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THE LEGAL ASPECTS OF EU COMMON FISHERIES POLICY DEVELOPMENT

Abstract. This article examines the process of the Common Fisheries Policy as the main legal source of the European Union's fisheries law. The fact that the regulation of the Common Fisheries Policy is referred to the joint competence of the EU caused a lot of controversy in the way of its formation. Those EU member states in which fishing is a significant source of income prevented the adoption of decisions that would restrict their right to carry out fishing activities. In this regard, as well as some other factors, the author characterizes the process of adoption of the CFP as belated.
Key words: fisheries, law of the European Union, environmental law, Common Fisheries Policy.
JEL classification: K32, K33

Introduction

Fishing is an extremely important sector of the EU economy. In 2019, the total amount of harvested fish resources in the EU amounted to 4.1 million tons, making it one of the world leaders in the industry. The geography of EU fishing is also extensive: it includes the waters of the Northeast Atlantic Ocean, the Mediterranean and Black Seas, the Eastern Central Atlantic, the Western Indian Ocean, as well as the Northeast and South of Atlantic. In this regard, for this supranational organization, the need to regulate fishing, as well as the implementation of international principles of fisheries management, is especially relevant.

The fundamental institution for regulating relations in the field of fisheries in the EU is the Common Fisheries Policy (CFP). As Richardson and Symes point out, one of the fundamental problems identified in the process of studying the EU fishing policy is its very emergence and the

events that accompany its subsequent development. (Symes 1997; Richardson 2001, p. 90). Lequesne believes that the establishment of a fishing policy can be explained by various external and internal factors (Lequesne 2001, p. 89). In his opinion, external factors are associated with the adaptation of EU member states to a changing environment, and internal factors are associated with changes in the structure of the EU itself. In turn, Hegland contrasts the scale of the macroeconomic and social significance of the EU fishing industry, noting that the latter is many times greater than the former. Because of this, argues Hegland, the fishing industry in certain parts of Europe is of key importance for local and regional economies. (Hegland 2009, p. 1). In this regard, the process of the CFP's development represents particular interest, since nowadays the sustainable development in regard of marine living resources is one of the most significant topics in international fisheries.

1. The EU legislative and normative acts regarding CFP

In accordance with Article 4 of the TFEU, the EU has joint competence in the field of fisheries, with the exception of the conservation of marine biological resources, where the Union is granted exclusive competence. Article 38 TFEU places the determination and implementation of common fisheries policy within the competence of the EU (TFEU 2009). These provisions were contained in the Treaty of Rome establishing the EEC in 1957, i.e. emerged at the very beginning of European integration. It follows from this that the main task of the Union in the field of fisheries is the harmonization of the legislation of the Member States, the development of common approaches to the implementation of fishing activities and the implementation of a unified policy, especially in connection with the need to conserve marine living resources. For the original six members of the EEC, fishing was not a significant part of the economy, and it was not until 1966 that the Commission adopted the first document specifically dealing with fisheries, the Report on the Situation of the Fis-

hing Sector of the EEC Member States and on the Basic Principles of a Common Policy.

The next step in the history of the EU CFP development was associated with the adoption in the 1970s of legislative acts belonging to the category of secondary EU law. The most significant regulations are Regulation 2141/70 and Regulation 2142/70. The fundamental significance of these acts lies in the fact that they determined the direction of fishing policy. An important step towards integration in this area was the introduction of the principle of equal access to the territorial waters of the Member States, which gave the right to each ship entered in the register of one of the Member States to access the maritime zones of the jurisdiction of any other Member State. This principle of free access caused great controversy, as the newly joined member states were much more interested in keeping fish resources for themselves than the original six members. The Council therefore decided, for a period of five years, to keep access to the 3 nautical mile zones restricted to the populations of coastal states.

