



# The Habitats and Birds Directives versus the Common Fisheries Policy: A Paradox

Jaap Leijen

## Keywords

Conservation of habitats, conservation of birds, fisheries conservation, exclusive competence, Habitats Directive, Birds Directive, CFP Basic Regulation, EU environmental policy, EU common fisheries policy.

## Abstract

The interaction between environmental conservation and fisheries has never been easy. This is no less true for European Union (EU) policy in these areas. Numerous EU Member States, and the European Commission, are struggling with the paradox in EU law that emerges when EU environmental policy and EU fisheries policy overlap. On the one hand, EU Member States are required to take conservation or protection measures, if necessary, in specific areas to fulfil their duties stemming from the Habitats and Birds Directives. On the other hand, Member States are, to a great extent, deprived of their competence to fulfil these duties as soon as these measures possibly touch upon fisheries. There is an exclusive competence for the EU attached to the common fisheries policy of the EU. This article addresses this paradoxical situation by analysing the Habitats and Birds Directives on the one side, and the exclusive competence of the EU in the area of fisheries on the other. The article concludes by examining possible solutions to the paradox, hopefully constituting worthwhile contributions to an ongoing discussion.

The article is a revised version of a report written on behalf of the Amsterdam International Law Clinic.

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Merkourios 2011 – Volume 27/Issue 73, Article, pp. 19-45.

URN: NBN:NL:UI:10-1-100931

ISSN: 0927-460X

URL: [www.merkourios.org](http://www.merkourios.org)

Publisher: Igitur, Utrecht Publishing & Archiving Services

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## I. Introduction

On 3 August 2010 Gerda Verburg, then Minister of Agriculture, Nature and Food Quality of the Netherlands, received a letter from both Janez Potocnik, European Commissioner for the Environment, and Maria Damanaki, European Commissioner for Maritime Affairs and Fisheries.<sup>1</sup> The letter was a response to a preceding letter of Gerda Verburg concerning measures to regulate fisheries in so-called Natura 2000 areas<sup>2</sup> – special areas of conservation (SACs) established pursuant to the Habitats Directive<sup>3</sup> and special protection areas (SPAs) established pursuant to the Birds Directive<sup>4</sup>.<sup>5</sup>

In their letter, the Commissioners wrote that measures affecting fisheries should, as a general rule, be taken under the common fisheries policy (CFP), even where they have nature protection as their objective.<sup>6</sup> However, there was possibly a problem with this arrangement. For the moment, the CFP does not provide the kind of national measures the Dutch Minister must take in order to comply with her obligations under the Habitats and Birds Directive.<sup>7</sup> According to the Commissioners, the CFP needs to be changed to better integrate the environmental protection requirements put on Member States through the Birds and Habitats Directives.<sup>8</sup> For the time being, the Commission remains ready to assess and accept national measures proposed on the basis of the Habitats and Birds Directives.<sup>9</sup>

The aforementioned letter reveals an imperfection in EU law. In short, the imperfection may be described as follows. On the one hand, Member States of the European Union (EU) are required to take conservation or protection measures, if necessary, in specific areas to fulfil the duties stemming from the Habitats and Birds Directives.<sup>10</sup> On the other hand, EU Member States are, to a great extent, deprived of their competence to do so as soon as these measures possibly touch upon fisheries. This is caused by the fact that the CFP is an area of exclusive competence for the EU.<sup>11</sup>

The imperfection is, in essence, a paradox in EU legislation: Member States are prohibited from complying with their obligations arising from the Habitats and Birds Directives when the necessary measures might affect fisheries. This article will address this paradox. The essential question to be answered is: how should the paradox of the Habitats and Birds Directives and the CFP be resolved?

Before seeking possible answers, the paradox itself needs to be analysed. At this stage, the Habitats and Birds Directives and the CFP will be considered as separate domains. Section II first addresses the domain of the Habitats and Birds Directives. It will detail relevant provisions of both Directives, their legal basis in the Treaty on the Functioning of the European Union (TFEU)<sup>12</sup>, and the binding force of the Directives. Section II then addresses the domain of the CFP. Section II provides insight into the exclusive competence in the field of the CFP, by analysing its main instrument, the Basic Regulation of the CFP<sup>13</sup>, the legal basis of CFP legislation in the TFEU, the origin of the exclusive competence, and the scope of the exclusive EU competence. Section III presents possible answers to the question of how the paradox should be resolved. Section III addresses action to fulfil the obligations under the Habitats and Birds Directives within the CFP framework, action to fulfil the obligations outside the CFP framework, and inaction, *i.e.* non-fulfilment of the obligations. Section III indicates the implications of each answer. Section IV includes examples of how the paradox has been resolved in practice.

On a final note, many sources refer to the European Community (EC). However, with the entry into force of the Treaty of Lisbon,<sup>14</sup> the EC definitively merged into the EU, the Community ceased to exist as an independent identity and became the Union. In the interest of consistency, the article will consequently refer to the Union, also when original sources refer to the Community, as far as appropriate.

1 Letter from Janez Potocnik and Maria Damanaki to Gerda Verburg (23 July 2010); on file with the author.

2 *ibid.*

3 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

4 Directive 2009/147/EC of the European Parliament and the Council of 30 November 2009 on the conservation of wild birds (codified version) [2009] OJ L20/7.

5 See Habitats Directive, art.3(1).

6 Letter from Potocnik and Damanaki (n 1).

7 *ibid.*

8 *ibid.*

9 *ibid.*

10 See Habitats Directive, art. 6 and Birds Directive, art. 4.

11 TFEU, art.3(1)(d).

12 Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

13 Council Regulation (EC) 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy [2002] OJ L358/59.

14 Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community [2007] OJ C306/01.

## II. The Paradox: an Analysis

This Section analyses the paradox itself, and more fundamentally whether it truly exists. To this end, this Section treats both sides of the paradox as separate domains: the Habitats and Birds Directives on the one hand, and the CFP on the other. First, this Section addresses the Habitats and Birds Directives. It must be emphasised that this domain centres around *instruments*. The main issues here are the objectives and scope of the Directives; the obligations they impose; their legal basis in the TFEU; and their binding force. Because of its practical relevance, the focus will be on obligations concerning the conservation of habitats. This Section then turns to the domain of the CFP, which contrary to the domain of the Directives, also focuses on *policy*. The central issue here is the scope of the *exclusive competence* of the EU in the field of the CFP. Still, the CFP's objective, scope and legal basis must be considered first. Thereafter this Section focuses on the EU's exclusive competence, by looking at the conferral of competence on the EU in the field and at delegation to the Member States. Interim conclusions will be offered at the end.

### II.1. The Habitats and Birds Directives

#### A. Objectives, Scope and Obligations of the Habitats and Birds Directives

##### A.1. Objectives

While closely linked together, the relationship between the Birds Directive and the Habitats Directive is one of *lex specialis* to *lex generalis*.<sup>15</sup> Although the Birds Directive preceded the Habitats Directive in time (adopted in 1979<sup>16</sup> and 1992<sup>17</sup> respectively), the Birds Directive may be regarded as *lex specialis* of the Habitats Directive, the latter then constituting *lex generalis*. This relationship is demonstrated by the objectives of the Directives and by the methods used. As for the objectives, whereas the main aim of the Habitats Directive is 'to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States',<sup>18</sup> the Birds Directive aims at 'the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States'.<sup>19</sup> In other words, the Habitats Directive focuses on habitats, fauna and flora in general, the Birds Directive on birds specifically. The relationship of *lex specialis* to *lex generalis* appears also from the methods used to achieve the objective of the Habitats Directive. A main method used is the establishment of a coherent European ecological network of SACs under the title Natura 2000.<sup>20</sup> According to the Habitats Directive, the Natura 2000 network shall include the SPAs classified pursuant to the Birds Directive.<sup>21</sup> The Natura 2000 network will thus be composed of SACs and SPAs, which host specific natural habitat types and habitats of species,<sup>22</sup> including habitats of bird species.<sup>23</sup> This network aims at enabling these natural habitat types and species' habitats 'to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.<sup>24</sup>

##### A.2. Scope

The scope of the Habitats and Birds Directives can be divided into three parts: the 'material' scope – the specific habitats and species to which the Habitats and Birds Directives apply; the 'geographical' scope – the land and maritime areas they cover; and the 'personal' scope – the entities to which the Directives are addressed.

15 For a more extensive discussion (in Dutch) of the Habitats and Birds Directives see eg HM Dotinga and A Trouwborst, *Juridische bescherming van biodiversiteit in de Noordzee: Internationaal, Europees en Nederlands recht* (Centrum voor Omgevingsrecht en -beleid / Netherlands Institute for the Law of the Sea 2008) 77-86 and 118-130.

16 Birds Directive, Recital 1 preamble.

17 Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

18 Habitats Directive, art 2(1).

19 Birds Directive, art 1.

20 Habitats Directive, art 3(1).

21 *ibid.*

22 *ibid.*

23 Habitats Directive, art.3(1); Birds Directive, art.4(1).

24 Habitats Directive, art.3(1).

The material scope of the Directives is, according to the Habitats Directive, confined to 'natural habitats and species of wild fauna and flora of [Union] interest'.<sup>25</sup> Natural habitats of Union interest are those which (1) are in danger of disappearance in their natural range, or (2) have a small natural range following their regression or by reason of their intrinsically restricted area, or (3) present outstanding examples of typical characteristics of a specific bio-geographical region.<sup>26</sup> Species of Union interest are species which are (1) endangered, (2) vulnerable, (3) rare, or (4) endemic and requiring particular attention as to their habitat or conservation status.<sup>27</sup> Annex I to the Habitats Directive contains the natural habitats, whereas Annexes II, IV and V enlist the species of Union interest.<sup>28</sup> For the habitats and species listed in Annexes I and II conservation requires the designation of SACs.<sup>29</sup>

For the Birds Directive, the material scope extends to 'all species of naturally occurring birds in the wild state'.<sup>30</sup> Moreover, the Birds Directive not only applies to birds, but to their eggs, nests and habitats as well.<sup>31</sup> Also, the habitats of certain bird species are designated as SPAs. Bird species falling within this category are defined by similar criteria as those for species of Union interest in the Habitats Directive.<sup>32</sup> Annex I to the Birds Directive lists these species.<sup>33</sup> In addition, SPAs will be designated for regularly occurring migratory species that are not listed in Annex I, but that are in need of protection regarding their breeding, moulting and wintering areas and staging posts along their migration routes.<sup>34</sup>

The geographical scope is the same as the European territory of the Member States to which the TFEU applies.<sup>35</sup> Moreover, as to the Habitats Directive, the Court of Justice of the EU (ECJ) clarified that it is also applicable beyond the Member States' territorial waters, namely in the exclusive economic zone (EEZ) and on the continental shelf, in which Member States of the EU exercise sovereign rights.<sup>36</sup> Therefore, the Habitats Directive, and arguably also the Birds Directive, have to be implemented in the EEZ and on the continental shelf as well.<sup>37</sup>

The personal scope of directives is generally confined to Member States of the EU: 'a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed'.<sup>38</sup> The Habitats and Birds Directives are addressed to all EU Member States.<sup>39</sup> In a few cases, the Directives are directed to the European Commission (Commission). For example, the Commission is tasked with establishing, in agreement with the Member States, a draft list of sites of Union importance<sup>40</sup> – sites that the Member States are obliged to designate as SACs once the list has been adopted by the Commission.<sup>41</sup> If no agreement can be achieved between a Member State and the Commission regarding the selection of a site as a site of Union importance, the Council shall take a decision on the selection of the site.<sup>42</sup>

#### A.3. Obligations

As mentioned above, the Habitats and Birds Directives are primarily addressed to the Member States of the EU, meaning that obligations stemming from the Directives have to be fulfilled by the Member States. The obligations are wide-ranging. Measures taken pursuant to the Habitats Directive must take account of economic, social and cultural requirements and regional and local characteristics.<sup>43</sup> Because of its practical relevance, the obligations of conservation and protection within SACs and SPAs are noteworthy. In principle, these obligations are, for both kinds of areas, described in the Habitats Directive.<sup>44</sup>

