

The Protection of Biodiversity in the Framework of the Common Fisheries Policy: What Room for the Shared Competence?

Marta Chantal Ribeiro

1 Introduction

The reform of the Common Fisheries Policy—especially anchored in Regulation (EC) No. 2371/2002, of 20 December, on the conservation and sustainable exploitation of fisheries resources—undertaken by Regulation (EU) No. 1380/2013, of 11 December,¹ clearly aims to enhance the protection of marine biodiversity.² Based on the basic regulation of 2002, the concern with species and ecosystems, that is, beyond the immediate sustainability of the targeted stocks, was a recurrent and priority aspect in the decision-making process of the EU regulations applicable to the management of fisheries. In the reform of 2013, this desideratum was reinforced, as stated notably in Art. 2 of Regulation No. 1380/2013: application of the ecosystem-based approach, fostering the collection of scientific data, decisions taken under the best available scientific advice, new strategy for discards, and coherence with the European Union environmental legislation. It is precisely the latter objective that will be in the core of the discussions: “The CFP shall, in

This chapter is based on a version published in Portuguese, entitled “A protecção da biodiversidade marinha no quadro do Regulamento (UE) n.º 1380/2013. A perspectiva do Estado-Membro costeiro”, in Pueyo Losa & Jorge Urbina (Coord.), *La Gobernanza Marítima Europea. Retos planteados por la reforma de la política pesquera común*, Navarra, Thomson Reuters - Aranzadi, November 2016, pp. 73–105 [research project: The Reform of the International and European Fisheries Governance. Challenges for the Spanish Fishing Industry (DER2013-45923-R), Spain].

¹O.J. L 354/22 (2013).

²In general see Churchill and Owen (2010).

M.C. Ribeiro (✉)

Faculty of Law, University of Porto, Porto, Portugal

Interdisciplinary Centre of Marine and Environmental Research, Porto, Portugal

e-mail: mchantal@direito.up.pt

particular: (...) be coherent with the Union environmental legislation, in particular with the objective of achieving a good environmental status by 2020 as set out in Article 1(1) of Directive 2008/56/EC.”³ The reinforcement of the environmental dimension in the management of fisheries pursued by Regulation No. 1380/2013 has, in fact, the consequence of amplifying opaque and overlapping legal solutions inherited from the previous regulation. This is noticeable, especially, in the interaction with the goals set forth by the *Marine Strategy Framework Directive* (2008/56/EC) and the directives under which the Natura 2000 network was being developed (92/43/EEC and 2009/147/EC). Furthermore, the balance established by Regulation No. 1380/2013 between the exclusive competence of the European Union for the conservation of fisheries resources⁴ and, in the domain of the shared competences,⁵ the competence of the coastal Member States for the protection of marine biodiversity is highly controversial. These two aspects are the axes of the analysis developed in the following pages. Attention will be focused on the interpretation of Arts. 11, 19, and 20—Art. 11 because of its direct connection with marine protected areas (MPAs) and Arts. 19 and 20 because these articles favor the protection of the ecosystems in general.

A prior clarification must be made concerning the terminology “conservation of marine ecosystems” used by Regulation No. 1380/2013. Our understanding is that the word “conservation” is used in a wide sense, including, on the one hand, the conservation of ecosystems from which the fish stocks and the continuity of fisheries are directly dependent (this is the obvious example of Art. 8) and, on the other hand, the protection of ecosystems in a strict environmental sense, that is, ecosystems negatively affected by fisheries but with no direct relation to the sustainability of fish stocks.

2 Interaction with the Marine Strategy Framework Directive and the Natura 2000 Network: Interpretation of Art. 11 of Regulation No. 1380/2013

One of the novelties introduced by Regulation No. 1380/2013 is Art. 11 on the conservation measures that are necessary for the purpose of complying with Member States’ obligations under Art. 13(4) of Directive 2008/56/EC, of 17 June (*Marine Strategy Framework Directive*—MSFD)⁶; Art. 4 of Directive 2009/147/

³See paras. 11 and 25 of the Preamble, Art. 2(5)(j) and Art. 11 of Regulation No. 1380/2013.

⁴Art. 3(1)(d) TFEU. For the history of the exclusive competence of the European Union for the conservation of marine biological resources under the common fisheries policy, see Churchill and Owen (2010) p. 3 et seq. and p. 302 et seq. See also the case law initiated by the *AETR/ERTA* case (31.03.1971, Case 22/70), the *Kramer* case (14.07.1976, Case 3, 4 e 6/76) and the *Commission v. United Kingdom* case (05.05.1981, Case 804/79).

⁵Art. 4(2)(e), TFEU.

⁶O.J. L 164/19 (2008).

EC, of 30 November (*Birds Directive*);⁷ or Art. 6 of Directive 92/43/EEC, of 21 May (*Habitats Directive*).⁸

The *Birds* and *Habitats* Directives are the legal bases for the implementation of the Natura 2000 network, that is, a coherent European ecological network of protected areas called “special protection areas” (*Birds*) and “special areas of conservation”⁹ (*Habitats*). On the other hand, Natura 2000 network is an important axis of the MSFD. In fact, marine protected areas are crucial¹⁰ for the achievement or maintenance of a good environmental status in the marine environment. Therefore, for this purpose, besides the Natura 2000 network, national and international networks of MPAs are also relevant.¹¹

According to scientific data, repeatedly across the years, fishing activities are one of the major threats for the marine biodiversity, namely due to the overexploitation of stocks, by-catch, and damage caused by the fishing nets. Hence, the restriction and/or prohibition of fishing activities are very common measures of the management plans of MPAs. In this scenario, it is important to ascertain whether Art. 11 facilitates or hinders the accomplishment by the coastal Member States of the “2020” goals, that is:

On the one hand, by 2020, at least, 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas. This goal was launched by the Contracting Parties to the Convention on Biological Diversity (CBD) in 2004.¹²

On the other hand, the achievement or maintenance of a good environmental status in the marine environment by the year 2020 at the latest, as laid down in Art. 1 of the MSFD.

⁷O.J. L 20/7 (2010).

⁸O.J. L 206/7 (1992).