In 1976, at the suggestion of the Commission, the Council adopted the so-called Hague Resolution, in the second paragraph of which, from 01.01.1977, it was provided for the expansion by Member States of their fishing zones from 12 to 200 nautical miles off the Northern and North Atlantic coasts. This was a clear response to the processes taking place within the framework of the Third UN Conference on the Law of the Sea, which was working at that time. The expansion of fishing jurisdiction zones has caused a new wave of sharp controversy regarding the distribution of the allowable catch between the coastal state and other members of the EEC, given the existence of the principle of free access, albeit in a 'dormant' state (Wilkie 2009). A certain role in these contradictions was played by the argument about the impending accession to the EEC of the countries of the Iberian Peninsula - Spain and Portugal, which had vast maritime zones (Gezelius 2008, pp. 208-229). In 1980, the Council succeeded in adopting the Declaration on a Common Fisheries Policy, which set out in a general way the fundamental provisions: rational and non-discriminatory management of fisheries resources, their protection and restoration in order to ensure their use on a long-term basis; effective con-

trol over the activities of persons engaged in fishing; implementation of structural measures involving partial financing from the EEC; establishing long-term relationships with third countries related to fishing in their territorial sea. It was not until 1983, after six years of intensive negotiations, that agreement on a specific fishery regulation was reached.

The next stage in the formation of a common EU fisheries policy began in 1992 with the adoption of the Maastricht Treaty. Secondary laws relating to this stage in the development of the EU common fisheries policy are characterized by a strong trend towards establishing a fishing permit system for the entire fishing industry and introducing a multi-year monitoring program for selected fish species. The beginning of the operation of this system was laid in the previous period of development of the EU fisheries policy through the adoption of Regulation 2241/87, which established certain measures to control fishing activities. In particular, rules were introduced to regulate the exercise of control over fishing vessels and their compliance with certain requirements, including the volume of the catch, and grounds were established for the prohibition of fishing. Subsequently, Regulation 3760/92 establishing a fisheries and aquaculture system, Regulation 2847/93 establishing a system of control over EEC fisheries policy, Regulation 1627/94 on general rules regarding special fishing permits, Regulation 894/97 on technical measures for to the Protection of Fisheries Resources and Regulation 1936/2001 on control measures applicable to the fishery of certain species of migratory fish.

The final stage in the development of the common EU fisheries policy is filled with the adoption of a variety of regulations. In addition, many new states joined the EU in May 2004, including those with a developed fishing industry. As Conceição-Heldt rightly believes, the integration or adaptation of the fishing fleets of these countries, such as Poland or Estonia, to the legal order already established in the EU, was not an easy task. (Conceição-Heldt 2006).

The third stage was initiated by the adoption of Regulation 2371/2002 on the protection and sustainable use of fisheries resources within the framework of the common fisheries policy, which has a reformatory sig-

nificance for the industry: it abolished state assistance for the renewal of the fishing fleet and established more stringent conditions for receiving cash subsidies for the modernization of fishing ships, the amount of payments for the delivery of non-working ships for scrap increased. In addition, this regulation contains the definition of "sustainable exploitation", which means the use of stocks in such a way that their future use is not limited and there is no negative impact on marine ecosystems (Regulation 2371 2002).

As can be seen, the third stage in the development of the common EU fisheries policy is characterized by rather serious actions to reform it, accompanied by the adoption of specific regulations aimed at achieving the goals of its reforms. However, the European Commission came to the conclusion that the goals of the reform carried out in 2002 have not been achieved everywhere, the current fisheries policy is not able to solve these problems and therefore needs a full-scale, fundamental and differential reform. The Commission published in April 2009 a Green Paper on the Reform of the EU Common Fisheries Policy. In addition to the above, among the most significant problems of fisheries policy, the Green Paper highlights the isolation of the fishing industry from the problems of protecting the marine environment and other policies related to marine activities, as well as food security. In addition, there are significant problems in achieving the principle of sustainable use of marine living resources: fish are caught before they breed, as a result of which resources are quickly depleted (Green Paper 2009, p. 7).