25 Habitats Directive, art.2(1).

26 Habitats Directive, art.1(c).

27 Habitats Directive, art.1(g).

28 See the Habitats Directive, Annexes I, II, IV and V.

29 See the Habitats Directive, Annexes I and II.

30 Birds Directive, art.1(1).

31 Birds Directive, art.1(2).

32 Birds Directive, art.4(1).

33 See the Birds Directive, Annex I.

34 Birds Directive, art.4(2).

35 Habitats Directive, art.2(1) and Birds Directive, art.1.

36 See eg case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017, para 117.

37 See *ibid*.

38 TFEU, art.288, third para.

39 Habitats Directive, art.24 and Birds Directive, art.20.

40 Habitats Directive, art.4(2).

41 Habitats Directive, art.4(4).

42 Habitats Directive, art.5(2-3).

43 Habitats Directive, art.2(3).

44 Habitats Directive, art.7.

According to the Habitats Directive they shall apply in an area as soon as it is adopted on the list of sites of Union interest.<sup>45</sup> The ECJ, though, has ruled that Member States are required to take protective measures that are appropriate for the purpose of safeguarding the relevant ecological interest of an area even at an earlier point in time, namely from the moment this area is included in the national list transmitted to the Commission for adoption on the list of sites of Union interest.<sup>46</sup> Further, the ECJ decided that, in addition to Member States' special obligations to protect SPAs, they have a more general obligation to preserve, maintain or re-establish a sufficiently large and diverse area of habitats for protected birds, which includes taking measures to upkeep and manage bird habitats that are not classified as a SPA.<sup>47</sup>

The prime obligation in regard to SACs and SPAs is for Member States to take appropriate steps to avoid (1) the deterioration of the natural habitats and habitats of (bird) species the areas contain, and (2) disturbances of the (bird) species for which the areas have been designated.<sup>48</sup> This obligation is binding as to the desired result,<sup>49</sup> which is a favourable conservation status.<sup>50</sup> This means that Member States are obliged to establish measures when any use actually does, or is likely to, deteriorate habitats or disturb (bird) species in these areas.<sup>51</sup> This includes use that pre-dates the designation of the area as an SAC or SPA.<sup>52</sup>

The prime, material obligation has a procedural counterpart:<sup>53</sup> Member States must appropriately assess any plan or project – including existing use<sup>54</sup> – likely to significantly affect a SAC or a SPA.<sup>55</sup> The competent national authorities shall approve the plan or project only after ascertaining that it will not adversely affect the integrity of the area in light of the assessment's conclusions.<sup>56</sup> Exceptionally, notwithstanding any significant effect, a plan or project may be carried out – in the absence of alternative solutions – for imperative reasons of overriding public interest, including social or economic concerns. In those cases, compensatory measures must be taken to an extent that the overall coherence of the Natura 2000 network is protected.<sup>57</sup> According to the Commission, compensatory measures should be in addition to the actions that are normal practice under the Habitats and Birds Directives or obligations laid down in EU law.<sup>58</sup>

#### B. The Legal Basis of the Habitats and Birds Directives

The Habitats and Birds Directives both indicate article 192(1) TFEU<sup>59</sup> as their legal basis.<sup>60</sup> article 192 is found under Title XX ('Environment') of the TFEU. It provides for the European Parliament (Parliament) and the Council to take decisions in accordance with the ordinary legislative procedure (which is laid down in article 294 TFEU), in order to achieve the objectives referred to in article 191 TFEU. article 191 TFEU contains a broad range of objectives for EU environmental policy. These objectives are: (1) preserving, protecting and improving the quality of the environment; (2) protecting human health; (3) prudent and rational utilisation of natural resources; and (4) promoting measures at the international level to deal with regional or worldwide environmental problems, in particular combating climate change.<sup>61</sup>

The Union must try to attain all of these objectives.<sup>62</sup> In achieving these objectives the EU environmental policy aims at

45 Habitats Directive, art.4(5).

46 Case C-117/03 *Società Italiana Dragaggi SpA and others* [2005] ECR I-167, para 30.

47 Case C-355/90 *Commission v Spain* [1993] ECR I-04221, para 22 (relying on article 3.2(b) of the old Birds Directive, which obliged Member States to take measures for the 'upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones').

48 Habitats Directive, art.6(2).

49 Directives in general are 'binding as to the result to be achieved' (TFEU, art.288, third para). For further explanation regarding this specific obligation see Dotinga and Trouwborst (n 15) 81 and 85.

50 Habitats Directive, art.3(1).

51 See also Dotinga and Trouwborst (n 15) 81.

52 See case C-117/00 *Commission v Ireland* [2002] ECR I-5335.

53 See also Dotinga and Trouwborst (n 15) 85.

54 See Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee en Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2004] ECR I-7405, para 28.

55 Habitats Directive, art.6(3).

56 *ibid.*

57 Habitats Directive, art.6(4).

58 Commission, 'Guidance document on article 6(4) of the 'Habitats Directive' 92/43/EEC' COM (2007) 10.

59 Ex art.175(1) of the Treaty Establishing the European Community / art.130s of the Treaty Establishing the European Economic Community.

60 Preamble Habitats and Birds Directives.

61 TFEU, art.191(1).

62 L Krämer, *EC Environmental Law* (6<sup>th</sup> edn, Sweet & Maxwell 2007) 8.

a high level of protection.<sup>63</sup> Such level can probably best be defined by looking at the environmental standards set by the Member States that generally apply high standards of environmental protection, eg Denmark, Sweden, Finland, Austria, Germany, and The Netherlands.<sup>64</sup> Further, the EU environmental policy is based on a number of principles, among which are: (1) the precautionary principle; (2) the prevention principle; (3) rectification of damage at source; and (4) the polluter-pays principle.<sup>65</sup>

In addition, the general subsidiarity principle, as laid down in article 5 of the TEU,<sup>66</sup> and the integration principle, as provided for in article 11 TFEU, apply. The subsidiarity principle – first inserted into the TEC<sup>67</sup> solely for environmental issues<sup>68</sup> – provides that, in areas that do not fall within its exclusive competence, the EU shall act only if and in so far the objectives of the proposed action can be attained better at Union level than at the level of the individual Member States.<sup>69</sup> The integration principle requires environmental protection to be integrated into the definition and implementation of all EU policies and activities.<sup>70</sup>

article 192(1) is the proper legal basis for the Habitats and Birds Directives. The ECJ clarified that article 192(1) will be the correct legal basis if a measure relates *principally* to the environmental field.<sup>71</sup> The Habitats and Birds Directives pursue the first of the aforementioned objectives in article 192 TFEU (preserving, protecting and improving the quality of the environment). Therefore, a strong argument can be made that article 192(1) is indeed the appropriate legal basis for both Directives.

### C. Binding Force

The key provision on the binding force of directives is article 288, third paragraph TFEU. This article – in part already cited above – reads:

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.<sup>72</sup>

The TFEU thus simply obliges Member States to fulfil the obligations stemming from a directive.

The binding force of EU law *in general* is well-established in the jurisprudence of the ECJ. Central to the ECJ's thinking on the subject are the notions of *primacy* and *direct effect* of EU law. The notion of primacy has its origin in the famous case of *Costa v ENEL*: 'By contrast with the ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.'<sup>73</sup> In a later case the ECJ further explained that 'rules of Community law must be fully and uniformly applied in all the Member States from the date of their entry into force and for so long as they continue in force'.<sup>74</sup> It continued: 'These provisions are therefore a direct source of rights and duties for all those affected thereby, whether Member States or individuals, who are parties to legal relationships under Community law'.<sup>75</sup>

article 288 TFEU explains that directives depend on implementation by each Member State. They are not designed to be directly invokeable in the Member States, at least not right away.<sup>76</sup> Yet, in *Van Duyn v Home Office*, the ECJ held that a directive is not inherently incapable of being relied on by an individual before a national court.<sup>77</sup> In a subsequent case the ECJ

63 TFEU, art.191(2).

64 Krämer (n 62) 12.

65 TFEU, art.191(2).

66 Consolidated Version of the Treaty on European Union [2008] OJ C115/13.

67 Consolidated Version of the Treaty Establishing the European Community [2002] C 325/33.

68 Krämer (n 62) 17.

69 TEU, art.5(3).

70 TFEU, art.11.

71 Case C-155/91 *Commission v Council* [1993] ECR I-939, para 7; Joined Cases C-164/97; C-165/97 *European Parliament v Council* [1999] ECR I-1339, paras 14-15.

72 TFEU, art.288 third para.

73 Case 6/64 *Costa v ENEL* [1964] ECR 585.

74 Case 106/77 *Amministrazione delle Finanze v Simmenthal* [1978] ECR 629, para 14.

75 *ibid* para 15.

76 Stephen Weatherill, *Cases & Materials on EU Law* (7<sup>th</sup> edn, OUP 2006) 133.

77 Case 41/74 *Van Duyn v Home Office* [1974] ECR 1337, para 12.

explained why, when and how a directive can produce such ‘direct effect’.<sup>78</sup> According to the ECJ, if Member States are placed under a duty to adopt a certain course of action by means of a directive, the effectiveness of such an act would be weakened if it were to be denied direct effect.<sup>79</sup> Consequently, a Member State failing to implement measures required by a directive in the prescribed periods may not, as against individuals, rely on its own failure to do so in court.<sup>80</sup> Thus, if an obligation stemming from a directive is unconditional and sufficiently precise, a national court must apply this obligation.<sup>81</sup> Moreover, the ECJ has been willing at times to give effect to directives even before the implementation period has expired; Member States must refrain from taking measures which are liable to seriously compromise the result of a directive.<sup>82</sup>

From the notions of supremacy and direct effect it can be concluded that Member States are bound to implement measures required by a directive, and upon failure to do so, obligations from directives can have legally binding force in the legal systems of the Member States. This dual nature of the binding force of directives corresponds with the model of ‘dual vigilance’.<sup>83</sup> There are two routes of enforcing Union law. The first has already become clear from the notion of direct effect: the ‘national-level’ control.<sup>84</sup> This route had been constructed in the case of *Van Gend en Loos v Nederlandse Administratie der Belastingen*, in which the ECJ ruled that ‘the states have acknowledged that Community law has authority which can be invoked by their nationals before [national] courts and tribunals’.<sup>85</sup>

The second route is the ‘European-level’ infringement procedure under articles 258 and 259 TFEU.<sup>86</sup> article 258 TFEU reads:

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.<sup>87</sup>

article 259 TFEU provides for Member States themselves to initiate an infringement procedure,<sup>88</sup> although this is politically sensitive and, therefore, rarely occurs.<sup>89</sup> According to article 260, the ECJ can ultimately impose a lump sum or a penalty payment on a Member State if it continues to fail to fulfil an obligation under the Treaties even after a judgment by the ECJ.<sup>90</sup> If the non-fulfilment of an obligation concerns the notification of measures transposing a *directive* adopted under a legislative procedure, the ECJ can impose a lump sum or penalty payment on a Member State already when the Commission brings a case before the ECJ pursuant to article 258.<sup>91</sup> Procedures on the basis of article 258 are numerous, including procedures for non-fulfilment of obligations stemming from the Habitats and Birds Directives.<sup>92</sup>

78 Weatherill (n 76) 133.

79 Case 148/78 *Pubblico Ministero v Ratti* [1979] ECR 1629, para 21.

80 *ibid* para 22.

81 *ibid* para 23.

82 See Case C-129/96 *Inter-Environmental Wallonie ASBL v Région Wallonne* [1997] ECR I-7411, paras 40-45. It is worth noting that the reasoning on this point by the ECJ is not entirely consistent or without controversy. For support for the ECJ’s reasoning, see art.18 of the Vienna Convention on Treaties (1969): ‘A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when [...] it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty,’ as well as the ‘principle of sincere cooperation’ in art.4(3) TEU, which will be discussed in Section III.1.

83 See Weatherill (n 76) 99.

84 *ibid*.

85 Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

86 Weatherill (n 76) 99.

87 TFEU, art.258.

88 TFEU, art.259.

89 Weatherill (n 76) 101.

90 TFEU, art.260(2).

91 TFEU, art.260(3).

92 Examples of art.258 procedures, in which the ECJ held that national measures were not sufficient to achieve the requirements of the Habitats Directive, include Case C-256/98 *Commission v France* [2000] ECR I-2487; Case C-103/00 *Commission v Greece* [2002] ECR I-1147; Case C-117/00 *Commission v Ireland*; Case C-75/01 *Commission v Luxembourg* [2003] ECR I-1585; Case C-143/02 *Commission v Italy* [2003] ECR I-2877; Case C-98/03 *Commission v Germany* [2006] ECR I-53; Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017.

## II.2. The Common Fisheries Policy

### A. Objective and Scope of the Common Fisheries Policy

In contrast to the Habitats and Birds Directives, the objective and scope of the CFP are diffuse.<sup>93</sup> On the one hand, the objective and scope of the CFP are laid down in the TFEU.<sup>94</sup> On the other hand they are described in the CFP Basic Regulation<sup>95</sup>. This dual source leads to a twofold outcome. In this Section, the objective and scope as described in the CFP Basic Regulation will be addressed. Section II.2 under B will touch upon the legal basis as found in the TFEU. In due course, the cause of the divergence in object and scope will become clear.