⁹Under Art. 4 of *Habitats* Directive, the designation of a special area of conservation implies three steps. First step: Member States propose a list of sites; second step: European Commission adopts a list of sites of Community importance; third step: Member States designate the special areas of conservation. The sites benefit from a preventive protection since the first step. See Art. 4(5) and Art. 6(2)(3)(4) of the *Habitats* Directive as interpreted by the European Union Court of Justice (ECJ) in the *Dragaggi* case (13.01.2005, Case C-117/03), in the *Bund Naturschutz in Bayern eV and others v. Freistaat Bayern* case (14.09.2006, Case C-244/05, paras. 41, 44 and 46) and in the *Commission v. Spain* case (Iberian lynx, 20.05.2010, Case C-308/08, para. 21).

¹⁰See paras. 6, 7 e 18 of the Preamble and Art. 13(4) of the Directive No. 2008/56/CE. See also, European Commission (2012).

¹¹See Annex I and Annex III, Table 1 (Habitat types) of the Directive No. 2008/56/CE.

¹²See Conference of the Parties to the CBD: COP 7-2004 (Decision VII/30, Annex II, Target 1.1) and COP 10-2010 (Nagoya), *The Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets* (Decision X/2, Annex, IV, 13, Target 11): “by 2020, at least (...) 10 per cent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well connected systems of protected areas and other effective area-based conservation measures, and integrated into the wider (...) seascapes”. The European Union is Contracting Party of the CBD since 21 March 1994.

The analysis of Art. 11 is divided into three sections: the geographical scope, the substantive scope, and the prescriptive competence of the coastal Member States.

2.1 *The Geographical Scope*

For the purpose of this study, at present, the issue of the geographical scope of the legal instruments under analysis is uncontroversial. The MSFD has the clearest wording by stating its application to internal waters, territorial sea, exclusive economic zone, and the continental shelf, including the areas beyond 200 nautical miles (Art. 2 and Art. 3(1)(a)(b)). In the areas of the continental shelf beyond 200 nautical miles (or “outer continental shelf”), the achievement or maintenance of a good environmental status is faced with major legal barriers, given the high seas regime of the water column overlying the seabed (Arts. 78 and 87, UNCLOS).¹³ Articles 13(4)(5) and 15 reveal this concern and establish a procedure to mitigate the effects of the high sea regime. The *Birds* and *Habitats* Directives share the same wide geographical scope, as confirmed by the European Union Court of Justice (ECJ). Thus, the *Habitats* Directive is also applicable to the natural habitats, habitats of species, and sedentary species of the continental shelf beyond 200 nautical miles.¹⁴

Turning the attention to Regulation No. 1380/2013, according to Art. 1(2) the Common Fisheries Policy has a more ambitious geographical scope embracing all the fishing activities carried out in the maritime areas under jurisdiction of the Member States (*Union waters*) and the fishing activities carried out outside the Union waters by fishing vessels flying the flag of Member States and registered in the European Union (*Union fishing vessels*).¹⁵ The expression “Union waters” must be widely interpreted, including the sedentary species of the seabed (Art. 77(4), UNCLOS). It is noteworthy to clarify, however, that the geographical scope of Art. 11 is confined to the Union waters.

2.2 *The Substantive Scope: The MPAs. The Complementary Effect of the MSFD with Regard to the Habitats Directive*

The wording of Art. 11 raises no doubts when it comes to the delimitation of its substantive scope. Article 11 applies only to conservation measures that are deemed necessary for the effectiveness of MPAs. Differently, the *Habitats* Directive raises

¹³United Nations Convention on the Law of the Sea, of 10 December 1982.

¹⁴*Commission v. United Kingdom case*, 20.10.2005, Case C-6/04, Col. I- 9017, paras. 115, 117 and 120. See also Churchill and Owen (2010), p. 65; and European Commission (2012), p. 20, paras. 3 and 4.

¹⁵E.g., Regulation (EC) No. 734/2008, of 15 July, O.J. L 201/8 (2008).

several hermeneutical issues that must be addressed, taking into account that this directive is a milestone for the designation of MPAs.

Unlike the *Birds* Directive, which is applicable to all wild bird species, the *Habitats* Directive establishes a selective protection restricted to the natural habitats listed in Annex I, the habitats of species listed in Annex II, and the species listed in Annexes IV and V. After reading these annexes, the prevailing conclusion is that coastal biodiversity is clearly privileged. The protection given to the biodiversity of the open and deep seas is fragmented and exhibits serious gaps. Benefiting from the practice followed by some Member States,¹⁶ the European Commission was sensible to these weaknesses of the *Habitats* Directive and, after a process started in 2003, came up with a solution developed in the document entitled “Guidelines for the establishment of the Natura 2000 network in the marine environment. Application of the Habitats and Birds Directives,” of May 2007.¹⁷ By means of revision of the *Interpretation Manual of European Union Habitats*, concluded in 2007, it is possible to extend the application of Annex I of the *Habitats* Directive to important deep sea ecosystems, that is, hydrothermal vent fields, cold coral reefs, and seamounts.¹⁸ This approach is simple and quick; nevertheless, it raises many questions unsolved so far, namely:¹⁹

First, does not address the gaps concerning deep sea and open sea species. Measures adopted in the framework of conservation of fisheries resources mitigate only part of the problem.²⁰

Second, does not identify which deep sea and open sea habitats should be classified as ‘priority natural habitat’ (e.g., Art. 4, *Habitats* Directive).

Third, there is no clear timetable for the implementation of *Habitats* Directive in the marine environment.

Fourth, neither the *Guidelines* nor the *Interpretation Manual* have binding force. Thus, it depends on the willingness of the Member States to comply with the extension operated by the revision of the *Interpretation Manual* in 2007.

It must be highlighted that some of these problems, such as gaps, the lack of a timetable, and the *soft law* nature of the *Guidelines* and of the *Interpretation Manual*, are indirectly mitigated by the timetable and framework established by

¹⁶See the case of Portugal. In 2002, a seamount located in the Portuguese exclusive economic zone (*Banco D. João de Castro*) was listed as site of Community importance, under the code ‘Reefs’, following the Portuguese proposition. See Decision 2002/11/EC, of 28 December 2001, O.J. L 5/16 (2002).