In 2013, Regulation 1380/2013 on the Common Fisheries Policy was adopted by the Parliament and the Council of the EU. Article 2 sets out the objectives of the CFP, which include ensuring sustainable fisheries, as well as the application of precautionary and ecosystem approaches (CFP Regulation 2013, p. 8). Article 7 of the Regulation provides for a number of measures to ensure the conservation and sustainable exploitation of marine living resources, including (CFP Regulation 2013, pp. 11-12):

- adoption of multiannual plans based on scientific data;

- targets for the conservation and sustainable exploitation of stocks and related measures to minimise the impact of fishing on the marine environment;

- measures to adapt the fishing capacity of fishing vessels to available fishing opportunities;

- measures on the fixing and allocation of fishing opportunities;

- minimum conservation reference sizes;

- pilot projects on alternative types of fishing management techniques and on gears that increase selectivity or that minimise the negative impact of fishing activities on the marine environment;

- limitations or prohibitions on the use of certain fishing gears, and on fishing activities, in certain areas or periods.

In addition, the EU gets the right to establish fish stock recovery areas. These areas are established in areas of the water area with a low level of population stability in order to preserve it. In such areas fishing activities may be restricted or prohibited in order to contribute to the conservation of living aquatic resources and marine ecosystems. Thus, the EU makes extensive use of the exclusive competence granted to it by the TFEU in matters of common fisheries policy and the conservation of marine living resources. Such radicalism is fully justified since the principle of sustainable fishing has not yet been fully implemented. Obviously, the goal of long-term sustainability has not been achieved. In 2009, the status of over half of the European Union's aquatic biological resources remained unknown, with only 32% being sustainably managed. Overall, over 25% of all stocks were overexploited and 50% were fully exploited (Birne et al. 2009, p. 752).

2. Judicary acts and the role of EUCJ in the formation of CFP

It should be noted that in the period before the adoption of the fisheries management system in 1983, the EEC Court played an important role in the development of EEC approaches. One of the most important decisions

in this regard is the decision in Commission v. United Kingdom, rendered in 1981. In this decision, the EEC Court, recalling that Art. 102 of the Model Act of Accession gives it the right to determine the conditions of fishing from the point of view of ensuring the protection of fish resources, indicated that this means that the EEC (and not the states) has the exclusive competence to take protective measures in "Community waters" (Case 804/79 1981). Considering the significance of the decisions of the EEC Court for the rule of law, one cannot but agree with R. Churchill and D. Owen that this decision meant "the embodiment of political desires into legal binding force" (Churchill, Owen 2010, p. 6).

The decision of the EU Court in the Kramer case has become not only one of the most important in the development of not only legal relations in the field of fisheries and the conservation of marine biological resources, but also influenced the development of EU law as a whole.

The Kramer case was considered in the EUCJ in connection with the appeal of the district courts of Zwolle (cases 3/76 and 4/76) and Alkmaar (case 6/76), for a preliminary ruling on criminal cases pending in these courts (Kramer Case 1976). In its Judgment of 14 July 1976 in this case, the Court confirmed the existence of a natural link between market policy and measures for the conservation of marine biological resources and concluded that the European Economic Community, at the "internal" level, has the power to take any measures for the conservation of marine biological resources, including the establishment catch quotas and their distribution among different Member States. Moreover, the Court found that from the duties and powers which Community law has established and conferred internally on its institutions, it follows that the EU also has the right to incur international obligations for the conservation of marine resources, and its rule-making powers ratione materiae extend as well - to the extent that Member States have similar authorities under public international law - fishing on the high seas (Kramer Case 1976, p. 30). At the same time, in the decision under consideration, the Court ruled that in its external relations the Community has the ability to assume international obligations in the entire field of objectives defined in the first part of the Treaty establishing the European Economic Community. The existence of

such powers follows not only from the direct grant of the Treaty, their existence may also follow indirectly from its other provisions, as well as from the Treaty of Accession of 1972 and from the measures taken within the framework of these provisions by the Community institutions.

