency for taking measures, recital 4 in the preamble to the Regulation notes that the Common Fisheries Policy is designed to ensure the long-term viability of the fisheries sector through sustainable exploitation of living aquatic resources based on the precautionary approach [10] [9]. This reminder of the objective pursued by the Union and the finding that the fishing quotas allocated to purse seiners would be exceeded soon, and in any event before the normal end of the fishing season, provide sufficient reasons for the urgency with which the Commission had to act on the basis of the precautionary approach [7].

DISCUSSIONS AND CONCLUSIONS

As regard:

1. 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. The Basic CFP Regulation is merely secondary legislation and is subordinate to Treaty provisions. In July 2011, the Commission published a Proposal for a Regulation (Proposed Regulation) that is intended to govern the operation of the CFP for the coming decade and overcome the problems inherent in the policy. Environmental sustainability of fish stocks is to be achieved through the restoration of fish stocks to maximum sustainable yield by 2015 [5]. This is the first time a quantifiable target has been set for the policy, rather than simply anticipating sustainable outcomes. However, the reforms proposed are not as radical as they might at first appear, for the target of maximum sustainable yield is not to be binding and the principles according to which the target is anticipated to be achieved are those underpinning the current regime [13].

2. On CFP- environment relation: 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. 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 [1].

ACKNOWLEDGEMENTS

“This work was cofinanced from the European Social Fund through Sectoral Operational Programme Human Resources Development 2007-2013, project number POSDRU/I.89/1.5/S62371 „Postdoctoral School in Agriculture and Veterinary Medicine Area”.

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