¹⁷For a more detailed insight see Ribeiro (2013), p. 585 et seq.

¹⁸At present, *Interpretation Manual of European Union Habitats*, European Commission (DG Environment), EUR 28, April 2013. See, for instance, code 1170 (reefs).

¹⁹The European Commission did an evaluation of the *Birds* and *Habitats* Directives to ensure that they are ‘fit for purpose’. See http://ec.europa.eu/environment/nature/legislation/fitness_check/index_en.htm. Accessed 31 January 2017.

²⁰E.g., as regards deep-sea sharks and the orange roughy (*hoplostethus atlanticus*) see the ‘zero’ tolerance established by the Regulation (EU) No. 1367/2014, of 15 December, O.J. L/1 366 (2014).

the MSFD.²¹ In respect of the gaps, for instance, the MSFD extends the protection potentially to all species and ecosystems²² and, in Art. 13(4), takes into account other regimes, domestic or international, applicable to the designation of MPAs. The MSFD and these regimes have, consequently, the virtue of complementing the protection given by the Natura 2000 network. This is the case, notably, of the OSPAR Convention²³ and the Barcelona Convention systems.²⁴ The *OSPAR List of Threatened and/or Declining Species and Habitats*,²⁵ for instance, gives a wider protection to species (e.g., orange roughy, sharks, cod) and ecosystems (e.g., seamounts, hydrothermal vents fields).²⁶ Furthermore, Contracting Parties may give protection to other species and habitats types and also to areas of ecological relevance.

In conclusion, in the framework of Regulation No. 1380/2013, networks of MPAs benefit from a particular attention. Presumably, the designation of an MPA facilitates the adoption by the European Commission/Union of conservation measures (restrictions or prohibitions of fishing) when there is involvement of fishing vessels flying the flag of a Member State other than the Member State that has designated the MPA. It should be highlighted that Art. 8 of Regulation No. 1380/2013 applies to a different situation. While Art. 11 concerns to MPAs in the sense of the Convention on Biological Diversity (“holistic” MPAs²⁷), Art. 8 applies to “biologically sensitive areas” intrinsically related with fish stock recovery (sectoral

²¹In respect of the timetable, see European Commission (2012), para. 17: “The timetable is also different. The MSFD requires that measures are taken to achieve or maintain GES [good environmental status] by 2020. There is no formal timetable set for achieving FCS [favourable conservation status] according to the HD [Habitats Directive]. The MSFD could therefore provide an additional stimulus for the implementation of conservation measures under the Habitats and Birds Directives, if measures to achieve FCS for species and habitats protected by HD and equivalent measures for wild birds are incorporated into or cross-referenced under the programme of measures within the respective marine strategies”.

²²See European Commission (2012), paras. 38 and 45, and p. 20, para. 1. See also the MSFD, Annex III, Table 1, Habitats types and Biological features.

²³Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), of 22 September 1992. In the OSPAR legal framework it must be highlighted the Annex V on the Protection and Conservation of the Ecosystems and Biological Diversity of the Maritime Area, of 23 July 1998, and the Recommendation 2003/3 on a Network of Marine Protected Areas, as revised by the *Recommendation 2010/2 on amending Recommendation 2003/3 on a network of Marine Protected Areas*, OSPAR 10/23/1, Annex 7.

²⁴Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, as revised in 10 June 1995. In the Barcelona Convention framework it must be highlighted the Protocol Concerning Specially Protected Areas and Biological Diversity in the Mediterranean, as revised in 10 June 1995.

²⁵Reference Number: 2008-6, OSPAR Commission. See also *Descriptions of habitats on the OSPAR list of threatened and/or declining species and habitats* (Reference Number: 2008-07), OSPAR Commission.

²⁶For the Mediterranean see: <http://www.unepmap.org/index.php?module=content2&catid=001001001>. Accessed 31 January 2017.

²⁷See Molenaar and Elferink (2009), pp. 6–7; and Ribeiro (2014), pp. 185–191.

MPAs). It might be argued, therefore, that Art. 8 consubstantiates the European Union's answer to the international call for the protection of vulnerable marine ecosystems in the fisheries context.²⁸

Finally, taking into account the three-step process for the designation of "special areas of conservation" under *Habitats* Directive, it must be stressed that Art. 11 shall be applicable since the inclusion of a natural habitat in the National List of Sites (first step). Only this interpretation complies with the ECJ case law and with the duty of the Member States to give preventive protection to the sites.²⁹

2.3 *The Prescriptive Competence of the Coastal Member State. Grounds and Solutions for an Interpretation of Art. 11 Consistent with the Shared Nature of the Environmental Competence*

Article 11, as previously described, clearly deals with pure protection of the marine environment. This area is conceived as shared competence according to Art. 4(2)(e) of the Treaty on the Functioning of the European Union (TFEU), to which applies the important principles of subsidiarity and proportionality developed by Art. 5(3)(4)³⁰ of the Treaty on European Union (TEU).³¹ We should

²⁸See in particular the UNGA (United Nations General Assembly) Resolution no. 61/105, 08.12.2006, A/RES/61/105, paras. 80–83; Resolution no. 64/72, 04.12.2009, A/RES/64/72, paras. 119, 122–123; and Resolution no. 66/68, 06.12.2011, A/RES/66/68, paras. 121–126, 128–129, 131–132 and 135.

²⁹See note 9.

³⁰The compliance with the principles of subsidiarity and proportionality precedes the effects described by Art. 2(2) TFEU.

