October 2019

A legal challenge to fishing quotas - by the European Parliament

Summary

ClientEarth research[1] has concluded that a TAC Regulation setting a fishing quota for the year 2020 (or any later year) in exceedance of the MSY exploitation rate, as recommended by ICES, would be incompatible with the CFP Basic Regulation.

This briefing considers whether such an incompatibility (once established) could result in the annulment of the TAC Regulation in question.

The legal vehicle considered in this Briefing would be a challenge in the European courts by the European Parliament, pursuant to Article 263 TFEU.

The conclusion is that such a legal challenge could result in the annulment of a TAC Regulation which was, by virtue of setting excessive fishing quotas, incompatible with the CFP Basic Regulation.

Legal backdrop

There is a hierarchy of norms in European Union (EU) law as follows[2]

Treaties

⬇

General principles of law

⬇

Legislative acts

⬇

Delegated acts

⬇

Implementing acts

} **Non-legislative acts**

As expressed by Craig and de Burca, the 'hierarchy of norms' *"captures the idea that in a legal system there will be a vertical ordering of legal acts, with those lower down the hierarchy being subject to legal acts of a higher status."*[3]

The CFP Basic Regulation and TAC Regulations

The Common Fisheries Policy (CFP) Basic Regulation[4] is a legislative act, adopted in accordance with the ordinary legislative procedure pursuant to Article 43(2) Treaty on the Functioning of the EU (TFEU).

Total Allowable Catch (TAC) Regulations[5] do not fit neatly into the established hierarchy of norms. They are not legislative acts; being adopted neither by ordinary nor special legislative procedure[6] (they are adopted by the Council alone). They are stated on their face to be "non-legislative acts". However, they are neither of the two types of non-legislative acts described by the TFEU; ie. delegated and implementing acts.[7]

TAC Regulations are instead *sui generis*; they are an example of a third type of non-legislative act – 'overlooked' and 'problematic' – based directly on the Treaty; in this case Article 43(3) TFEU.[8]

Legal bases in the Treaty

The legal bases of the CFP Basic Regulation and TAC Regulations are, respectively, Articles 43(2) and 43(3) TFEU. Those articles read as follows:

Article 43(2) TFEU. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.

Article 43(3) TFEU. 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.

The basis for challenge: Article 263 TFEU

Article 263 TFEU provides a basis for challenges to the legality of EU acts. The European Parliament is a privileged applicant, so its standing is guaranteed in any such action.[9] A successful action may result in the CJEU declaring the relevant act null and void and requiring the necessary measures to be taken to achieve compliance.[10] Any such challenge must be brought within two months of the publication of the relevant Regulation in the Official Journal of the EU.[11]

There are four heads of review under Article 263:[12]

1. Lack of competence;

2. Infringement of an essential procedural requirement;

3. Infringement of the Treaties or of any rule of law relating to their application;

4. Misuse of powers.

The first part of the third head of review provides for the annulment of an act which infringes the Treaties. This is, of course, consistent with the Treaties being at the top of the hierarchy of norms, noted above.

The second part of the third head provides the basis for the annulment of any act infringing *"any rule of law relating to [the Treaties'] application."* (Note that all Union acts (such as the CFP Basic Regulation) constitute such sources of rules of law.[13]) This wording *prima facie* provides the formal basis for any claim founded on the infringement of a 'higher' law by a 'lower' law.

As Craig & de Burca note, it has also *"provided the foundation for the development of the principles of judicial review"*; those general principles* sitting above all non-legislative and legislative acts in the hierarchy of norms. Accordingly, the general principles function as grounds for annulment of the latter under Article 263 TFEU,[14] just as, for example, there will be grounds for annulment where delegated legislation violates another Union act.[15]

The general case appears to be stated by Hartley, in his discussion of the third head of Article 263(2) TFEU[16]:

"*Violation of another Union act will be a ground of annulment if that other act was binding on the author of the act subject to challenge*".

More explicitly, PLC states that any legal act lower in the hierarchy of norms will be subject to annulment if it infringes any act higher in that hierarchy.

"*The first three of [the Article 263] grounds can be summarised as breach of a higher EU law (see Hierarchy of norms in EU law) …*"[17]

(PLC relies upon the first three grounds of Article 263 TFEU, rather than only part of the third ground. For current purposes, however, it may be noted that a claim brought under Article 263 does not need to distinguish between the different heads[18]).

The quote from Hartley is helpful for present purposes because it suggests that, for the purposes of considering the annulment of *sui generis* legislative acts, it is not necessary to identify within which of the established categories of norms such acts fall (before finding the relative positions of those categories); rather, it is enough to assess the relative positions of the 'violated' and 'violating' acts themselves, in terms of the bindingness of one on the other.