As can be seen from the text of this decision, when considering the Kramer case, the Court developed in interconnection the so-called principle of 'useful necessity' and the concept of 'external accompaniment'. The essence of the latter lies in the fact that if the Community legislation gives its institutions competence in any area or to achieve a set goal, then the Community has the right to assume international obligations, even in the absence of internal legal acts regulating the EU authorities in the field of international relations. The Court also concluded that Member States participating in fisheries agreements (conventions) are further obliged to take joint actions within their framework and are also obliged not to impose such obligations under these conventions that could prevent the Community carry out the tasks entrusted to it by Article 102 of the 1972 Accession Treaty. The Community institutions and the Member States are obliged to use all political and legal means at their disposal to ensure the participation of the Community in the said agreements. Thus, this decision fixed the general principles of interaction and participation of the Community, represented by its institutions and Member States, in the said treaties (conventions) and international organizations on fisheries and the conservation of marine biological resources.

At the moment when the Council of the EU was in a situation of political deadlock because of which the Council could not reach an agreement when making appropriate decisions on the use and conservation of marine biological resources in the CFP formed in the late 70s and early 80s, the Court designated the competence of the EU and the member states in this area, and the application of national law and EU law is demarcated.

In some cases, the EUCJ has raised questions of fundamental principles of the Union law functioning, for example, the principle of direct application of EU law. Thus, in the early 1980s, Factortame Limited, among other Spanish fishing companies, re-registered its fishing vessels, which

previously sailed under the Spanish flag, as British fishing vessels, and also acquired British vessels for the purpose of using them in fisheries in that State. Most of these vessels delivered their catches to Spain, but since the fish was caught in British waters, they were subject to the British fishing quota. In 1988, the UK government promulgated the Merchant Shipping Act, which put forward a number of conditions that, if not met, prevented fishing, including requiring that fishing vessels have British owners as a condition of being registered in the UK (and gaining access to fishing under British fishing quota).

After analyzing the mentioned cases, it becomes obvious that the EUCJ had a significant impact not only on the creation of the legal framework in the field of fisheries and the conservation of marine biological resources, but also on the development of the legal system and international relations in the EU as a whole. Long before the adoption of the Lisbon Treaty, the EUCJ decisions finally fixed the scope of the conservation of marine biological resources in the exclusive competence of the EU, and were also of great importance for the regulation of the fisheries industry at the time the EU Council was in a situation of political deadlock, which could not come to an agreement when adopting the relevant decisions on the use and conservation of marine biological resources in the CFP formed in the late 1970s and early 1980s. At the same time, the EU Court of Justice simultaneously designated the competence of the EU and the Member States, and distinguished between the application of national law, EU law and international law.

In its decisions in cases in this area, the EUCJ has consolidated the doctrine of the rule of law of the EU over national legislation in areas where the EU has competence in connection with the accession of member states to the founding treaties of the EU and made important conclusions regarding the responsibility of member states (the doctrine of state responsibility). Also, the EUCJ has developed the concept of ‘external support‘ and consolidated the principles of interaction and participation of the Community, represented by its institutions and Member States, in international treaties regulating fisheries and relevant international organizations. Many of the provisions contained in its decisions subsequently formed the

basis for changes made to the founding documents of the EU, as well as to its legislation in the field of fisheries and the conservation of marine biological resources.

Conclusion

Thus, the construction and normal functioning of the CFP became possible thanks to the coordinated activities of all the institutions of the Union. At the same time, it can be stated that regulation in this area is seriously lagging behind and is not able to respond to emerging challenges in a timely manner. Thus, measures to ban dangerous fishing gear were legally enshrined at the EU level only in 2019 (Regulation 1241 2019, p. 13). In addition, actions to reform the CFR usually consist only in the prolongation of certain terms of Regulation 1380/2013. For example, in 2022, changes were made regarding the right of Member States to prohibit fishing by other Member States in their territorial waters - initially such measures were introduced until 2022, but now they have been extended until 2032 (Regulation 2495 2022). In general, the introduction of such measures indicates an extremely unfavorable state of the EU fish stocks, since in this case the principle of equal access to them by member states is violated. It seems that such measures will not make it possible to qualitatively change the situation with the conservation and sustainable use of the EU's marine living resources. It is necessary to make every effort to implement and operationalize the principles of fisheries management, since their current postulation in Regulation 1380 does not allow to achieve their actual compliance.

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