³¹Prior to the Regulation No. 1380/2013 came into force, there were discussions about the competent level for regulating fisheries inside MPAs: the coastal Member State or the European Union? At that time several Authors argued in favor of the coastal Member State competence. See Schwarz (2004), Owen (2004) and Ribeiro (2013), pp. 694–703. In the latter, we did a short analysis of the *pros and cons* of giving prevalence to the European Union level. *Pros*: coordination, consistency and coherence of the measures adopted; publicity; wider acceptance of the measures (less conflicts); increased facility in the adoption of measures applicable to large geographical areas (with or without MPAs in place). *Cons*: long decision-making processes; the prevailing economic rationale of the decision makers in the framework of fisheries; the prevailing power of the European Commission and the Council concerning the timing and content of the measures, in other words, it is easy to predict the adoption of measures—or the absence of measures—quite different from the ones proposed by the coastal Member State, which has a closer knowledge of the right balance of interests for ensuring an effective protection of the marine biodiversity (p. 698). It might also be argued that a coastal Member State may manipulate the measures so that its fishing fleet might get a competitive advantage. This scenario is real; however, the European Commission has several ways of controlling the measures without the need of emptying the regulatory powers of the coastal Member State.

expect, therefore, a more coherent and proportionate regime regarding the prescriptive—notably legislative—competence of the coastal Member State, taking into account that the *Birds* and *Habitats* Directives, as well as the MSFD, rely completely on the coastal Member State for the adoption of the required conservation measures.³² The system established by Art. 11, however, follows the same approach found in other provisions inherited from Regulation No. 2371/2002, notably Arts. 13, 19, and 20. More clearly:

First, according to Art. 5(1) of Regulation No. 1380/2013, “Union fishing vessels shall have equal access to waters and resources in all Union waters”. This principle of equal access to waters and resources derogates the exclusivity for the fishing vessels flying the flag of the coastal State, set forth by Art. 19,³³ Arts. 56 and 62,³⁴ and Art. 77³⁵ of UNCLOS.

Second, paragraphs 2, 3 and 4 of Art. 5 establish two main derogations (12 nautical miles; outermost regions: 100 nautical miles)³⁶ to the equal access to EU waters and resources, notwithstanding, the ordinary situation is the access to the EU waters – including frequently the 12 nautical mile and the 100 nautical mile zones – of fishing vessels flying the flag of diverse Member States.

Third, the range of the regulatory powers of the coastal Member State depends on the flag of the fishing vessel. Actually, the decision-making process and the intensity of the control made by the European Commission differ depending whether the fishing vessels fly the flag of the coastal Member State or the flag of other Member States. It should be highlighted that both the decision-making process and the type of control made by the European Commission differ also from one provision to another. In this study the comparison will be focused on Arts. 11, 19 and 20.

Fourth, in the context of fisheries, a wide or restrictive interpretation of the prescriptive competence of the European Union concerning the pure protection of the marine environment will affect, in the same extent, the international competence of the coastal Member State (Art. 3(2) TFEU).

2.3.1 The Prescriptive Competence of the Coastal Member State: Fishing Vessels Flying Its Flag

Article 11 does not raise any relevant criticism in the case of the need for the adoption of conservation measures applicable to fishing vessels flying the flag of the coastal Member State. Within the boundaries of MPAs, in any maritime zone under national jurisdiction (territorial sea, exclusive economic zone, continental shelf), the coastal Member State is empowered to unilaterally regulate fishing activities carried out by fishing vessels flying its flag (Art. 11(1)). The conservation measures

³²E.g., Art. 6 of *Habitats* Directive and Arts. 13, 15 and 18 of MSFD.

³³Territorial sea.

³⁴Exclusive economic zone. In this maritime zone the exclusivity for the fishing vessels flying the flag of the coastal State is not absolute given the regime set forth by Art. 62(2) of UNCLOS.

³⁵Continental shelf.

³⁶These derogations were inherited from the legal framework applicable to the Common Fisheries Policy before the Regulation No. 1380/2013. The question is whether they will be extended after 31 December 2022 (Art. 5(4)).

adopted by the coastal Member State must, nevertheless, comply with three cumulative requirements:

First, the measures must be compatible with the objectives set out in Art. 2 of Regulation No. 1380/2013. Article 2 sets forth a large list of objectives. With respect to the objectives of socio-economic nature, our understanding is that its assessment must take into consideration the regime set out in Art. 6(3)(4) and Art. 7 of *Habitats* Directive (assessment of the implications for the site³⁷ and exceptions) and in Art. 14 of MSFD (exceptions). These commands prescribe strict criteria for an inversion of the hierarchy between environmental objectives and socio-economic objectives. Inclusive, when doing the analysis of the articulation between Art. 6 of *Habitats* Directive and Art. 14 of MSFD, the European Commission itself concluded in the sense of the prevalence of the most favourable solution to the protection of the environmental objectives, as follows: “the MSFD exceptions cannot take precedence over Article 6 of the *Habitats* Directive as the Treaty requires that stricter provisions take precedence when more than one applies to the same issue”.³⁸

Second, the measures must meet the objectives of the relevant Union legislation that they intend to implement.

Third, the measures must be at least as stringent as measures prescribed by European Union law. In other words, the coastal Member State must respect this minimum standard of protection (“*measures under Union law*”), nonetheless, he can go further in the intensity of protection based on Art. 193 TFEU. Under this article the coastal Member State can maintain or introduce “more stringent protective measures”, provided that such measures are compatible with the Treaties and notified to the European Commission.

What if the coastal Member State does not comply with these requirements? In this event, considering the general control for which is competent the European Commission, this institution (and also other Member States) might bring the Member State before the ECJ in the context of an action for infringement of European Union law (Arts. 258 to 260 TFEU).

2.3.2 The Prescriptive Competence of the Coastal Member State: Fishing Vessels Flying the Flag of Other Member States or Third States

The legal scenario changes completely if the measures adopted by the coastal Member States, under the same circumstances, are liable to affect fishing vessels flying the flag of other Member States (Art. 11(2–6)). In this case, the decision-making process might be long and with an unpredictable outcome, involving Member States with direct management interest in the fishery to be affected by such measures, the Advisory Councils, the European Commission, and, when this institution makes use of Art. 43 TFEU, the European Parliament and the Council, as well as the Economic and Social Committee. More clearly:

³⁷In the *Landelijke Vereniging* case (07.09.2004, Case C-127/02), on the mechanical fishing of cockles, the ECJ included the fishing activities in the concept of ‘project’ for the purpose of assessment of its implications for the site.

³⁸See European Commission (2012), para. 61 et seq., notably para. 67.

First, the coastal Member State – called “the initiating Member State” – must request the adoption of the relevant measures by initiating a procedure near the European Commission. The initiating Member State shall provide the European Commission and the other Member States having a direct management interest with relevant information on the measures required, including their rationale, scientific evidence in support and details on their practical implementation and enforcement (Art. 11(3)).