#### A.1. Objective

The CFP's main aim is to 'ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions'.<sup>96</sup> To this end, the EU has to apply the precautionary approach,<sup>97</sup> which is based on the same considerations as the precautionary principle referred to in article 191(2) TFEU.<sup>98</sup> As far as the CFP Basic Regulation is concerned, these considerations mean 'that the absence of adequate scientific information should not be used as a reason for postponing or failing to take management measures to conserve [...] species and their environment'.<sup>99</sup> Furthermore, the EU must aim, on the one hand, 'at a progressive implementation of an eco-system-based approach to fisheries management' and 'to contribute to efficient fishing activities within an economically viable and competitive fisheries and aquaculture industry, providing a fair standard of living for those who depend on fishing activities and taking into account the interests of consumers' on the other.<sup>100</sup> Moreover, the CFP is guided by a number of principles of good governance: (1) clear definition of responsibilities at the Union, national and local levels; (2) decision-making based on sound scientific advice which delivers timely results; (3) broad involvement of stakeholders at all stages of the policy from conception to implementation; and (4) consistency with other EU policies, in particular with environmental, social, regional, development, health, and consumer protection policies.<sup>101</sup>

The main means to achieve the objectives of the CFP is the establishment of Union measures by the Council 'governing access to waters and resources and the sustainable pursuit of fishing activities'.<sup>102</sup> In particular, these measures are aimed at limiting fishing mortality and the environmental impact of fishing activities.<sup>103</sup> The CFP Basic Regulation provides for a wide-ranging list of possible measures, containing:<sup>104</sup>

1. The adoption of recovery plans;
2. the adoption of management plans;
3. the establishment of targets for the sustainable exploitation of stocks;
4. the limitation of catches;
5. the fixation of number and type of fishing vessels authorised to fish;
6. the limitation of fishing effort;
7. the adoption of technical measures, including:
  - (a) measures regarding the structure of fishing gear, the number and size of fishing gear on board, their methods of use and the composition of catches that may be retrained on board when fishing with such gear;
  - (b) zones and/or periods in which fishing activities are prohibited or restricted including for the protection of spawning and nursery areas;
  - (c) minimum size of individuals that may be retrained on board and/or landed;

<sup>93</sup> An excellent overview of the CFP is provided by R Churchill and D Owen, *The EC Common Fisheries Policy* (OUP 2010).

<sup>94</sup> See TFEU, art.39(1) (further discussed in Section II.2 under B.).

<sup>95</sup> Reg (EC) 2371/2002.

<sup>96</sup> CFP Basic Regulation, art.2(1).

<sup>97</sup> *ibid.*

<sup>98</sup> CFP Basic Regulation, Recital 3 preamble.

<sup>99</sup> CFP Basic Regulation, art.3(i) .

<sup>100</sup> CFP Basic Regulation, art.2(1).

<sup>101</sup> CFP Basic Regulation, art.2(2).

<sup>102</sup> CFP Basic Regulation, art.4(1).

<sup>103</sup> CFP Basic Regulation, art.4(2).

<sup>104</sup> *ibid.*

- (d) specific measures to reduce the impact of fishing activities on marine ecosystems and non target species;
- 8. the establishment of incentives, including those of an economic nature, to promote more selective or low impact fishing;
- 9. the conduct of pilot projects on alternative types of fishing management techniques.

In the case of ‘a serious threat to the conservation of living aquatic resources, or to the marine eco-system resulting from fishing activities’ that requires immediate action, the Commission may take emergency measures at the request of a Member State.<sup>105</sup>

Limiting catches by way of the establishment of total allowable catches (TACs)<sup>106</sup> and their division into Member States’ quotas,<sup>107</sup> in particular *vis-à-vis* commercially exploited stocks,<sup>108</sup> remains the primary method of fisheries management used by the EU.<sup>109</sup> However, in recent years, a fair amount of technical measures have been adopted to limit the environmental effects of fishing. They include specific measures to reduce the impact of fishing activities on marine eco-systems and non-target species, *e.g.* marine mammals, turtles, young fish, vulnerable stocks, and birds.<sup>110</sup> Several of these measures aim at furthering the objectives of the Habitats and Birds Directives.<sup>111</sup>

#### A.2. Scope

The material scope of the CFP is, according to the CFP Basic Regulation, confined to (1) ‘conservation, management and exploitation of living aquatic resources’; (2) ‘aquaculture’; and (3) ‘the processing and marketing of fishery and aquaculture products’.<sup>112</sup> Living aquatic resources are, in the context of the CFP, understood as ‘available and accessible living marine aquatic species, including anadromous and catadromous species during their marine life’.<sup>113</sup>

The geographical scope of the CFP extends to the territory of Member States and Union waters.<sup>114</sup> Union waters are defined as ‘the waters under the sovereignty or jurisdiction of the Member States with the exception of waters adjacent to the territories mentioned in Annex II to the Treaty’.<sup>115</sup> The term thus overlaps with ‘the territory of the Member States’ in that both formulations cover the internal waters and territorial sea of the Member States; the internal waters and territorial sea are both (a) ‘waters under the sovereignty [...] of the Member States’, and (b) part of the territory of Member States.<sup>116</sup> The definition’s express reference to jurisdiction clarifies that Union waters include waters beyond the territorial sea subject to coastal State jurisdiction,<sup>117</sup> and as such the EEZ.<sup>118</sup> However, the explicit reference to ‘waters’ makes it unclear whether the seabed beyond the territorial sea is also covered. The ECJ is likely to include the seabed of the EEZ if necessary, but for the continental shelf exceeding the 200 nautical miles limit of the EEZ the decision is currently uncertain.<sup>119</sup>

In relation to the personal scope, it must be borne in mind that this Section treats the objective and scope of the CFP as laid down in a *regulation* (the CFP Basic Regulation). ‘A regulation shall have general application. It shall be binding in its entirety

105 CFP Basic Regulation, art.7(1).

106 The term ‘TAC’ can be defined as ‘the quantity that can be taken and landed from each stock each year’. See Council Regulation (EC) 40/2008 of 16 January 2008 fixing for 2008 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required [2008] OJ L19/1, art.3(a).

107 The term ‘quota’ can be defined as a proportion of the TAC allocated to the Union, Member States or third countries. See art.3(b) Reg 40/2008.

108 Dotinga and Trouwborst (n 15) 41-42.

109 Churchill and Owen (n 93) 132-133.

110 Dotinga and Trouwborst (n 15) 42.

111 Examples include Council Regulation (EC) 809/2007 of 28 June 2007 amending Regulations (EC) No 894/97, (EC) No 812/2004 and (EC) No 2187/2005 as concerns drift nets [2007] OJ L182/1; Council Regulation (EC) 1568/2005 of 20 September 2005 amending Regulation (EC) No 850/98 as regards the protection of deep-water coral reefs from the effects of fishing in certain areas of the Atlantic Ocean [2005] OJ L252/2; Commission Regulation (EC) 1147/2005 of 15 July 2005 prohibiting fishing for sandeel with certain fishing gears in the North Sea and the Skagerrak [2005] OJ L185/19.

112 CFP Basic Regulation, art.1(1).

113 CFP Basic Regulation, art.3(b).

114 See CFP Basic Regulation, art.1(1).

115 CFP Basic Regulation, art.3(a).

116 Churchill and Owen (n 93) 62.

117 See also Case 61/77 *Commission v Ireland* [1978] ECR 417, paras 38-51.

118 Churchill and Owen (n 93) 63.

119 *ibid* 63-65.

and directly applicable in all Member States.<sup>120</sup> A regulation could therefore directly apply to a variety of actors. According to the regulation in question, the CFP applies first and foremost to Union fishing vessels and, without prejudice to the primary responsibility of the flag state, nationals of Member States undertaking any of the activities mentioned under the material scope.<sup>121</sup> A Union fishing vessel should, in this context, be understood as ‘a vessel equipped for commercial exploitation of living aquatic resources’, which is ‘flying the flag of a Member State’ and registered in the Union.<sup>122</sup> Notable are the Member States as actors within the CFP. The CFP Basic Regulation delegates powers to the Member States. These powers will be discussed in Section II.2 under C below.

### B. The Legal Basis of the Common Fisheries Policy

The CFP Basic Regulation indicates article 43 TFEU<sup>123</sup> as its legal basis. article 43 TFEU is the combined legal basis for common agricultural policy (CAP) and CFP acts.<sup>124</sup> The CFP and the CAP have a shared legal framework.<sup>125</sup> article 43(2) TFEU provides for the Parliament and the Council to establish, in accordance with the ordinary legislative procedure, the common organisation of agricultural markets and ‘other provisions necessary for the pursuit of the objectives of the common agricultural policy and the *common fisheries policy*’.<sup>126</sup> In addition, article 43(3) TFEU provides that the Council, on a proposal from the Commission, ‘shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of *fishing opportunities*’.<sup>127</sup>

article 39(1) TFEU lists the objectives of the CAP<sup>128</sup> which, in virtue of article 38(1) TFEU, are also the objectives of the CFP.<sup>129</sup> Translated into fisheries terminology article 39(1) TFEU may be read as being: (1) to increase fisheries productivity by promoting technical progress and by ensuring the rational development of fisheries and the optimum utilisation of the factors of fisheries; (2) to ensure a fair standard of living for, *inter alia*, fishermen; (3) to stabilise markets in fishery and aquaculture products; (4) to assure the availability of supplies of fishery and aquaculture products; and (5) to ensure that supplies of fishery and aquaculture products reach consumers at reasonable prices.<sup>130</sup>

Although article 39(1) TFEU does not refer to fisheries conservation as being one of the objectives of the CFP, fisheries conservation plays a central role within the CFP. The role for fisheries conservation, within the CFP, can be deduced from the (implicit) reference to ‘the rational development of fisheries’ and ‘the availability of supplies of fishery and aquaculture products’ in article 39(1).<sup>131</sup> This position has never seriously been contested before the ECJ.<sup>132</sup> Furthermore, the Union has moved to occupy the area of fisheries conservation within the framework of the CFP.<sup>133</sup> The adoption of Council Regulation 170/83 ‘establishing a Community system for the conservation and management of fishery resources’,<sup>134</sup> the predecessor of the current CFP Basic Regulation, marked the conclusive move of the CFP into the area of fisheries conservation.<sup>135</sup> The CFP Basic Regulation, in turn, presents the environmental aspect as a cornerstone of the CFP. As can be read in the previous Section, the objective of the Regulation is to ensure exploitation providing sustainable economic, social, and *environmental* conditions.<sup>136</sup> The Union measures the Regulation refers to aim in particular at limiting fishing mortality and the environmental impact of fishing activities.<sup>137</sup>

120 TFEU, art.288, second para.

121 CFP Basic Regulation, art.1(1).

122 CFP Basic Regulation, art.3(c-d).

123 Ex TEC, art.37.

124 See TFEU, art.43(2).

125 See TFEU, art.38(1): ‘References to the common agricultural policy or to agriculture, and the use of the term ‘agriculture’, shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector’.

126 TFEU, art.43(2) (emphasis added).

127 TFEU, art.43(3) (emphasis added).

128 TFEU, art.39(1).

129 See (n 125).

130 See Churchill and Owen (n 93) 30.

131 See eg Joined Cases 3, 4 and 6/76 *Kramer and others* [1976] ECR 1279, paras 21-33.

132 Churchill and Owen (n 93) 129.

133 Daniel Owen, *Interaction Between the EU Common Fisheries Policy and the Habitats and Birds Directives*, IEEP Policy Briefing (IEEP 2004) 4; available on the website of the Institute for European Environmental Policy (IEEP).

134 Council Regulation (EEC) 170/83 establishing a Community system for the conservation and management of fishery resources [1983] OJ L24/1.