This is important because – even though they are explicitly stated to be non-legislative acts – it is not possible to definitively place *sui generis* TAC Regulations within the established hierarchy of norms.[19] *"[The] hierarchy of norms is incomplete, in the sense that there are certain legal acts that do not readily fall within any of [its] categories."*[20]

* They include: fundamental rights, proportionality, legitimate expectations, non-discrimination, transparency and the precautionary principle.

In other words, to assess whether an infringement of the CFP Basic Regulation by a TAC Regulation will be grounds for annulment of the latter, we can consider the relationship between those legal acts, without needing to place the latter definitively within the hierarchy of norms.

The relationship between Articles 43(2) and 43(3) TFEU

Legislative vs Non-legislative acts

Notwithstanding the limitations of seeking to rely upon the 'orthodox' categories that make up the hierarchy of norms, it may still be relevant that the CFP Basic Regulation is a legislative act while TAC Regulations are non-legislative acts.

Legislative acts sit above the two 'orthodox' forms of non-legislative acts (delegated and implementing acts) in the hierarchy of norms, and this superiority derives from the extra democratic legitimacy that comes with the involvement of the European Parliament. Like delegated and implementing acts, TAC Regulations made under Article 43(3) TFEU are made without the involvement of the European Parliament.

On this basis - and other things being equal - we should expect that the TAC Regulation will, at best, be equal in status to the CFP Basic Regulation.

That being so, the *sui generis* nature of TAC Regulations does guard against drawing firm conclusions. For one thing, TAC Regulations are made by the Council, and in this sense they have more democratic input than delegated acts and implementing acts, which are normally made by the Commission alone. More generally, and to the same end, it is the case that some *sui generis* non-legislative acts under the TFEU were, when *"enacted under the predecessor provisions of the EC Treaty, clearly … legislative in nature"*.[21]

Case law on Articles 43(2) and 43(3) TFEU

A very helpful Opinion was given by AG Szupnar in the 2014 case, *Germany v EP and Council*.[22]

A section of the Opinion is entitled "**Reminder of the Court's case-law concerning legal basis: Article 43 TFEU**" – and it describes the two cases where the relationship between Articles 43(2) and 43(3) TFEU were at issue: the 2012 *Venezuela*[23] and 2013 *cod*[24] judgments.

Those cases concerned (and resulted in) the annulment of, respectively, a Council decision and a Council regulation, on the basis that the Council had "exceeded the powers conferred on it by Article 43(3) TFEU".[25]

Quoting from AG Szupnar's Opinion:

"*[in Venezuela] the Court held that 'the adoption of the provisions referred to in Article 43(2) TFEU necessarily presupposes an assessment of whether they are "necessary" for the pursuit of the*

objectives [of the CAP / CFP], with the result that it entails a policy decision that must be reserved to the EU legislature. By contrast, the adoption of measures … in accordance with Article 43(3) TFEU … are of a primarily technical nature and ***are intended to be taken in order to implement provisions adopted on the basis of Article 43(2) TFEU'***."

Whether or not an exact analogy between legislative and implementing acts is possible, there appears nonetheless to be some kind of a hierarchy - a direction of travel - between acts adopted on the two legal bases. Indeed, the Opinion of AG Wahl in the subsequent *cod* case states: "the Court has [in Venezuela] established a clear ***hierarchy*** between those provisions."[26]

In the event, the *cod* judgment moved away from any framing that acts adopted under Article 43(3) TFEU were, straightforwardly, implementing measures: ie. they "*should not be confused with the measures provided for in Article 291(2) TFEU"*.[27]

As AG Szpunar's later Opinion relates:

"It is … apparent from the judgments given until now by the Court [ie. the Venezuela and cod judgments] that, although the measures adopted on the basis of Article 43(3) TFEU are not legislative acts, they are also not merely implementing measures as provided for in Article 291(2) TFEU. Most academic writers take the view that this is an autonomous and sui generis power, as did AG Kokott in her Opinion in Inuit Tapiriit Kanatami and Others v Parliament and Council."[28]

In other words, TAC Regulations cannot be slotted neatly into the same category as implementing measures adopted under Article 291 TFEU. This is consistent with the above discussion - and the approach being taken here: that it is enough to understand the relationship between Articles 43(2) and 43(3) TFEU without reference to the established categories of Union acts.