Second, the initiating Member State and the other Member States having a direct management interest may submit a joint recommendation, as referred to in Art. 18(1)(2), within six months from the provision of sufficient information. The Commission shall adopt the measures, by means of delegated acts (Art. 46)³⁹, taking into account any available scientific advice, within three months from receipt of a complete request (Art. 11(2)(3)).

When comparing the wording of Art. 11(3) and the wording of Art. 18(3), we came into the conclusion that the European Commission *must* adopt – not a *mere empowerment* or *option* – the required conservation measures, provided that the requirements set out by Art. 11(1) are met. This conclusion is supported by the purpose of Art. 11(1) and also by the fact that the *Birds* and *Habitats* Directives and the MSFD rely completely on the *original*⁴⁰ regulatory powers of the coastal Member State for the adoption of the required conservation measures.⁴¹ This reasoning also explains the exclusive power of initiative of the coastal Member State in the context of Art. 11.⁴²

It is not clear, however, whether the European Commission, in cooperation with the Member States⁴³, can influence the shape of the measures, taking into account the available scientific advice, with the aim of avoiding the rejection of the measure. A positive answer seems to be more in line with the spirit of the legislator (*mens legislatoris*).

It should be highlighted that occasionally the conservation measures to be adopted might affect fishing vessels flying the flag of third States. This might occur namely in the fishing grounds overlying the continental shelves of Member States beyond 200 nautical miles. This situation is expressly addressed in Art. 13(5) and Art. 15 of MSFD, as well as in Art. 18(4)⁴⁴ of Regulation No. 1380/2013. In this event, only the European Union can propose the restriction or prohibition of a fishing activity to the relevant regional fisheries management organisation or, when direct negotiation is adequate, to third States. The intermediation of the European Union is the consequence of its exclusive competence at the international level for adopting decisions concerning, strictly, the conservation of fishing

³⁹See also Art. 290 TFEU.

⁴⁰It is important to remember that the limits of European Union competences are governed by the principle of conferral (Art. 3(6) and Art. 5(1)(2) TEU; Art. 7 TFEU) and the use of shared competences is governed by the principles of subsidiarity and proportionality (Art. 5(3)(4) TEU followed by Art. 2(2) TFEU).

⁴¹E.g., Art. 6(1)(2) and Art. 4(5) of *Habitats* Directive, and Arts. 13, 15 and 18 of MSFD. It is of the coastal Member State the power and duty to adopt preventive measures and conservation measures.

⁴²See the difference of Art. 12 of Regulation No. 1380/2013. Emergency measures can be adopted by the European Commission at the reasoned request of a Member State or on its own initiative.

⁴³See Art. 11(6) and Art. 18(2) of Regulation No. 1380/2013.

⁴⁴“Where the conservation measure applies to a specific fish stock shared with third countries and managed by multilateral fisheries organisations or under bilateral or multilateral agreements, the Union shall endeavour to agree with the relevant partners the measures that are necessary to achieve the objectives set out in Article 2”.

resources (Art. 3(2) TFEU).⁴⁵ This exclusive competence of the European Union in the fisheries domain must not threaten the internal competence of Member States when acting in the context of shared competences, such as the *Birds* and *Habitats* Directives or the MSFD and, likewise, must not endanger the international competence of Member States when acting in the context of shared competences, such as the protection of marine environment (e.g., OSPAR Convention, Barcelona Convention, CCAMLR⁴⁶).⁴⁷ Both competences-exclusive and shared-must be articulated, giving high relevance to the principle of sincere cooperation,⁴⁸ and a clear border must be established between the mere conservation of fishing resources (competence of the European Union) and the protection of marine environment (competence of the Member States and of the European Union, the latter exclusively in the area of pre-emption by common rules).⁴⁹ In order to keep the balance established by the Member States when ratifying the TEU and TFEU, the abusive appropriation of competence by the European Union must be refrained, taking into account the supreme principle of conferral of competences (Art. 5(1)(2) and Art. 48(2),⁵⁰ TEU). In other words, the system laid down by the Member States in the TEU and TFEU requires that the scope of the exclusive competences, both at internal and external levels, must be subject to a restrictive interpretation.

Third, if the joint recommendation is deemed not to be compatible with the requirements referred to in Art. 11(1), the European Commission may submit a proposal in accordance with the Treaty, that is, Art. 43(1)(2) and Art. 289(1) TFEU. According with these provisions, the conservation measures will be jointly adopted by the European Parliament and the Council. In our understanding, before the referred submission of the proposal under Art. 43, the Member States may amend the joint recommendation and restart the procedure before the European Commission.

Fourth, if not all Member States succeed in agreeing on a joint recommendation to be submitted to the European Commission (absence of a joint recommendation), two things might happen: this institution may submit a proposal in accordance with the Treaty (Art. 11 (3))⁵¹ or, in the case of urgency, the European Commission shall adopt temporary conservation measures (Art. 11(4)(5)). These measures shall be limited to those in the absence of which the achievement of the objectives associated with the establishment of the

⁴⁵“The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope”. Emphasis added. See the case law cited in note 4.

⁴⁶An interesting case was brought before the ECJ in November 2015 concerning the *Convention on the Conservation of Antarctic Marine Living Resources*, of 20 May 1980 (CCAMLR). See Case C-626/15: <http://data.consilium.europa.eu/doc/document/ST-15523-2015-INIT/en/pdf>. Accessed 31 January 2017. This Convention goes beyond the pure conservation of fishery resources. See, for instance, the wide concept of “marine living resources”, which embraces all marine species (Art. I (2)).

⁴⁷See, in general, Wouters et al. (2009).

⁴⁸See Art. 4(3) TEU: “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 (...)”.

⁴⁹See again Art. 3(2) TFEU: “The Union shall also have exclusive competence for the conclusion of an international agreement when (...) in so far as its conclusion may affect common rules or alter their scope”. In general, for a deep analysis of the complex ECJ case law, see Rosas (2015).

⁵⁰The proposals for the amendment of the Treaties may serve “either to increase or to reduce the competences conferred on the Union in the Treaties”. Emphasis added.