135 Owen (n 133) 4.

136 CFP Basic Regulation, art.2(1).

137 CFP Basic Regulation, art.4(2).

However, as fisheries conservation, environmental conservation (and protection) is no explicit objective of the CFP. Moreover, from the discussion of the legal basis of the Habitats and Birds Directive, it is clear that article 192(1) is the correct legal basis if a measure relates principally to the environmental field. The legal basis of an EU act in general depends of the *objective centre of gravity* of that act.<sup>138</sup> In order to decide on the centre of gravity it is necessary to look at the aim and content of the act in question. If the assessment of an act shows that it has a twofold purpose or a twofold component, the act must be founded on a sole legal basis, based on the main or predominant purpose or component.<sup>139</sup> Therefore, with increasing emphasis on environmental protection, various acts originating from the CFP could, and in some cases should, be enacted under the EU environmental policy. For example, in 2007, the Commission proposed that a Council decision on whaling ought to have article 37 TEC (now article 43 TFEU) *and* article 175(1) TEC (now article 192(1) TFEU) as its legal basis.<sup>140</sup> In the end, the Council adopted the proposed decision, but cited only article 175(1) TEC as the legal basis, thereby indicating that the Council rejected the idea of using article 37 TEC.<sup>141</sup>

In this context, the integration principle – requiring, as noted before, environmental protection to be integrated into the definition and implementation of all EU policies and activities – plays an important role. In a number of cases, when acts were contested because they were not adopted under the environmental policy, the ECJ decided in favour of integration. The ECJ did so by impliedly or explicitly deeming the primary purpose to lie outside the environmental field, regarding environmental conservation as merely an ancillary purpose.<sup>142</sup> Thus, the centre of gravity is decisive. In the case *Biosafety Protocol*, the ECJ appeared to be putting the brakes on the influence of integration.<sup>143</sup> It explained that an influence too far-reaching would ‘effectively render the specific provisions of the Treaty concerning environmental protection policy largely nugatory’.<sup>144</sup>

Meanwhile, an issue that has arisen and is inextricably bound with the legal basis for fisheries conservation and environmental conservation is the distinction between fisheries conservation and environmental conservation. The areas are closely intertwined: fisheries conservation could be considered part of environmental conservation. The example of the regulation on whaling makes this clear. The Commission regarded the regulation as part of fisheries policy and as an environmental conservation measure.<sup>145</sup> However, the Council took a different view and insisted that regulating whaling should be seen as part of solely environmental conservation.<sup>146</sup>

However, the ECJ has acknowledged and endorsed the central role for fisheries conservation within the CFP.<sup>147</sup> In doing so, the ECJ rendered fisheries conservation to be separate from environmental policy. In addition, the ECJ only referred to acts fixing catch quotas and their allocation between the different Member States as belonging to fisheries conservation.<sup>148</sup> The scope of fisheries conservation, though, may be broader than that.<sup>149</sup> By emphasising the environmental aspect in the CFP Basic Regulation, the EU legislator arguably did broaden the scope of fisheries conservation, or has thoroughly applied the integration principle.

The legal basis of CFP conservation acts has never been seriously put to the test before the ECJ.<sup>150</sup> It is, for example, surprising that Union measures reducing the impact of fishing activities on marine ecosystems can, and in fact have been adopted under the CFP.<sup>151</sup> As noted in Section II.2.A.1 above, several of these measures even aim at contributing to the achievement of the objectives of the Habitats and Birds Directives. The demarcation of areas, however, is still unclear: first of fisheries conservation as opposed to environmental conservation, and secondly of the CFP as opposed to the environmental policy. Particularly the delineation of the area of fisheries conservation is, in the context of the conferral of competence, of utmost

138 Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-8419, paras 32-34.

139 See eg Case C-336/00 *Austria v Huber* [2002] ECR I-07699, paras 30-31.

140 Commission, ‘Proposal for a Council Decision establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the Schedule of the International Convention on [sic] the Regulation of Whaling’ COM (2007) 821, explanatory memorandum, para (5); see also proposed preamble.

141 Council, document 9818/08, ENV 317, PECH 114 (2008) 3 and 9.

142 Examples include Case C-62/88 *Greece v Council* [1990] ECR I-1527, paras 19-20; Case C-405/92 *Mondet v Armement Islais* [1993] ECR I-6133, paras 24 and 28; *Austria v Huber* (n 140) paras 35-36.

143 Owen (n 133) 10.

144 Opinion 2/00 Biosafety Protocol [2002] 1 CMLR 28, para 40.

145 COM (2007) 821, explanatory memorandum, para (5) and proposed preamble.

146 Council 9818/08 3 and 9.

147 See eg *Kramer and others* 21-33.

148 *ibid* paras 30-33.

149 *ibid*.

150 Churchill and Owen (n 93) 129 and Owen (n 133) 14.

151 Dotinga and Trouwborst (n 15) 42.

importance. As long as the legal basis of CFP conservation acts has not been called into question before the ECJ, the lack of clarity remains.

#### C. Conferral of Competence

The conferral of competence to act in the field of the CFP is laid down in the TFEU. article 3(1) provides:

The Union shall have exclusive competence in the following areas: [...] (d) the conservation of marine biological resources under the common fisheries policy; [...].<sup>152</sup>

In contrast, article 4(2) states:

Shared competence between the Union and the Member States applies in the following principal areas: [...] (d) [...] fisheries, excluding the conservation of marine biological resources; [...].<sup>153</sup>

Thus, in the area of fisheries conservation under the CFP the EU has an exclusive competence. Regard must be had to the fact that the EU has exclusive competence solely in this area under the CFP; it does not extend to the entire field of the CFP. In the remaining area(s) of the CFP, the Union has shared competence with the Member States.

The exclusive competence of the EU in the area of fisheries conservation under the CFP was not originally laid down in the Treaty. Following its ruling on fisheries conservation as part of the CFP (see previous Section), the ECJ added exclusive competence to fisheries conservation within the CFP. In *Commission v United Kingdom* it held that:

[...] 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 [Union].

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 [Union] law.<sup>154</sup>

The TFEU uses the wording of article 102 of the 1972 Act of Accession<sup>155</sup> – relating to the accession to the (then) European Economic Community by Denmark, Ireland and the United Kingdom – for the area in which the Union has exclusive competence: *conservation of marine biological resources*.<sup>156</sup> The term ‘marine biological resources’ has not been further defined in EU legislation, but is well interchangeable with the term ‘living aquatic resources’, which the CFP Basic Regulation describes as ‘available and accessible living marine aquatic species, including anadromous and catadromous species during their marine life’ (see Section II.2.A.2 above).<sup>157</sup> The term ‘conservation’, though, has not been defined anywhere in EU legislation. It is often coupled with ‘management’, but given that the Treaty explicitly confers exclusive competence to the EU solely in the area of conservation it should *not* be extended to management, which is potentially considerably wider in scope.<sup>158</sup> Fisheries management is a shared competence of the EU and the Member States.

#### D. Delegation of Competence

Not only is the scope of the EU’s exclusive competence under the CFP limited to the legislative competence in the area of conservation of marine biological resources. The EU has delegated some of its powers to the Member States. Delegated powers are laid down in a number of regulations. The principal regulations are the Technical Measures Regulation<sup>159</sup> and the

<sup>152</sup> TFEU, art.3(1).

<sup>153</sup> TFEU, art.4(2).

<sup>154</sup> Case 804/79 *Commission v United Kingdom* [1981] ECR 1045, paras 17 and 18 (emphasis added).

<sup>155</sup> Act Concerning the Conditions of Accession and the Adjustment of the Treaties – Accession of the Kingdom of Denmark, Ireland and the United Kingdom [1972] OJ L73/14.

<sup>156</sup> 1972 Act of Accession, art.102.

<sup>157</sup> CFP Basic Regulation, art.3(b).

<sup>158</sup> Churchill and Owen (n 93) 130.

<sup>159</sup> Council Regulation (EC) 850/98 of March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms [1998] OJ L125/1.

CFP Basic Regulation.<sup>160</sup> The delegated powers provided in these two Regulations are very similar; the delegated powers in the CFP Basic Regulation are, however, more extensive.<sup>161</sup> Only the delegated powers arising from the CFP Basic Regulation will therefore be discussed below, *i.e.* those set out in articles 8, 9, and 10.

article 8 provides for Member State emergency measures.<sup>162</sup> article 8(1) states:

If 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<sup>163</sup> where any undue delay would result in damage that would be difficult to repair, that Member State may take emergency measures, the duration of which shall not exceed three months.<sup>164</sup>

The emergency measures may apply to both own-flagged vessels and vessels of another Member State.<sup>165</sup> They are subject to the procedure laid down in article 8(2-6). This procedure could be divided into two stages. The first stage applies solely to emergency measures and is provided for in article 8(2):

Member States intending to take emergency measures shall notify their intention to the Commission, the other Member States and the Regional Advisory Councils concerned by sending a draft of those measures, together with an explanatory memorandum, before adopting them.<sup>166</sup>

The second stage is laid down in article 8(3-6), but also applies to article 9 measures:

- (3) The Member States and Regional Advisory Councils concerned may submit their written comments to the Commission within five working days of the date of notification. The Commission shall confirm, cancel or amend the measure within 15 working days of the date of notification.
- (4) The Commission decision shall be notified to the Member States concerned. It shall be published in the Official Journal of the European [Union].
- (5) The Member States concerned may refer the Commission decision to the Council within 10 working days of notification of the decision.
- (6) The Council, acting by qualified majority, may take a different decision within one month of the date of receipt of the referral.<sup>167</sup>

article 9 delegates power to the Member States to take measures within their 12 nautical mile zone. article 9(1), first paragraph reads:

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 within 12 nautical miles of its baselines provided that the [Union] has not adopted measures addressing conservation and management specifically for this area. The Member State measures shall be compatible with the objectives set out in article 2<sup>168</sup> and no less stringent than existing [Union] legislation.<sup>169</sup>

160 Other regulations that provide for delegated powers eg apply to only a specific geographic area: Council Regulation (EC) 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending Regulation (EC) No 1434/98 and repealing Regulation (EC) No 88/98 [2005] OJ L349/1 and Council Regulation (EC) 1967/2006 of 21 December 2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea, amending Regulation (EEC) No 2847/93 and repealing Regulation (EC) No 1626/94 [2006] OJ L409/11.

161 Churchill and Owen (n 93) 193-194.

162 As discussed in Section II.2.A.1 the Commission, too, can take emergency measures. art.7(1) CFP Basic Regulation provides for the same circumstances as described in art.8 CFP Basic Regulation that justify such measures. The Commission can take emergency measures 'at the substantiated request of a Member State or on its own initiative'.

163 As discussed in Section II.2.A.2 it is still uncertain if waters under the sovereignty or jurisdiction of a Member State include the continental shelf exceeding the 200 nm.

164 CFP Basic Regulation, art.8(1).

165 Churchill and Owen (n 93) 192.

166 CFP Basic Regulation, art.8(2).

167 CFP Basic Regulation, art.8(3-6).

168 The objectives of article 2 are the objectives of the CFP, discussed in Section II.2.A.1.

169 CFP Basic Regulation, art.9(1), first para.

Such measures may include those likely to affect the vessels of another Member State. However, for these measures, a Member State must follow a procedure that, as in the case of emergency measures, consists of a first stage applying solely to this type of measures and a second stage that is shared with the procedure for emergency measures, i.e. article 8(3-6).<sup>170</sup> The first stage is provided for in article 9(1), second paragraph:

Where measures to be adopted by a Member State are liable to affect the vessels of another Member State, such measures shall be adopted only after the Commission, the Member State and the Regional Advisory Councils concerned have been consulted on a draft of the measures accompanied by an explanatory memorandum.<sup>171</sup>

Finally, article 10 addresses Member State measures applicable solely to fishing vessels flying their own flag:

Member States may take measures for the conservation and management of stocks in waters under their sovereignty or jurisdiction provided that:

- (a) they apply solely to fishing vessels flying the flag of the Member State concerned and registered in the [Union] or, in the case of fishing activities which are not conducted by a fishing vessel, to persons established in the Member State concerned and
- (b) they are compatible with the objectives set out in article 2(1) and no less stringent than existing [Union] legislation.<sup>172</sup>

In contrast to articles 8 and 9, article 10 does not include the conservation of the marine ecosystem. Therefore, Member States do not have power to adopt structural measures to minimise the effect of fishing on the conservation of the marine ecosystem beyond their 12 nautical mile zone.

An important comment should be made about the delegation of competence as laid down in articles 8, 9 and 10 of the CFP Basic Regulation. articles 9 and 10 speak of measures for conservation *and management*. As discussed in previous Section, the EU's exclusive competence should *not* be extended to management; in the area of management, the EU and the Member States share competence. Therefore, delegation of power from the EU to the Member States to take management measures could well be deemed an impossibility in that such power was not in Union hands in the first place. The same reasoning seems to apply to the inclusion of conservation of marine ecosystems in articles 8 and 9. As can be concluded from the discussion of the legal basis of CFP acts, it is already highly uncertain if the conservation of marine ecosystems falls under the CFP, and not under environmental policy.