According to the *cod* judgment, one respect in which measures adopted under Article 43(3) differ from Article 291 implementing acts is that the possibility of autonomous decision-making under Article 43(3) is not ruled out.[29]

Critically, however, the Council, in adopting measures under Article 43(3) TFEU, must, *"where relevant"*, act within the legal framework established under Article 43(2) TFEU. Szpunar again, quoting the *cod* judgment directly:

"… the Court stated that 'paragraphs 2 and 3 of Article 43 TFEU pursue different aims and each has a specific field of application, which means that they may be used separately as a basis for adopting particular measures under the [CFP], provided that the Council, when it adopts measures on the basis of Article 43(3), acts within the limits of its powers and, ***where relevant, within the legal framework already established under Article 43(2) TFEU***.'"[30]

Application to the question at hand

The CFP Basic Regulation constitutes a legal framework established under Article 43(2) TFEU. Research by ClientEarth[31] has concluded that the CFP Basic Regulation imposes (pursuant to

Articles 2(2), 6(1) and 16(4)) a duty on the Union to fix fishing opportunities that are consistent with achieving (for the year 2020 and thereafter) the MSY exploitation rate.

The TAC Regulations then fix those fishing opportunities. TAC Regulations are plainly measures adopted in pursuance of, and on the basis of, this legal framework established under Article 43(2) TFEU. The *cod* judgment provides that that legal framework (ie. the CFP Basic Regulation) should limit the Council's action in adopting TAC Regulations, *"where relevant"*.

The extent of a TAC Regulation's reliance on the CFP Basic Regulation - ie. the 'relevance' of the latter - can be seen very clearly from the preamble to a TAC Regulation: [32]

Having regard to the Treaty on the Functioning of the European Union, ***and in particular Article 43(3)*** thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) ***Article 43(3) of the Treaty provides that the Council, on a proposal from the Commission, is to adopt measures on the fixing and allocation of fishing opportunities.***

(2) ***Regulation (EU) No 1380/2013 of the European Parliament and of the Council [the CFP Basic Regulation] requires*** that conservation measures be adopted taking into account available scientific, technical and economic advice, including, where relevant, reports drawn up by the Scientific, Technical and Economic Committee for Fisheries (STECF) and other advisory bodies, as well as in the light of any advice received from Advisory Councils.

(3) ***It is incumbent upon the Council to adopt measures on the fixing and allocation of fishing opportunities, including certain conditions functionally linked thereto, as appropriate. In accordance with Article 16(4) of Regulation (EU) No 1380/2013, fishing opportunities should be fixed in accordance with the objectives of the Common Fisheries Policy (CFP) established in Article 2(2) of that Regulation.*** In accordance with Article 16(1) of that Regulation, fishing opportunities should be allocated to Member States in such a way as to ensure relative stability of fishing activities of each Member State for each fish stock or fishery.

(4) ***The total allowable catch (TACs) should therefore be established, in line with Regulation (EU) No 1380/2013, on the basis of available scientific advice***, taking into account biological and socio-economic aspects whilst ensuring fair treatment between fishing sectors, as well as in the light of the opinions expressed during the consultation of stakeholders, in particular at the meetings of the Advisory Councils.

It is plain that the Council, when it adopts TAC Regulations along these lines, is purporting to act within the legal framework established under Article 43(2) TFEU; the CFP Basic Regulation. We argue, following our earlier research, that this demands that TACs are set consistent with the MSY exploitation rate.

In the *cod* judgment, a Regulation made under Article 43(3) TFEU was annulled. This was because (following *Venezuela*), the Regulation in question did involve a policy choice and so should, it was found, have been adopted under Article 43(2) TFEU. The policy choice in that case was to *adapt the general mechanism for setting the TACs*.[33] The judgment noted that such amendments purported to "*define the legal framework in which fishing opportunities are established and allocated*"[34]; again reinforcing the conclusion that the CFP Basic Regulation,

adopted under Article 43(2) TFEU, will likewise *define the legal framework* governing the setting of fishing quotas through TAC Regulations.

It is possible that a court would take the same approach as it did in the *cod* case when considering the setting of TACs in exceedance of the MSY exploitation rate; ie. that the Council had strayed into questions of policy, in which case the offending TAC Regulation would presumably be annulled.

In my view the present case is slightly different in type and will likely elicit a slightly different judicial response (though a similar outcome). It is hard to imagine that a Regulation merely setting TACs - notwithstanding that they may be at excessive levels - could be said to fall outside the bounds of Article 43(3) and under the remit of Article 43(2) TFEU. This is because, in the first case, the fixing and allocation of fishing opportunities is explicitly what Article 43(3) TFEU provides for:

"*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*."

In the second case, as noted, a TAC Regulation is *prima facie* aiming to give effect to the CFP Basic Regulation, adopted under Article 43(2) TFEU. Put another way, there could be no basis for concluding that fishing quotas set out in a TAC Regulation were excessive (and potentially unlawful) without reference to the CFP Basic Regulation.