⁵¹See Arts. 43 and 289(1) TFEU.

conservation measures, in accordance with the *Birds*, *Habitats* and MSFD Directives and the Member State's intentions, is in jeopardy. According with paragraph 4, hence, the conservation measures adopted by the European Commission must be consistent with the *initiating* Member State's intentions. The use of paragraphs 4 and 5 will occur possibly when the debate between the initiating (coastal) Member State and the other Member States is extreme, based in conflicting objectives: urgent environmental protection, on the one hand, and socio-economic reasons, on the other hand.

It is noteworthy to mention that Art. 11(4)(5), when compared with Art. 12, set out a more generous procedure and time limit. Under Art. 11(5), the urgency measures shall apply for a maximum period of 12 months, which may be extended for the same period provided the conditions that justified the measures continue to exist.

The articulation between paragraphs 3 and 4 of Art. 11 raises some doubts. In our understanding, flexibility must be given to the European Commission. Instead of a mandatory choice between submitting a proposal under Art. 43 TFEU or adopting emergency measures, the European Commission may combine both options, taking into account that the ordinary legislative procedure may be long.

Fifth, the Commission shall facilitate cooperation between the Member State concerned and the other Member States having a direct management interest in the fishery in the process of implementation and enforcement of the measures adopted under Art. 11(2)(3)(4).

Article 11 itself raises some doubts of interpretation, as previously explained. The main obstacles, however, emerge when we compare Art. 11 with other provisions, notably Arts. 19 and 20. The most relevant obstacles are the overlapping of regimes and the different balance between exclusive and shared competences (developed in Sect. 3, *infra*). The case of the 12 nautical mile zone, for instance, is obvious. In fact, when the conservation measures to be adopted by the coastal Member State are liable to affect fishing vessels flying the flag of other Member States, Art. 20(2)(3)(4) sets out a more respectful legal solution regarding the environmental competence of the coastal Member State. In other words, the decision-making process laid down in Art. 20(2)(3)(4) is centered in the coastal Member State, and the European Commission can only exercise an external—but important⁵² and necessary⁵³—control. Therefore, when fishing vessels flying the flag of other Member States are affected, the adoption of conservation measures by the coastal Member State is easier under such article. This leads to the absurd conclusion that adopting measures for the protection of ecosystems is easier when there is no designation of MPAs. Art. 11 thus, in the case of fishing vessels flying the flag of other Member States, establishes a disproportionate solution favoring the exclusive competence of the European Union (conservation of fishery resources) rather than the shared competence of the coastal Member State (environment: designation and regulation of MPAs). In order to ensure compliance with the system of competences established in TFEU and directives, and coherence in the application of Arts. 11 and 20, we propose that Regulation No. 1380/2013 must be interpreted as follows:

⁵²See Art. 20(4).

⁵³The control is required, for instance, to avoid disproportion, distortion and manipulation of objectives by the coastal Member State.

First, in the 12 nautical mile zone, when the conservation measures to be adopted by the coastal Member State are liable to affect fishing vessels flying the flag of other Member States, the application of Art. 20(2)(3)(4)⁵⁴ should prevail over Art. 11.

Second, in a future revision of Regulation No. 1380/2013 (*de iure condendo*), the legal solution set out in Art. 20(2)(3)(4) should be extended to the exclusive economic zone and the continental shelf when the conservation measures applicable in the MPAs are liable to affect fishing vessels flying the flag of other Member States.

3 Beyond Art. 11: The Contribution of Other Provisions for the Protection of Marine Biodiversity

The express concern of Regulation No. 1380/2013 with MPAs (Art. 11) does not diminish the importance of other provisions that also contribute, directly, to the protection of ecosystems: Art. 8 concerning the protection of fish stocks recovery areas, described as biologically sensitive areas (equivalent to vulnerable marine ecosystems); Arts. 12 and 13 concerning emergency measures; and Arts. 19 and 20 concerning national measures. With the exception of Art. 8, these articles derive from the former basic regulation (No. 2371/2002); nonetheless, some important changes have been inserted, namely, in the decision-making process towards a lighter procedure and the strengthening of the coastal Member State's regulatory powers.

Under this new legal framework, the coastal Member State can adopt general measures with the aim to protect ecosystems and species outside the MPAs while complementing their effects. Let us see Arts. 19 and 20 more closely and the interaction between them and with Art. 11.

3.1 *Scope of Art. 20: Conservation Measures Adopted by the Coastal Member State in the 12 Nautical Mile Zone*

Within 12 nautical miles of its baselines, the coastal Member State may, on the one hand, take nondiscriminatory measures for the conservation and management of fish stocks and, on the other hand, take nondiscriminatory measures for the “*maintenance or improvement of the conservation status of marine ecosystems*.” We will give relevance to the goals evidenced in italics, given their importance for the achievement of the objectives laid down in the *Birds* and *Habitats* Directives, and

⁵⁴We reject the application of Art. 20(1) in the context of MPAs as regards the possibility of the European Union calling back its regulatory competence. This possibility must be subject to a restrictive interpretation in the sense that European Union cannot unilaterally replace the coastal Member State regarding the initiative and legislative competence for the protection of marine environment, as enshrined in the *Birds* and *Habitats* Directives and MSFD.

MSFD. It must be underlined that all these legal instruments set out objectives beyond the MPAs, addressing both the protection of ecosystems and species.⁵⁵ Under the former basic Regulation (No. 2371/2002), the practice confirmed the inclusion of species in the scope of Art. 9 (now Art. 20).⁵⁶

The prescriptive competence of the coastal Member State is subject to three cumulative requirements (Art. 20(1)):

First, that the European Union has not adopted, namely under Art. 43 TFEU, measures addressing *conservation* specifically for that area or specifically addressing the problem identified by the coastal Member State concerned. This requirement must be clarified. In the context of the pure conservation of marine ecosystems and species – a domain of elusive borders, that is not always easy to establish, in relation to the conservation of fish stocks and associated ecosystems⁵⁷ – the European Union cannot arbitrarily replace the coastal Member State regarding its initiative and legislative competence, as enshrined in the *Birds* and *Habitats* Directives and MSFD. Actually, as mentioned before, also the European Union must comply with the principle of sincere cooperation (Art. 4(3), TEU). If the coastal Member State does not take adequate measures or initiatives the right option for the European Commission is making use of the action for infringement of, notably, these directives (Arts. 258 and 260 TFEU).