The inclusion of the conservation of marine ecosystems in the CFP can be looked at as an attempt by the EU to apply the integration principle.<sup>173</sup> The scope of the EU's *exclusive competence* in the field of the CFP, however, is clearly limited to the conservation of *marine biological resources*. It remains to be seen whether the Union is correct with its broad interpretation of its exclusive competence under the CFP, as implied by the delegation of competence in the CFP Basic Regulation.<sup>174</sup> As with the scope of fisheries conservation under the CFP, the scope of the exclusive competence in the area has never been put to the test before the ECJ.<sup>175</sup>

### II.3. Interim Conclusions

This Section analysed the paradox: an implied prohibition for Member States to comply with obligations arising from the Habitats and Birds Directives when this might have an effect on fisheries. The ultimate question to be answered in the respect is: is it truly there? A number of minor conclusions culminate in the final answer.

170 CFP Basic Regulation, art.9(2).

171 CFP Basic Regulation, art.9(1), second para.

172 CFP Basic Regulation, art.10.

173 Owen (n 133) 14.

174 It could be argued that the integration principle does not merely require environmental protection to be integrated in other policy areas, but also widens the scope of the exclusive competence in any area to that extent. The author is however of the opinion that the scope of an exclusive competence should be interpreted very strictly and must in that sense be distinguished from the policy area it applies to. This is because of the fundamental nature of exclusive competence: it deprives the Member States of a competence to act in an area. See, to that effect, also R van Ooik, 'The European Court of Justice and the Division of Competences in the European Union' in D. Obradovic and N. Lavranos (eds), *Interface between EU Law and National Law* (Europa Law Publishing 2007) 15.

175 Owen (n 133) 15.

#### A. The Domain of the Habitats and Birds Directives

- The Habitats and Birds Directives oblige Member States to take measures to avoid the deterioration of natural habitats and habitats of (bird) species (including breeding, moulting and wintering areas of migratory bird species), and disturbances of the (bird) species, for which SACs and SPAs are designated. The measures apply in the territorial sea, the EEZ, and the continental shelf. The result of the measures should be a favourable conservation status.
- The Habitats and Birds Directives are binding, as to the result to be achieved, upon each Member State.

#### B. The Domain of the Common Fisheries Policy

- In the field of CFP the EU has an exclusive competence. The exclusive competence is, according to the TFEU, limited to the *conservation of marine biological resources*. Thus, the EU must share competence with the Member States in the area of fisheries, *excluding* the conservation of marine biological resources.
- The demarcation of the area of fisheries conservation within the CFP is unclear. The EU legislator applies a broad interpretation of the scope of fisheries conservation. According to the CFP Basic Regulation, the EU's exclusive competence in the field of the CFP also covers fisheries *management* as well as the conservation of marine ecosystems. Neither the scope of fisheries conservation, nor of the exclusive competence it carries, has ever been seriously contested before the ECJ.
- The EU legislator has delegated the following competences to act in the area of fisheries conservation to the Member States: (1) a competence to take emergency measures in case of a serious and unforeseen threat to the conservation of living aquatic resources or to the marine ecosystem resulting from fishing activities; (2) a competence to take non-discriminatory measures within the 12 nautical mile zone for the conservation and management of fisheries resources and to minimise the effect of fishing on the conservation of marine ecosystems; and (3) a competence to take measures applicable solely to fishing vessels flying the Member State's flag for the conservation and management of stocks in its waters, and arguably also for the conservation of the marine ecosystem. For the execution of the first two delegated competences approval of the Commission is needed.

#### C. A Paradox?

Within the domain of the Habitats and Birds Directives the paradox remains. Within the domain of the CFP though, the picture is different. First, in the TFEU – ie primary law – the exclusive competence within the CFP is limited to *conservation of marine biological resources*. Following the wording of the Treaty the exclusive competence does *not* extend to the conservation of *habitats*. It could therefore be argued that in the area of marine habitats conservation, the EU has to share competence with the Member States, be it within the framework of fisheries excluding the conservation of marine biological resources, or within the framework of environment, as the Union in fact did when enacting the Habitats and Birds Directives. However, in the CFP Basic Regulation – ie secondary law – the scope of the exclusive competence is impliedly broadened to the conservation of marine ecosystems, which could include marine habitats. Measures aiming at contributing to the achievement of the objectives of the Habitats and Birds Directives have been taken within the CFP framework.

Second, the EU legislator delegated competences to the Member States. In any case, these competences provide space for coastal Member States to take measures to avoid the deterioration of natural habitats and habitats of (bird) species, and disturbances of (bird) species, within the 12 nautical mile zone. It is noted that when these measures are liable to affect the vessels of another Member State, they can only be taken if and insofar agreed on by the Commission.

### III. The Paradox: a Solution?

Even if the scope of the EU's exclusive competence in the field of the CFP, as implied by the CFP Basic Regulation, were not accepted, it could still conflict with particular obligations (specifically as regards species protection) for Member States arising from the Habitats and Birds Directives. The delegated competences leave only small spaces to fulfil these obligations. This Section will indicate possible ways out of the paradox of the Habitats and Birds Directive and the CFP. It first addresses action within the CFP. Then it examines action outside the CFP. Thereafter, it touches upon the possibility of leaving the obligations under the Habitats and Birds Directives unfulfilled. Conclusions will be drawn at the end.

### III.1. Action within the Common Fisheries Policy

First, possible action will be addressed that does not infringe the Union's exclusive competence. It could be argued that action within the CFP is the only permitted action. This line of thinking assigns priority to the CFP, for example, by stressing that when fisheries conservation under the CFP and protection under the environmental policy overlap as in the case in question, the integration principle shifts the centre of gravity of action towards the CFP.<sup>176</sup>

It can be induced from non-legally binding documents that the above approach is the view of the Commission. The Commission formulated its principle opinion on the interaction between the Habitats and Birds Directives and the CFP in a communication that contributed to a debate on the reform of the CFP<sup>177</sup> finally culminating in the present CFP Basic Regulation. It stated that both the Habitats and the Birds Directive:

build on article 174 [now article 191] of the Treaty and define management requirements which fall mostly within the responsibility of Member States. However, whenever these requirements imply the regulation of fishing activities, then it is for the [Union], on the basis of article 37 [now article 43] of the Treaty, to adopt the necessary measures.<sup>178</sup>

In non-binding guidelines for the establishment of the Natura 2000 network in the marine environment, published after the entry into force of the CFP Basic Regulation, the Commission drew the same conclusion, this time by emphasising the EU's exclusive competence.<sup>179</sup> It argued that in cases in which it is necessary to regulate certain fishing activities to avoid the deterioration of habitats for which SACs and SPAs have been designated, 'given that fisheries is an exclusive [Union] competence, fisheries management measures should be decided in the context of the Common Fisheries Policy and according to its rules. The basic rules are enshrined in the [CFP Basic Regulation]'.<sup>180</sup>

Based on aforementioned presumption, the Commission produced a non-binding guidance document on fisheries measures for marine Natura 2000 sites in 2008.<sup>181</sup> The document describes a procedure in which a Member State, according to the Commission, must follow in order to achieve the regulation of fishing activities necessary to avoid the deterioration of habitats for which SACs and SPAs have been designated. The document makes a distinction between sites located within the 12 nautical miles of the Member States' coast and those located beyond the 12 nautical miles zone.<sup>182</sup> In the former case, Member States are competent to take measures by virtue of and in compliance with article 9 of the CFP Basic Regulation.<sup>183</sup> In addition, they are free to adopt measures for the conservation and management of stocks within the 12 nautical miles zone applying solely to own-flag vessels by virtue of article 10, however under the same conditions as apply to article 9 measures.<sup>184</sup> In the latter case, Member States are, because of the Union's exclusive competence under the CFP, excluded from taking any fisheries measure.<sup>185</sup> The document states that in such cases, 'Member States must address a *formal request* of adoption of such measures to the Directorate General of Fisheries and Maritime Affairs (DG MARE) of the Commission'.<sup>186</sup>

The procedure the Commission prescribes for sites beyond the 12 nautical miles zone is extensive. A formal request of a Member State must be accompanied by comprehensive scientific and technical information.<sup>187</sup> The Commission in turn shall request scientific advice from bodies engaged in the field of fisheries and environment.<sup>188</sup> The Commission then drafts a final proposal for specific fisheries measures, taking into account all available information. The adoption of these measures should

176 See N Wolff, *Fisheries and the Environment* (Nomos 2002) 172.

177 Commission, 'Elements of a Strategy for the Integration of Environmental Protection Requirements into the Common Fisheries Policy' COM (2001) 143 final 3.

178 *ibid* 7.

179 Commission, 'Guidelines for the establishment of the Natura 2000 network in the marine environment: Application of the Habitats and Birds Directives' (2007).

180 *ibid* 108.

181 Commission, 'Fisheries measures for marine Natura 2000 sites: A consistent approach to requests for fisheries management measures under the Common Fisheries Policy' (2008).

182 *ibid* 2-3.

183 See *ibid* 3.

184 See *ibid*.

185 *ibid*.

186 *ibid* 3.

187 *ibid* 4.

188 *ibid* 5-6.

be guided by four principles: (1) involvement of stakeholders; (2) proportionality; (3) non-discrimination; and (4) effective control.<sup>189</sup> The Commission's proposal will, in principle, include a 'fast track procedure'.<sup>190</sup> If, however, the Council disagrees with the fast track procedure, the proposed measures have to be adopted according to the ordinary legislative procedure as laid down in article 294 TFEU.<sup>191</sup> As could be seen in Section II.2.A.1 above, the CFP Basic Regulation provides for a wide range of measures the Union legislator may take to, *inter alia*, limit the environmental impact of fishing activities.<sup>192</sup> The former procedure would allow the proposal to be adopted within three months. The latter could though take two years or more.<sup>193</sup>

The 'Union route' described above might thus take a very long time. There is, however, a more important drawback of the Union route: the EU could withhold from taking the necessary action. The Habitats and Birds Directives are essentially, by nature, addressed to the Member States and not to the EU organs (see to that effect Sections II.1.A.1 and II.1.C above). Therefore, the Union is not obliged to fulfil the obligations stemming from the Directives.<sup>194</sup> In addition, the Union route turns the fulfilment of the obligations under the Directives from a more administrative act into a political decision. The Council, consisting of representatives of each Member State at a ministerial level, must decide by a qualified majority.<sup>195</sup> If the ordinary legislative procedure is applied, the Parliament – pre-eminently a political organ – is involved as well.<sup>196</sup> Thus, the Union route draws the fulfilment of the obligations into the political arena, and therefore it is uncertain where this route leads to. That the situation in which there is unwillingness of (one of) the EU organs to enact the necessary action is not a completely theoretical one may be demonstrated by Case 804/79 *Commission v United Kingdom*, as discussed in Section III.3 below.

In case the Union is unwilling to enact the necessary measures, article 4(3) of the TEU could bring relief.<sup>197</sup> This article states that:

Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.<sup>198</sup>

Other than its predecessor provision article 10 TEC, article 4(3) TEU refers to both the Union and the Member States. article 4(3) TEU thereby codifies established case law of the ECJ holding that EU organs are also subject to an obligation of genuine and sincere cooperation.<sup>199</sup> Failure by the Union to assist the Member States in adopting the necessary measures would thus constitute an infringement of the principle of sincere cooperation, and therefore of article 4(3) of the TEU. Such an infringement could be challenged before the ECJ by a Member State or a by an EU institution in accordance with article 265 TFEU.<sup>200</sup> A Member State could thus initiate a 'bottom-up' infringement procedure against an EU organ for its failure to assist the Member State in fulfilling its tasks flowing from the Treaties.

The Union route thus constitutes a closed alternative system for action by the Member States to fulfil obligations arising from the Habitats and Birds Directives in the field of fisheries. The guidance document obliges Member States to request the EU organs to take the necessary measures in marine SACs and SPAs. The document turns the Member States' obligation to act under the Habitats and Birds Directives into a legal duty to request the adoption of Union measures.<sup>201</sup> Following the principle of sincere cooperation, the Union is under a duty to adopt the necessary measures. If the Union nevertheless appears unwilling to act, the Member State concerned can initiate an infringement procedure under article 265 TFEU. This

189 ibid 6-8.

190 ibid 8.

191 ibid.

192 CFP Basic Regulation, art.4(2).

193 Fisheries measures for marine Natura 2000 sites (n 181) 8.

194 See also Dotinga and Trouwborst (n 15) 87.

195 See) TEU, art.16(2-3; TFEU, art.43(2-3).

196 See TFEU, art. 43(2) and 294.

197 See also A Proelss and others, 'Protection of Cetaceans in European Waters – A Case Study on Bottom-Set Gillnet Fisheries within Marine Protected Areas' (2011) 26 *The International Journal of Marine and Coastal Law* 5, 42-44.

