

Date: September 2016

Subject: Article 15 of the CFP and Article 39 of the TFEU

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## Background

Upon request of one of the industry representatives, the NWWAC Secretariat drafted a letter to the European Commission asking them to clarify if there is a contradiction between Article 39 of the Treaty on the Functioning of the European Union (TFEU) and Article 15 of the Common Fisheries Policy (CFP) Basic Regulation,<sup>1</sup> and if there is, what the implications are. **This memo is meant to help inform a more in-depth discussion on this request before the Executive Committee makes a final decision on whether to send it, and if so, what it should say.**

Article 39 of the TFEU sets the objectives for the CFP. It states in particular that the CFP must increase agricultural productivity (understood as also covering fisheries) by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production. It must also ensure a fair standard of living for the agricultural community, which includes fishermen. Article 15 of the CFP outlines how an obligation to land all catches of species subject to catch limits will be implemented throughout EU waters.

## Should the NWWAC ask the Commission these questions?

The European Commission is not empowered to interpret EU law; this is the sole prerogative of the Court of Justice of the European Union. As the questions posed amount to a request for the interpretation of EU law, it is not appropriate to ask the European Commission these questions as they are not in a position to provide the answers.

Furthermore, for the reasons outlined below, the Other Interest Group members of the NWWAC do not think that the answers to these questions would result in any changes to the implementation of Article 15, for the following reasons.

**Scope:** Article 39 of the TFEU falls under Title III on Agriculture and Fisheries, and references to agriculture/agricultural must be understood as also referring to fisheries, but with *"regard to the specific characteristics of the sector"*. So while it is clear that the articles under this title apply to the CFP, it is also clear that the specific characteristics of the sector must be considered. Most importantly for this analysis, this means that 'the factors of production' of fisheries must be viewed differently from growing crops, because fish stocks are a wild natural resource, and the result of this 'natural production' is what fisheries rely on. Additionally, fishing in a way that maximises production with low risk of stock collapse will lead to the 'optimum utilisation' of the fisheries resources and therefore to the long-term economic viability of the sector.

**Competence:** Article 3 of the TFEU refers to the CFP and states that the Union shall have exclusive competence in the *"conservation of marine biological resources under the CFP"*. It is therefore clear that the CFP not only has to achieve the objectives described in Article 39 TFEU,

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<sup>1</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L354, 28.12.2013, p.22. (referred to as CFP Basic Regulation).

it also must achieve conservation objectives. In addition, the general principle of integration in Article 11 of the TFEU requires taking into account environmental protection requirements in the implementation of all Union policies, including the CFP.

**Objectives:** Article 191 of the TFEU requires the Union to contribute, through all its policies, to achieving environmental objectives such as preserving, protecting and improving the quality of the environment, and the prudent and rational use of natural resources. These objectives must therefore be taken into account in the implementation of the CFP since fish are a natural resource. The TFEU does not create a hierarchical order for its objectives, therefore they all must be achieved. If some objectives conflict, a balance or compromise must be found.<sup>2</sup>

The landing obligation was adopted in the reformed CFP to ensure that the use of fish stocks is more rational, controlled and environmentally sustainable and would lead to a more economically viable fisheries sector<sup>3</sup>. Article 15 of the CFP Basic Regulation is the result of a compromise to implement both the social and economic objectives of Article 39 of the TFEU and the conservation objectives of Articles 3 and 191(1) of the TFEU.

**Balance:** The CFP is based on political and legal choices, and these reflect the compromises needed to achieve all the objectives of the TFEU. This does not mean that a decision to establish a balance between competing objectives, such as social and environmental objectives, should be considered contrary to either objective.

The flexibilities and mitigation measures associated with the landing obligation (introduced to the Commission's proposal by the co-legislators) are meant to help reduce economic and/or social impacts caused by its implementation; they are not designed to completely eliminate all negative impacts. This means that Article 15 of the CFP is not incompatible with Article 39(1)(a) of the TFEU, rather that there are economic costs – at least in the short-term – to achieving the economic, social and environmental objectives of the TFEU, which are integrated and implemented through the CFP.

**Conclusion:** Fishing at sustainable levels is in line with Article 3 of the TFEU, which clearly states that the CFP is charged with the conservation of marine biological resources and not only their exploitation. It is also in line with the environmental requirement for the prudent and rational use of natural resources (Article 191 of the TFEU) and with the principle of integration of environmental requirements in the CFP (Article 11 of the TFEU).

The objectives in Article 39(1)(a) of the TFEU referring to "*the optimum utilisation of the factors of production*" and "*a fair standard of living for the agricultural community*" are not the only objectives that the CFP has to take into account and fish as a 'factor of production' are a wild resource that needs to be protected under the environmental requirements of the TFEU.<sup>4</sup> Taking this into account, it can be concluded that Article 15 of the CFP strikes an acceptable and fair balance between all the objectives to be pursued and that there is no contradiction between Article 15 of the CFP Basic Regulation and Article 39(1)(a) of the TFEU.

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<sup>2</sup> EU Environmental Law, Ludwig Krämer, 8th Edition, 1.12, p.8.

<sup>3</sup> Proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy COM/2011/0425 final, whereas 18 and 19; Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L354, 28.12.2013, p.22, (CFP Basic Regulation), Recital 26.

<sup>4</sup> In particular under Article 3(3), Article 11 and Article 191(1) of the TFEU.