Second, the conservation measures adopted by the coastal Member State must be compatible with the objectives set out in Art. 2.

Third, the conservation measures must be at least as stringent as measures prescribed by European Union law. We recall here the reasoning developed in Art. 11 about this *minimum standard of protection*.

3.1.1 Twelve Nautical Mile Zone: Fishing Vessels Flying the Flag of the Coastal Member State

In the 12 nautical mile zone, provided that the three requirements described above are met, the prescriptive competence of the coastal Member State is absolute with respect to fishing vessels flying its flag. The only additional requirement is the duty of that State to make publicly available appropriate information concerning the measures adopted (Art. 20(3)). This command in paragraph 3 is a novelty, and so is paragraph 4 of Art. 20, both introduced in 2013 due to the amendment of the decision-making processes.

According to paragraph 4, if the European Commission considers that a measure adopted under Art. 20 does not comply with the conditions set out in paragraph 1, it may, subject to providing relevant reasons, request that the coastal Member State concerned amends or repeals the relevant measure. In our understanding, however,

⁵⁵In the case of species, see Art. 12 et seq., and Annexes IV-VI of *Habitats* Directive. In general, see Annex I of MSFD.

⁵⁶See Churchill and Owen (2010), pp. 192–193. See the following Decisions of the European Commission: C (2004) 3229, of 24 August, and 2005/322/EC, of 26 February.

⁵⁷It is worthy of analysis the Council Regulation (EC) No. 1967/2006, of 21 December, concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea.

in the case of fishing vessels flying the flag of the coastal Member State, the more favorable regime set out in Art. 19 (*all Union waters*) must prevail over Art. 20 (1 and 4), provided that, by means of an extended interpretation, the application of Art. 19 to the conservation of ecosystems is accepted, as the practice indicates (see Sect. 3.2., *infra*). Therefore, under these circumstances, the European Commission can only make use of the general powers of control inherent to the action for infringement of European Union law (Arts. 258 and 260 TFEU).

3.1.2 Twelve Nautical Mile Zone: Fishing Vessels Flying the Flag of Other Member States

Where conservation measures to be adopted by the coastal Member State are liable to affect fishing vessels of other Member States, the decision-making process is substantially different involving duties of coordination (Art. 6(4)), consultation, and motivation. More clearly, the conservation measures shall be adopted by the coastal Member State only after consulting the European Commission, the relevant Member States, and the relevant Advisory Councils⁵⁸ on a draft of the measures, which shall be accompanied by an explanatory memorandum that demonstrates, *inter alia*, that those measures are nondiscriminatory. For the purpose of such consultation, the coastal (consulting) Member State may set a reasonable deadline, which shall, however, not be shorter than two months (Art. 20(2)). Still, Regulation No. 1380/2013, when compared with Regulation No. 2371/2002, clearly strengthens the regulatory powers of the coastal Member State, taking into account that it is (always) up to this State to make the final decision.

Paragraph 3 (publicity of the measures by the coastal Member State) and paragraph 4 (control of the measures by the European Commission) gain increased relevance when conservation measures are liable to affect fishing vessels of other Member States. These requirements are very important in performing an adequate counterbalance of the devolution of prescriptive competence to the coastal Member State. The external control of the measures by the European Commission, notably, may prevent distortion and manipulation of objectives by the coastal Member State (e.g., disguised competitive gain in a particular fishery). What if the coastal Member State does not amend or repeal the measure as requested by the European Commission? In our view, in the context of conservation of ecosystems and species, the answer is making use of the action for infringement of European Union law (Arts. 258 and 260 TFEU), being the final decision of the ECJ.

We fully agree with the devolution of regulatory powers operated by Art. 20 (2) of Regulation No. 1380/2013. The solutions enshrined in Art. 20 convey a fair balance of interests and are more respectful of the environmental competence of the coastal Member State. It is surprising, in our point of view, that Art. 11 does not

⁵⁸The powers of the Advisory Councils are not irrelevant. See Art. 44(3)(4) of Regulation No. 1380/2013.

follow the same approach precisely in a situation (MPAs) where the environmental competence of the coastal Member State—and, consequently, the inherent regulatory powers—should obviously prevail. The fact that Art. 11 also applies to the exclusive economic zone and continental shelf is not a convincing argument. We recall, consequently, our interpretation developed in Sect. 2.3.2., in fine: in the 12 nautical mile zone, when the conservation measures to be adopted by the coastal Member State are liable to affect fishing vessels flying the flag of other Member States, the application of Art. 20(2)(3)(4) should prevail over Art. 11.

A final remark concerning the pragmatic solution adopted by Portugal and Spain, by which the solutions laid down in Art. 20 were circumvented: these two Member States signed a bilateral fisheries agreement in Brussels, on 24 March 2014, establishing a regime, based on principles of reciprocity and national treatment, for the adjacent areas (Minho and Guadiana) of their respective territorial seas in the Atlantic Ocean.⁵⁹

3.2 Scope of Art. 19: Conservation Measures Adopted by the Coastal Member State Applicable to Fishing Vessels Flying Its Flag or to Persons Established in Its Territory. Grounds for the Inclusion of Marine Ecosystems by Means of an Extended Interpretation

According to paragraph 1 of Art. 19, Member States may adopt “measures for the conservation of fish stocks in Union waters” provided that those measures fulfill three cumulative requirements:

First, measures must apply solely to fishing vessels flying the flag of that Member State or, in the case of fishing activities which are not conducted by a fishing vessel, to persons established in that part of its territory to which the Treaty applies (Art. 355 TFEU).

The second and third requirements are identical to those set out in Art. 20(1): compatibility of measures with the objectives set out in Art. 2 and those measures must be at least as stringent as measures under European Union law.

Furthermore, paragraphs 2 and 3 of Art. 19 stipulate some duties of information:

The Member State shall, for control purposes, inform the other Member States concerned of provisions adopted, and the Member States shall make publicly available appropriate information concerning the measures adopted.

The noncompliance with these requirements and obligations may end in an action for infringement of European Union law initiated by the European Commission or other Member States (Arts. 258 to 260 TFEU).