198 TEU, art.4(3).

199 See eg Case 230/81 *Luxemburg v Parliament* [1983] ECR 255, para 37; Case 2/88 *J.J. Zwartveld and others* [1990] ECR I-3365, para 17; Case 350/93 *Commission v Italy* [1995] ECR I-699, para 16.

200 TFEU, art.265.

201 See Proelss (n 197) 39.

procedure is, in its turn, only admissible if the EU organ concerned has first been called upon to act.<sup>202</sup> In sum, when a Member State lacks the competence to take the necessary measures because it is conferred exclusively on the Union, the EU legislator should adopt these measures.

### III.2. Action outside the Common Fisheries Policy

Despite its potential of resolving the paradox, the Union route, as discussed in the previous Section, is liable to criticism. First, it should be noted that the Commission's position, as laid down in the non-legally binding documents discussed above, seems to be far from perfect. Above all, it interprets the Union's exclusive competence within the CFP as all-embracing, as it considers *fisheries* to be an exclusive Union competence. In Section II.2.C above, it is explained that the Treaty makes a distinction between the conservation of marine biological resources, in which area the Union has exclusive competence, and *fisheries excluding* the conservation of marine biological resources, where the Union has to share competence with the Member States. A strong argument can therefore be made that the Commission's position in this regard may be deemed incorrect. Second, as noted in the previous Section, the Union route may be long-term. Finally, the described line of thinking underlying the Union route views the issue from a primary EU law perspective: the Treaties. It concerns the legal basis of a measure taken in the area of overlap of environmental policy and fisheries policy. It does not take account of the instruments that interrupt the line between legal basis and measure: the Habitats and Birds Directives. The obligations under these Directives remain intact. If the Union fulfilled the obligations when necessary, the Member States would in theory still violate their obligations under the Directives.<sup>203</sup> The Union route only offers an *alternative*.

It should be stressed that, from a factual perspective, restricting fishing under the CFP, on the one hand, and conservation and protection of habitats and species under the Habitats and Birds Directives, on the other, share the same beneficial consequences for the marine environment.<sup>204</sup> Nonetheless, action outside the CFP must also be addressed. First, the Union route is facing abovementioned practical and legal problems. Second, the line of thinking supporting the Union route could be challenged: the Member States may, or even *should*, take the necessary action, notwithstanding the Union's exclusive competence under the CFP.<sup>205</sup> This opposing argumentation gives priority to the Habitats and Birds Directives. Following a 1999 judgment in an infringement procedure the Commission had initiated against France,<sup>206</sup> the ECJ seems to opt for this latter approach, although it must be borne in mind that the case at hand differs from the paradox of the Habitats and Birds Directives and the CFP.

In the aforementioned infringement procedure, the Commission had brought an action before the ECJ under article 169 TEC (now article 258 TFEU) on grounds that, by not adopting the special measures necessary for the conservation of bird habitats in the *Marais Poitevin* marshland, and by not taking the appropriate measures to avoid deterioration of those habitats, France had failed to fulfil its obligations under article 4 of the Birds Directive.<sup>207</sup> According to the Commission, the deterioration of the habitats was in particular due to the agricultural activity in the *Marais Poitevin*.<sup>208</sup> The French government did not contest this submission. However, the French government argued that the responsibility for the deterioration rested primarily with the CAP and not solely with the French authorities. It explained that aid for agriculture is financed entirely by the EU under the CAP. This would run contrary to agri-environmental aid, which requires a considerable financial effort from the part of the Member State, and thus to the protection of the habitats in question.<sup>209</sup> In this respect, the ECJ held that:

As for the French Government's argument that Community aid measures for agriculture are disadvantageous to agriculture compatible with the conservation requirements laid down by the Birds Directive, it should be pointed out 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, in particular under the first sentence of article 4(4) thereof.<sup>210</sup>

202 TFEU, art.265, second para.

203 See to that effect also Proelss (n 197) 39.

204 T Markus, *European Fisheries Law* (European Law Publishing 2009) 54.

205 See eg Owen (n 133) 20-21 and Proulss (n 197) 39-45.

206 Case C-96/98 *Commission v France* [1999] ECR I-8531.

207 *ibid* para 1.

208 *ibid* paras 29-30.

209 *ibid* paras 32-33.

210 *ibid* para 40.

If it is assumed that the *Marais Poitevin* reasoning applies to the paradox in question, and also for the Habitats Directive, it should be examined how the ‘Member State route’ can be reconciled with an infringement of the Union’s exclusive competence in the field of the CFP. The TFEU holds a provision that has the potential of reconciling fulfilment of obligations under the Habitats and Birds Directives by a Member State with the EU’s exclusive competence under the CFP. In line with the ECJ’s reasoning cited above, article 2(1) TFEU on exclusive competence of the EU reads:

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*.<sup>211</sup>

Under Chapter 2, Section 1 titled ‘The legal acts of the Union’ article 288, first paragraph TFEU provides that to exercise the Union’s competences, the institutions shall *inter alia* adopt directives. Thus, the Habitats and Birds Directives are Union acts. It must be emphasised that the reconciliation provided by article 2(1) TFEU means an immediate and definitive solution of the paradox. article 2(1) TFEU, which came into being with the entry into force of the TFEU, has so far not been interpreted by the ECJ. However, the wording of the article does not seem to leave much space to interpret it otherwise than that Member States retain competence to carry out what the EU institutions have laid down in their legislative acts,<sup>212</sup> such as the Habitats and Birds Directives.

Apart from the article 2(1) TFEU solution of the paradox, the concept of ‘trusteeship’ could provide a delegation of power to act to a Member State in an area in which the Union in principle has exclusive competence.<sup>213</sup> The ECJ accepted this concept in *Commission v United Kingdom*, which was already touched upon in Section II.2.C above.<sup>214</sup> In 1979, the Commission sought a declaration from the ECJ under article 169 TEEC<sup>215</sup> (now article 258 TFEU) that the United Kingdom had failed to fulfil its obligations under the Treaty by applying unilateral measures in the area of sea fisheries.<sup>216</sup> More specifically, the Commission argued that the United Kingdom’s unilateral measures would have encroached upon the Union’s exclusive competence.<sup>217</sup> The measures adopted by the United Kingdom corresponded to measures proposed by the Commission to the Council, which were, pursuant to article 102 of the 1972 Act of Accession of Denmark, Ireland and the United Kingdom, necessary for the conservation of fisheries resources.<sup>218</sup> The Council had failed to adopt these measures.<sup>219</sup> The ECJ stressed that such a failure to act could not in any case restore the competence for a Member State to act unilaterally in an area of exclusive competence of the EU.<sup>220</sup> However, according to the ECJ, that idea did not mean that it would be ‘entirely impossible for the Member States to amend the existing conservation measures in case of need owing to the development of the relevant biological and technical facts’. In regard of the Union’s exclusive competence, such amendments could be ‘of a limited scope only and could not involve a new conservation policy on the part of a Member State’.<sup>221</sup> More specifically, the ECJ stated that:

As this is a field reserved to the powers of the Community, within which Member States may henceforth act only as trustees of the common interest, a Member State cannot therefore, in the absence of appropriate action on the part of the Council, bring into force any interim conservation measures which may be required by the situation except as part of a process of collaboration with the Commission and with due regard to the general task of supervision which article 155 [...] gives to the Commission.<sup>222</sup>

Thus, in a situation characterized by the inaction of the Council [...], as well as the requirements inherent in the safeguard by the Community of the common interest and the integrity of its own powers, imposed upon Member States not only an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, but also a duty not to lay down national conservation measures in spite of objections,

211 TFEU, art.2(1) (emphasis added).

212 See eg Van Ooik (n 174) 17.

213 See also Proelss (n 197) 41-42.

214 Case 804/79 *Commission v United Kingdom*.

215 Treaty Establishing the European Economic Community.

216 Case 804/79 *Commission v United Kingdom* para 1.

217 *ibid* para 9.

218 See 1972 Act of Accession, art.102.

219 Case 804/79 *Commission v United Kingdom* para 4.

220 *ibid* para 20.

221 *ibid* para 22.

222 The Commission’s task of supervision is now laid down in TEU, art.17(1).

In this way, trusteeship merges the Union route and the Member State route. The primary route is the Union route. If the Union, however, fails to take the necessary steps to fulfil obligations under the Habitats and Birds Directives touching upon fisheries, a Member State, acting as a trustee of the common interest, could adopt the necessary measures under auspices of the Commission. Notably, a Member State will find itself at a crossroads when the Union route is followed until the point that an EU organ fails to enact the requested measures. It could initiate an article 265 TFEU procedure on grounds of a breach of the principle of sincere cooperation by the Union, as discussed in the previous Section. Or it could assume a reassignment of a competence to act in the field of fisheries on grounds of the legal concept of trusteeship. In this respect, it should be stressed that the procedural requirements for a Member State to act as trustee are high:<sup>224</sup> it has an obligation to undertake detailed consultations with the Commission and to seek its approval in good faith, and it has a duty not to lay down national conservation measures over the objections, reservations or conditions of the Commission. In the case above, the ECJ decided that the United Kingdom had failed to meet these requirements.<sup>225</sup> However, there is an important difference between the case above and the paradox in question: the Habitats and Birds Directives *oblige* the Member States to adopt the necessary measures for the protection and conservation of marine habitats.

### III.3. Inaction

The Member State route discussed in the previous Section has, in its turn, an obvious drawback as well: if the Union's exclusive competence is regarded as extending to marine habitats, it will anyhow be infringed by action in the area by a Member State. The theoretical thinking underlying the Union route would oppose action by a Member State, even if the Union route were stalled, despite the safeguard of the article 265 TFEU infringement procedure. From this perspective, it is relevant to examine if there is an option for the Member States to leave the obligations stemming from the Habitats and Birds Directives unfulfilled. However, not fulfilling an obligation runs counter to the nature of an obligation: it must be fulfilled. Therefore, this Section will focus on the question if a Member State could be *released* from its obligations under the Habitats and Birds Directives in the situation that measures to fulfil these obligations need to be adopted in the area of fisheries.

The Marine Strategy Framework Directive<sup>226</sup> provides such an exemption. This Directive, based on article 175(1) TEC (now article 192(1) TFEU),<sup>227</sup> aims at establishing 'a framework within which Member States shall take the necessary measures to achieve or maintain good environmental status in the marine environment by the year 2020 at the latest'.<sup>228</sup> To that end, marine strategies shall be developed and implemented, in order to, *inter alia*, 'protect and preserve the marine environment, prevent its deterioration or, where practicable, restore marine ecosystems in areas where they have been adversely affected'.<sup>229</sup> The strategies shall apply 'an ecosystem-based approach to the management of human activities', while 'enabling the sustainable use of marine goods and services by present and future generations'.<sup>230</sup> Furthermore, the Directive must 'contribute to coherence between, and aim to ensure the integration of environmental concerns into, the different policies, agreements and legislative measures which have an impact on the marine environment'.<sup>231</sup> article 14(1) of the Framework Directive reads:

A Member State may identify instances within its marine waters where, for any of the reasons listed under point (a) to (d), the environmental targets or good environmental status cannot be achieved in every aspect through measures taken by that Member State, or, for reasons referred to under point (e), they cannot be achieved within the time schedule concerned:

- (a) action or inaction for which the Member State concerned is not responsible;
- (b) natural causes;
- (c) force majeure;
- (d) modifications or alterations to the physical characteristics of marine waters brought about by actions taken for reasons of overriding public interest which outweigh the negative impact on the

223 Case 804/79 *Commission v United Kingdom* paras 30-31.

224 Proelss (n 197) 42.

225 See case 804/79 *Commission v United Kingdom* para 38.

226 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) [2008] OJ L164/19. See also Dotinga and Trouwborst (n 15) 90.

227 Preamble Marine Strategy Framework Directive.

228 Marine Strategy Framework Directive, art.1(1).

229 Marine Strategy Framework Directive, art.1(2).

230 Marine Strategy Framework Directive, art.1(3).

231 Marine Strategy Framework Directive, art.1(4).

- environment, including any transboundary impact;
- (e) natural conditions which do not allow timely improvement in the status of the marine waters concerned.

The Member State concerned shall identify such instances clearly in its programme of measures and shall substantiate its view to the Commission. In identifying instances a Member State shall consider the consequences for Member States in the marine region or subregion concerned.