In conclusion, the claim envisaged here depends upon the following arguments succeeding:

- Following the *cod* judgment, the Council, when setting TACs, must act within the legal framework of the CFP Basic Regulation.
- TACs set by the Council are, in fact, incompatible with / infringe the CFP Basic Regulation.

The *cod* judgment appears to put the Council's obligation to act "where relevant" within the framework of the CFP side-by-side with its obligation to act within the limits of its powers (ie. to not stray into policy decisions). [35] So it must be expected that an infringement of the CFP Basic Regulation would have the same effect on the offending legal act as any straying into policy decisions would have; namely its annulment.

October 2019

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ClientEarth is a registered charity that uses the power of the law to protect people and the planet.

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.

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[1] Internal research conducted summer 2019. For more details please contact the author.
[2] Paul Craig and Grainne de Burca, "EU Law: Text, Cases and Materials", 5th edn, 2011, p.119
[3] Craig and de Burca (2011), p.103
[4] Regulation (EU) No.1380/2013 of the European Parliament and of the Council
[5] Eg. Council Regulation (EU) No. 2018/120
[6] Article 289 TFEU
[7] These are adopted pursuant to Articles 290, 291 TFEU and are identified in their titles as being delegated or implemented acts (Article 290(3); Article 291(4) TFEU).
[8] Other "non-legislative acts adopted in a *sui generis* procedure" are identified by Kornezov as, including those based on Articles 31, 45(3)(d), 66, 103, 108(2), 109 and 215(1)(2) TFEU ("Locus standi of private parties in actions for annulment: has the gap been closed", C.L.J., 2014, 73(1), 25-28).
See also. Jurgen Bast, "Is There a Hierarchy of Legislative, Delegated, and Implementing Acts?", from "Rulemaking by the European Commission: The New System for Delegation of Powers" (2016).
[9] Article 263(2) TFEU
[10] Articles 264, 266 TFEU
[11] Article 263(6) TFEU
[12] Article 263(2) TFEU
[13] T.C. Hartley, "The Foundations of European Union Law", 7th edn, 2010, p.424
[14] Craig & de Burca (2011), chapter 15
[15] "Violation of another Union act will be a ground of annulment if that other act was binding on the author of the act subject to challenge. This will occur where the latter is delegated legislation and also…" Hartley (2010), p.424
[16] Ibid.
[17] https://uk.practicallaw.thomsonreuters.com/w-018-6881?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1
[18] This briefing does not consider other grounds for the annulment of a TAC regulation under Article 263 TFEU; for example infringement of a general principle of law such as legitimate expectation, or under the 'misuse of powers' head of review. Nor does it consider the prospects of an action brought under Article 265 TFEU (failure to act). Initial research suggests that that article is designed to catch a failure to take any action at all, as opposed to a failure to take an action fully or properly.
[19] Consider, eg., Jurgen Bast, "Legal Instruments and Judicial Protection", from "Principles of European Constitutional Law" (2011), at p.85:
"... Next to the two types of legislative acts ("ordinary" and "special") there are two types of habilitated acts ("delegated" acts of the Commission and "implementing" acts of the Commission or the Council). The fifth category is non-legislative acts adopted by an institution directly under the Treaties. Would there be a two-tier hierarchy between legislative and non-legislative acts, or rather a system of three, four or five levels? The answer is far from clear. … ."
[20] Craig & de Burca, p.120.
[21] Craig & de Burca, p.113.
[22] Case C-113/14
[23] Joined Cases C-103/12 and C-165/12; *EP and Comn v Council*
[24] Joined Cases C-124/13 and C-125/13; *EP and Comn v Council*
[25] Opinion of AG Szupnar Case C-113/14; *Germany v EP and Council* at [66].
[26] https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62013CC0124&from=EN at [64].
And see also https://europeanlawblog.eu/2015/12/24/joined-cases-c-12413-and-c-12513-the-court-strengthens-the-role-of-the-parliament-in-the-cfp/: The *cod* judgment "found a clear hierarchical relationship between the two provisions in the context of the CFP"…
[27] Opinion of AG Szupnar Case C-113/14; *Germany v EP and Council* at [67].
[28] Case C-583/11
[29] Opinion of AG Szupnar Case C-113/14; *Germany v EP and Council* at [72].
[30] Opinion of AG Szupnar Case C-113/14; *Germany v EP and Council* at [69] (quoting paragraph 58 of the *cod* judgment).
[31] See note 1
[32] Council Regulation 2018/120

[33] Paragraph 79 of *cod* judgment (see footnote 24).
[34] Paragraph 80 of cod judgment (see footnote 24).
[35] Paragraph 58 of *cod* judgment (see footnote 24).