However, the Member State concerned shall take appropriate ad-hoc measures aiming to continue pursuing the environmental targets, to prevent further deterioration in the status of the marine waters affected for reasons identified under points (b), (c) or (d) and to mitigate the adverse impact at the level of the marine region or subregion concerned or in the marine waters of other Member States.<sup>232</sup>

Thus, article 14(1) lists exceptions that release Member States from their obligations; however under the Marine Strategy Framework Directive. It does not provide a release from a Member State's obligations arising from the Habitats and Birds Directives for the reason that the Directive addresses action in the field of marine environmental policy and contributes to coherence between the different policies and legislative acts. The Marine Strategy Framework Directive explicitly refers to the Habitats and Birds Directives in article 13(4). This article states that programmes of measures established pursuant to the Framework Directive shall include 'spatial protection measures, contributing to coherent and representative networks of marine protected areas, adequately covering the diversity of the constituent ecosystems', such as SACs 'pursuant to the Habitats Directive' and SPAs 'pursuant to the Birds Directive'. Marine SACs and SPAs and their protection regimes shall so be incorporated into the framework programmes of measures.<sup>233</sup>

However, the integration of SACs and SPAs into the framework programmes of measures still does not imply applicability of article 14(1) to obligations arising from the Habitats and Birds Directives. Behind article 13(4) of the Marine Strategy Framework Decision lies the consideration that establishment of marine protected areas designated or to be designated under the Habitats and Birds Directives means 'an important contribution to the achievement of good environmental status under this Directive'.<sup>234</sup> This consideration clarifies that on the one hand, the Habitats and Birds Directives are part of the marine strategy; but on the other hand, these Directives continue to play an independent role within the strategy framework. Therefore, article 14(1) of the Framework Directive cannot be directly applied to obligations under the Habitats and Birds Directives.<sup>235</sup>

Interestingly, the Marine Strategy Framework Directive also touches upon the CFP, however only in the preamble.<sup>236</sup> Recitals 39 to 41 thereof read:

Measures regulating fisheries management can be taken in the context of the [CFP], as set out in [the CFP Basic Regulation], based on scientific advice with a view to supporting the achievement of the objectives addressed by this Directive, including the full closure to fisheries of certain areas, to enable the integrity, structure and functioning of ecosystems to be maintained or restored and, where appropriate, in order to safeguard, *inter alia*, spawning, nursery and feeding grounds. [...]

The [CFP], including in the future reform, should take into account the environmental impacts of fishing and the objectives of this Directive.

In the event that Member States consider that action in the fields mentioned above or other fields linked to another [Union] policy [...] is desirable, they should make appropriate recommendations for [Union] action.<sup>237</sup>

These considerations stress and encourage the move of the CFP into the area of environmental conservation and protection. Moreover, they seem to reiterate the Commission's view on the regulation of fisheries, as discussed in Section III.1 above:

232 Marine Strategy Framework Directive, art.14(1).

233 Dotinga and Trouwborst (n 15) 90.

234 Marine Strategy Framework Directive, Recital 6 preamble.

235 Dotinga and Trouwborst (n 15) 90.

236 *ibid* 90-92.

237 Marine Strategy Framework Directive, Recitals 39-41 preamble.

'fisheries management measures should be decided in the context of the Common Fisheries Policy and according to its rules'. However, there is a curious difference.<sup>238</sup> This difference was still absent in the draft text of the Framework Directive. The preamble of the draft text stated that '[measures] regulating fisheries management *should* be taken in the context of the [CFP], as set out in [the CFP Basic Regulation]'.<sup>239</sup> As could be read, the present Framework Directive though states in recital 39 of the preamble: '[measures] regulating fisheries management *can* be taken in the context of the [CFP], as set out in [the CFP Basic Regulation]'.<sup>240</sup> This adaptation contrasts with the Commission's thinking on regulating fisheries. It implies that the Union's legislator is of the opinion that there is space to regulate fisheries *outside* the CFP.<sup>241</sup>

It is unclear, however, if action outside the CFP then would concern action in the context of other Union policy areas, or action by Member States, or both. According to recital 41 of the preamble of the Framework Directive, partly cited above, Member States *should* anyhow make appropriate recommendations for *Union action* if they find that action in the fields mentioned, ie in the field of the CFP, is needed. Among others, this consideration lies at the basis of article 15 of the Framework Directive. article 15(1) provides that '[where] a Member State identifies an issue which has an impact on the environmental status of its marine waters and [...] which is linked to another [Union] policy [...], it shall inform the Commission accordingly and provide a justification to substantiate its view'.<sup>242</sup> article 15(2) continues that '[where] action by [Union] institutions is needed, Member States shall make appropriate recommendations to the Commission and the Council for measures regarding the issues referred to in [article 15(1)]'.<sup>243</sup> The Commission shall then reflect the recommendations when presenting proposals to the Parliament and the Council.<sup>244</sup> article 15, read together with paragraph 41 of the preamble, thus seems to imply that if action in the context of the Framework Directive touched upon fisheries, a Member State, apparently unable to act unilaterally in the context of the environmental policy, must request the Union to act. It so refutes, in its turn, action outside the CFP.

Two final comments should be made in respect of foregoing. First, in addition to the fact that an exemption for reason of the exceptions under article 14(1) of the Marine Strategy Framework Directive cannot be applied to the Habitats and Birds Directives in the first place, true inaction, in the sense of passivity, is also under the Framework Directive no option. A Member State has to clearly identify inaction for which it is not responsible in its programme of measures and shall substantiate its view to the Commission. Furthermore, it must take appropriate ad-hoc measures. If inaction were due to the involvement of the CFP, and Union action is needed, a Member State should make appropriate recommendations to the Commission and the Council for the necessary measures. The Commission could in turn present proposals that reflect these recommendations to the Parliament and the Council. Second, 'inaction' under the Framework Directive resembles action within the CFP, in particular the formal request procedure, as discussed in Section III.1 above. Surprisingly, 'inaction' under the Framework Directive demands more than action within the CFP as discussed in Section III.1 above; in case of inaction, a Member State is still obliged to take appropriate ad-hoc measures.

### III.4. Interim Conclusions

This Section examined possible solutions to the paradox of the Habitats and Birds Directives and the CFP. It addressed three options: (1) action within the CFP; (2) action outside the CFP; and (3) inaction. A few important conclusions can be drawn from this examination.

- Inaction is not an option. Member States, if need be in cooperation with the Union, *must* seek the fulfilment of the obligations arising from the Habitats and Birds Directives, even when this might touch upon fisheries.
- Two routes could provide a solution for the paradox: the Union route and the Member State route.
- The Union route means fulfilment of obligations under the Habitats and Birds Directives by the Union. This route constitutes a closed system. When a Member State lacks the competence to take the necessary measures because it is conferred on the Union, the EU legislator must adopt these measures. However, it merely offers an alternative for

238 See also Dotinga and Trouwborst (n 15) 91-92.

239 Common position (EC) 12/2007 adopted by the Council on 23 July 2007 with a view to adopting Directive .../.../ EC of the European Parliament and of the Council of ... establishing a Framework for Community Action in the field of Marine Environmental Policy (Marine Strategy Framework Directive) [2007] OJ C242E/11, recital 39 preamble (emphasis added).

240 Marine Strategy Framework Directive, Recital 39 preamble (emphasis added).

241 Dotinga and Trouwborst (n 15) 91-92.

242 Marine Strategy Framework Directive, art.15(1).

243 Marine Strategy Framework Directive, art.15(2).

244 *ibid.*

fulfilment of obligations by the Member States.

- The Member States route means fulfilment of obligations under the Habitats and Birds Directives by the Member States, notwithstanding the Union's exclusive competence in the field of the CFP. Action by a Member State could be reconciled with an infringement of the Union's exclusive competence by the legal concept of trusteeship. However, the procedural requirements for a Member State to act as a trustee are high. Moreover, a Member State can only act as a trustee after the Union route has been pursued and an EU organ fails to enact the necessary measures. Thus, the Union route remains the primary route; the Member State route is the secondary route.
- An immediate and definitive solution of the paradox seems to be provided by article 2(1) TFEU. It states that, in general, when the EU has an exclusive competence in a specific area, the Member States are still able to legislate and adopt legally binding acts in that area for the implementation of Union acts

#### IV. The Paradox: in Practice

Thus far, abstract solutions have been proposed for an abstract paradox. This Section will add a practical dimension to a highly theoretical exercise. It will concentrate on the two courses of action: acting within the CFP and acting outside the CFP. Examples of inaction will not be discussed, because, as concluded in previous Section, inaction is not an option.

##### IV.1. Action within the Common Fisheries Policy

Action by a Member State seeking compliance with obligations from the Habitats and Birds Directives in the context of the CFP is confined to action in compliance with articles 8, 9 and 10 of the CFP Basic Regulation, which provide for the main delegated powers, and the formal request procedure set out in the Commission's guidance document on fisheries measures for marine Natura 2000 sites.<sup>245</sup> It is hard to ascertain how frequently articles 10 and 9, as not applied to foreign-flagged vessels, of the CFP Basic Regulation have been used in practice. The execution of the delegated powers laid down in these articles does not involve a Commission's decision. However, the execution of the delegated powers under articles 8 and 9, as applied to foreign-flagged vessels entails a Commission's decision pursuant to the procedure set out in article 8(3) to 8(6).<sup>246</sup> So far two such decisions have been published in the Official Journal of the European Union, both in respect of the application of article 9 to foreign-flagged vessels.<sup>247</sup> A formal request has been addressed to the Commission only once.<sup>248</sup>

The first example of action by a Member State within the CFP is an article 9 procedure that was initiated by The Netherlands in regard to the Voordelta, a SAC within The Netherlands' 12 nautical mile zone.<sup>249</sup> Following the construction of the harbour facilities 'Maasvlakte 2' in the Voordelta, The Netherlands was obliged to take appropriate compensatory measures under article 6(4) of the Habitats Directive.<sup>250</sup> Some of these measures concerned the conservation, management and exploitation of living aquatic resources, which, according to the Commission, are subject to the rules of the CFP. Some of the measures were also liable to affect vessels of other Member States. Therefore, the Dutch government sought the Commission's approval for the compensatory measures.<sup>251</sup>

The Commission considered that the proposed fisheries measures were not discriminatory, as they applied equally to all vessels.<sup>252</sup> In its view, they would be intended to minimise the effect of fishing on the conservation of marine eco-systems within 12 nautical miles of the Dutch baseline.<sup>253</sup> In addition, the Commission noted that the Union had not adopted any measure addressing conservation or management specifically for the Voordelta.<sup>254</sup> Thus, the measures complied with the requirements of article 9(1) of the CFP Basic Regulation.<sup>255</sup> Finally, the Commission found that the measures would be compatible with article 2 of the CFP Basic Regulation, particularly with the precautionary approach, and were no less

245 See Section III.1.

246 CFP Basic Regulation, art. 8(2) and 9(2).

247 Churchill and Owen (n 93) 192-193.

248 *ibid* 263-264.

249 Commission Decision 2008/914/EC of 11 June 2008 on the confirmation of measures proposed by The Netherlands for the conservation of marine eco-systems in the Voordelta area [2008] OJ L332/1, recital 3 preamble.

250 Dec 2008/914/EC, Recital 4 preamble.

251 Dec 2008/914/EC, Recitals 5-8 preamble.

252 Dec 2008/914/EC, Recital 10 preamble.

253 *ibid*.

254 *ibid*.

255 Dec 2008/914/EC, Recital 10 read together with recital 6 preamble.

stringent than existing Union legislation.<sup>256</sup> Therefore, the Commission confirmed the fisheries measures proposed by The Netherlands.<sup>257</sup>

The second example does not relate to the conservation of habitats, but to the protection of species, namely dolphins. In order to protect dolphins, the United Kingdom consulted the Commission about extending a ban on pair trawling for bass within the 12 nautical mile zone off the south-west coast of England. The ban had only applied to own-flag vessels and the United Kingdom was interested in extending it to foreign-flagged vessels.<sup>258</sup> In this case, the Commission did not systematically apply the requirements of article 9(1) to the measure in question, but rather, it focused on the scientific justification for the measure.<sup>259</sup> It considered that a Member State, pursuant to article 9 of the CFP Basic Regulation, may take measures necessary to minimise the impact of fishing on marine ecosystems.<sup>260</sup> However, based on the scientific information available, the Commission found that the proposed measure was not likely to achieve the desired goal.<sup>261</sup> Instead, the Commission would propose appropriate measures, based on sound scientific understanding of the nature and scale of the problem, in due time.<sup>262</sup> On these grounds, the Commission rejected the proposed measure.<sup>263</sup>

Two comments should be made in regard of the latter example. First, it clarifies that a Member State could well be deprived of its delegated powers under articles 8 and 9, as applied to foreign-flagged vessels, by the Commission. In the United Kingdom case, the Commission interfered with the *kind* of measure a Member State was planning to take. It suggests that the Commission enjoys a large discretion in respect of article 8 and article 9 procedures. By consequence, the Member State's discretion in regard to these procedures is limited. The Member States' delegated competences under article 8 and 9, as applied to foreign-flagged vessels, are limited to a 'right of initiative' and a 'power to implement'. The decision-making competence, however, remains in Union hands.

Second, the example concerns an *extension* of a *domestic* ban on pair trawling for bass to foreign-flagged vessels. The domestic ban is laid down in the United Kingdom South-west Territorial Waters (Prohibition of Pair Trawling) Order 2004.<sup>264</sup> It constitutes an example of unilateral action in the field of fisheries. However, the legal basis of the British ban is unclear. According to the Order, the ban only applies within the 12 nautical miles zone<sup>265</sup> and solely to British fishing boats<sup>266</sup>. The geographical limitation suggests that the Order's basis is article 9 of the CFP Basic Regulation. However, the applicability of the Order to only British vessels contravenes the article 9 requirement of non-discrimination.<sup>267</sup> The measure amounts to discrimination against British flagged vessels. article 10 may *solely* be applied to own-flag vessels.<sup>268</sup> However, article 10 does not entail a geographical limitation. Furthermore, it is uncertain if the conservation of stocks referred to in article 10 covers the protection of dolphins. Perhaps the ban may be viewed as an allowable combination of articles 9 and 10. Such combination seems to be in line with the Commission's opinion in its guidance document, discussed in Section III.1 above.

The sole example in which the formal request procedure was followed is provided by a case in which Ireland turned to the Commission for taking protective fisheries measures in candidate SACs to protect cold-water corals west of Ireland beyond the 12 nautical miles zone.<sup>269</sup> In 2006, Ireland made a formal request 'to bring forward proposals to ensure the protection' of the sites.<sup>270</sup> In April 2007, the Commission requested advice on an urgent basis from the International Council for the

256 Dec 2008/914/EC, Recital 11 preamble.

257 Dec 2008/914/EC, art.1.

258 Commission Decision 2005/322/EC of 26 February 2005 on the request presented by the United Kingdom pursuant to article 9 of Council Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy [2005] OJ L104/37, recital 1 preamble.

259 Churchill and Owen (n 93) 193.

260 Dec 2005/322/EC, Recital 6 preamble.

261 Dec 2005/322/EC, Recital 6 read together with recital 5 preamble.

262 Dec 2005/322/EC, Recital 8 preamble.

263 Dec 2005/322/EC, art.1.

264 United Kingdom South-west Territorial Waters (Prohibition of Pair Trawling) Order 2004, SI 2004/3397.

265 Prohibition of Pair Trawling Order 2004, art.2(1).

266 Prohibition of Pair Trawling Order 2004, art.3(1).

267 CFP Basic Regulation, art.9(1).

268 CFP Basic Regulation, art.10(a).

269 Churchill and Owen (n 93) 264.

270 ICES Report of the Ad hoc Group for Western Irish Natura Sites (AGWINS), ICES CM 2007/ACE:06 (ICES, 2007), Annex 2; available on the website of the ICES.

Exploration of the Seas (ICES).<sup>271</sup> The ICES reported later that year.<sup>272</sup> In November 2007, the Commission included fisheries protection measures in a proposal for a Regulation on fishing opportunities.<sup>273</sup> Subsequently, the Council adopted the measures in Regulation 40/2008,<sup>274</sup> albeit modified. The Regulation provided that ‘it shall be prohibited to conduct bottom trawling and fishing with static gear, including bottom set gill-nets and long-lines’ within the sites in question.<sup>275</sup>

On a final note, the Dutch government is preparing an article 9 procedure in respect of measures aiming at restricting bottom trawling in the North Sea Coastal Zone, again a SAC within its 12 nautical miles.<sup>276</sup> Furthermore, several formal requests are currently being prepared or considered. The Netherlands is preparing fisheries measures to be adopted by the Union for all three areas designated as Natura 2000 areas in the EEZ in the Dutch part of the North Sea: the Doggersbank, the Klaverbank and the Friese Front.<sup>277</sup> Germany is doing the same for Natura 2000 areas in the EEZ of its part of the North Sea.<sup>278</sup> The United Kingdom has also shown an interest in sending a formal request to the Commission about adopting fisheries measures.<sup>279</sup>

#### IV.2. Action outside the Common Fisheries Policy

As with articles 10 and 9, as not applied to foreign-flagged vessels, of the CFP Basic Regulation, it is hard to monitor action by Member States outside the CFP. By nature, such action would always lack a formal procedure. Moreover, the Member States will probably attempt to follow the Commission’s guidelines. The Commission could initiate an article 258 infringement procedure when a Member State acts unilaterally.<sup>280</sup> All the same, the author has not found any such actions to resolve the paradox outside the CFP.

The absence of such examples does not indicate that action outside the CFP is not an option. As discussed in the previous Section, action outside the CFP might be legally possible. In fact, examples of unilateral action in the field of fisheries for purposes *other* than environmental conservation and protection are numerous. Member States restrict or ban fisheries in safety zones around wind power parks or artificial islands, in areas of oil and mineral prospecting and exploitation, maritime traffic, military activities, et cetera.<sup>281</sup> Such unilateral action could be interpreted in two ways. On the one hand, it could be argued that, in contrast to the Commission, Member States do not regard the Union’s exclusive competence as covering the field of fisheries as a whole (see Section III.2 above). As such, the EU’s exclusive competence would not cover the aforementioned national regulation of fisheries. On the other hand, it could indicate that Member States find action in the field of fisheries allowable, notwithstanding a Union’s exclusive competence in the field.

#### V. Conclusions

This article examined possible solutions for the paradox of the Habitats and Birds Directives and the CFP: an implied prohibition for Member States to comply with obligations arising from the Habitats and Birds Directives when this might have an effect on fisheries. To that end, it first analysed the paradox by treating both sides of the paradox as separate domains: The Habitats and Birds Directives on the one side, and the CFP on the other. It then addressed possible solutions to the paradox: (1) action within the CFP; (2) action outside the CFP; and (3) inaction.

Following this analysis, two preliminary comments may be made. First, it might be argued that the paradox could be resolved by contrasting the Habitats and Birds Directives on the one side with the CFP Basic Regulation on the other. A final solution could then be deduced from a comparison of legislation and effect between a directive and a regulation. However, this

271 ibid.

272 See Report of the Ad hoc Group for Western Irish Natura Sites (AGWINS).

273 Commission, ‘Proposal for a Council Regulation fixing for 2008 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required’ COM (2007) 759 final, proposed para 12.2 of Annex III.

274 See (n 106).

275 2008 Reg 40/2008, Para 13.2 of Annex III.

276 HM Dotinga, ‘Gebiedsbescherming in de Noordzee – de betekenis en beperkingen van het natuurbeschermingsrecht’ in N Teesing (ed), *Het dilemma van de Noordzee: intensief gebruik én het grootste natuurgebied van Nederland* (Vereniging voor Milieurecht / Boom Juridische uitgevers 2010) 31.

277 ibid 32.

278 ibid.

279 ibid.

280 TFEU, art.258.

281 See Dotinga and Trouwborst (n 15) 89.

approach appears incorrect. The paradox is not a dilemma of legislative acts, but a dilemma of competence. The obligations under the Habitats and Birds Directives imply a competence for the Member States to act. However, in the field of the CFP, the Union has an exclusive competence to act. The Union has, so to speak, given a competence to the Member States with one hand and taken it with the other. The dilemma is thus between the Union's exclusive competence in the field of the CFP and the Member State's competence to act under the Habitats and Birds Directives. The CFP Basic Regulation is a mere *instrument* of the CFP, albeit the most important instrument.

Second, some will argue that the solution of the paradox lies in comparing the legal basis of the CFP on the one hand, with the legal basis of the environmental policy on the other. The comparison would clarify that priority should be assigned to the CFP (see to that effect Section III.1 above). However, this solution is arguably a fallacy. First, as explained in Section III.2 above, the obligations under the Habitats and Birds Directives remain intact. The Member States could still violate these obligations when withholding from adopting fisheries measures. In addition, measures taken by a Member State pursuant to the Habitats and Birds Directives do not have as their legal basis article 192(1) TFEU. The *Habitats and Birds Directives* have as their basis article 192(1), but measures pursuant to these Directives are based on the Directives themselves. Above all, such comparison would confuse a competence dilemma with a legal basis dilemma. In other words, it is submitted that the exclusive competence in the field of the CFP should be separated from the legal basis of CFP acts. The former concerns the division of competences between the Union and the Member States, while the latter regards the division of Union competences between the different policy areas, *i.e.* at the Union level.

The paradox is in fact constituted by an *exclusive competence* in the field of the CFP on the one side and *obligations* arising from the Habitats and Birds Directives on the other. As appears from Section II, the obligations under the Directives stand firm. The scope of the exclusive competence does, however, not cover the entire field of fisheries. The TFEU – *i.e.* primary law – limits the exclusive competence within the CFP to solely *conservation of marine biological resources*. In the area of fisheries *excluding* the conservation of marine biological resources, the Union has to share competence with the Member States. Therefore, the conservation of marine *habitats* does not seem to fall under the Union's exclusive competence. However, the CFP Basic Regulation – *i.e.* secondary law – impliedly broadened the scope of the exclusive competence to the conservation of marine ecosystems, which could include marine habitats.

In any case, the EU legislator delegated competences to the Member States, and, in doing so, has abandoned the exclusivity of its competence to that extent. The main delegated competences are laid down in articles 8, 9 and 10 of the CFP Basic Regulation. Of relevance for the fulfilment of conservation duties under the Habitats and Birds Directives is the delegated power under article 9. article 9 allows Member States to take non-discriminatory measures within the 12 nautical mile zone for the conservation and management of fisheries resources and to minimise the effect of fishing on the conservation of marine ecosystems. Those measures to be taken pursuant to this article that are likely to affect foreign-flagged vessels are subject to a consultation procedure.

Section III examined ways out of the paradox. It concluded that Member States, if need be in cooperation with the Union, *must* seek the fulfilment of the obligations arising from the Habitats and Birds Directives, including when this might touch upon fisheries. Two routes could provide a solution for the paradox: the Union route and the Member State route. The Union route means fulfilment of obligations under the Habitats and Birds Directives by the Union. This route constitutes a closed system. When a Member State lacks the competence to take the necessary measures because it is conferred on the Union, the EU legislator must adopt these measures. However, the Union route might be long-term. Above all, it merely offers an alternative for fulfilment of obligations by the Member States.

The Member States route means fulfilling the obligations under the Habitats and Birds Directives by the entities they are addressed to (the Member States) notwithstanding the Union's exclusive competence in the field of the CFP. Action by a Member State could be reconciled with an infringement of the Union's exclusive competence by the legal concept of trusteeship. The procedural requirements for a Member State to act as a trustee are however high. Moreover, a Member State can only act as a trustee after the Union route has been followed to the point an EU organ fails to enact the necessary measures. The Union route so remains the primary route; the Member State route is the secondary route.

An immediate and definitive solution of the paradox seems to be provided by article 2(1) TFEU. It states that, in general, when the EU has an exclusive competence in a specific area, the Member States are still able to legislate and adopt legally binding acts in that area for the implementation of Union acts, notwithstanding the Union's exclusive competence.

Of final note, as can also be read in recital 40 of the preamble of the Marine Strategy Framework Directive, cited in Section

III.3 above, the CFP will be reformed. The Commission has started the reform process in 2009, when it published a green paper on the reform of the CFP.<sup>282</sup> The green paper has meanwhile been followed up by a Commission staff work document containing a synthesis of a consultation on the reform of the CFP.<sup>283</sup> The reform seems to be a perfect opportunity to once and for all resolve the paradox of the Habitats and Birds Directives and the CFP. However, neither the green paper nor the Commission staff working document point in the direction of any solution. ■

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<sup>282</sup> Commission, 'Reform of the Common Fisheries Policy' (Green Paper) COM (2009) 163 final.

<sup>283</sup> Commission Staff, 'Synthesis of the Consultation on the Reform of the Common Fisheries Policy' (Commission Staff Working Document) SEC (2010) 428 final.