Besides the duties of information, the main innovation introduced by Art. 19, when compared with the former Art. 10 of Regulation No. 2371/2002, is the

⁵⁹See, namely, Art. 4(3) and Art. 5(4) of Decreto No. 21/2014, of 8 August, DR I/152, p. 4139, available at <https://dre.pt/application/file/55236009>. Accessed 31 January 2017.

geographical scope, that is, the measures adopted by a Member State may be applicable in the territorial sea, exclusive economic zone, and continental shelf under its jurisdiction or under the jurisdiction of other Member States (*Union waters*).⁶⁰ Consequently, within European Union waters, a coastal Member State may establish a unified regime for the fishing vessels flying its flag. In these circumstances, in the 12 nautical mile zone, the requirement whereby measures must be “at least as stringent as measures under Union law” should be extended to measures adopted by the relevant Member States in accordance with Art. 20(2).

The big question⁶¹ about Art. 19 is the scope of the conservation measures. In fact, for the purpose of protection of marine biodiversity, the wording of Art. 19 may generate controversy, taking into account that it refers only to “measures for the conservation of fish stocks in Union waters.” Focusing particularly on the exclusive economic zone and the continental shelf,⁶² does this mean that the coastal Member State is restrained from adopting measures with the aim to protect ecosystems or species envisaged by the European Union environmental legislation, such as the MSFD?⁶³

CHURCHILL and OWEN writing about Art. 10 of Regulation No. 2371/2002, the predecessor of Art. 19, acknowledge the following: “The authors have been unable to ascertain whether the failure of Article 10 expressly to apply to marine ecosystems was an oversight on the part of those drafting the Regulation or was intentional.”⁶⁴ In our understanding, only an oversight on the part of those drafting the regulations is admissible. In fact, there are several irrefutable arguments in favor of an extended interpretation of Art. 19,⁶⁵ in order to include the protection of ecosystems in the exclusive economic zone and continental shelf:

First, the predominant link of nationality, that is, between the coastal Member State that adopt the conservation measures and the fishing vessels to which the measures apply. The link of nationality is fully respected by Arts. 11 and 20. Why Art. 19 would be different in the case of conservation of marine ecosystems?

Second, the shared nature of the environmental competence and the powers and duties of the coastal Member State set out in the *Birds* and *Habitats* Directives and MSFD. The

⁶⁰See Art. 4(1)(1): “Union waters” means the waters under the sovereignty or jurisdiction of the Member States, with the exception of. . .”.

⁶¹Another question is the articulation of Art. 19 with Art. 20. In the 12 nautical mile zone, outside the boundaries of MPAs but taking into account the limits described previously (see note 54 and Sect. 3.1 of this chapter), Art. 19 might be important when the European Union call back the regulatory powers according with Art. 20(1). Art. 19 provides legal basis for the adoption of other measures by the coastal Member State applicable to his fishing vessels, as long as the requirement of minimum standard of protection is met. Another issue of articulation was addressed in Sect. 3.1.1 of this chapter.

⁶²Art. 20, for the 12 nautical mile zone, expressly embraces the conservation of ecosystems.

⁶³E.g., ecosystems characterized by dispersion, namely, cold-water coral reefs and sponge aggregations.

⁶⁴(2010), p. 191.

⁶⁵We expressed our point of view for the first time in *A protecção da biodiversidade marinha...* (2013), pp. 715–717.

interpretation by which the wording of Art. 19 expresses the exclusivity of the European Union for adopting measures for the conservation of marine ecosystems would contravene the system of competences established by the TFEU and the directives referred above.

Third, the global system of the Regulation No. 1380/2013. The use of Art. 13 (emergency measures) by the coastal Member State is subject to strict conditions (e.g., “[o]n the basis of evidence of a serious threat (...) to the marine ecosystem”) and is limited in time (“measures shall apply for a maximum period of three months”). Art. 13, hence, does not provide legal basis for a sufficient and enduring protection of ecosystems in the exclusive economic zone and continental shelf. In our point of view, Art. 13 combined with Arts. 11, 19 (extended interpretation) and 20, only shows real usefulness with regard to its possible application to fishing vessels flying the flag of other Member States, in particular for fishing activities carried out in the exclusive economic zone and continental shelf.⁶⁶

This extended interpretation was followed by Portugal in Portaria No. 114/2014, of 28 May,⁶⁷ and was accepted by the European Commission. The facts are quite easy to describe:

Following the requests of Portugal and Spain, in 2005, the European Union adopted the Regulation No. 1568/2005, of 20 September,⁶⁸ regarding the protection of deep-water coral reefs and other vulnerable deep-sea ecosystems from the effects of fishing in large areas of the Macaronesian region, that is, waters around the Azores and Madeira Archipelagos and Canary Islands (Fig. 1). This Regulation prohibits the use, by the European Union fleet, of any gillnet, entangling net or trammel net at depths greater than 200 meters and any bottom trawl or similar towed nets operating in contact with the bottom of the sea, including in areas of the exclusive economic zone and continental shelf beyond 200 nautical miles,⁶⁹ notably, where hydrothermal vent fields are located.

In 2014 Portugal extended the geographical scope to other parts of the exclusive economic zone and a larger area of the continental shelf beyond 200 nautical miles in order to protect diverse deep-sea ecosystems, such as seamounts and hydrothermal vent fields (Fig. 1). Therefore, according with Portaria No. 114/2014, in those larger areas, fishing vessels flying the flag of Portugal are prohibited from using several nets operating in contact with the bottom of the sea. The Portaria is clearly anchored in Art. 19 of Regulation No. 1380/2013.

In 8 July 2015 Portugal requested to the European Commission the extension, to the rest of the European Union fleet, of the prohibition contained in the Portaria No. 114/2014. The request was based in Art. 15 of the MSFD. The European Commission acknowledged the legitimacy of the Portuguese request, but no measures have been taken so far.

A final remark concerning the pragmatic solution adopted by Portugal and Spain, circumventing the limits set out by Art. 19, for some areas of the exclusive economic zones adjacent to Madeira and Canary Islands and the mainland: the bilateral fisheries agreements signed by these two Member States respectively in

⁶⁶In the 12 nautical mile zone the main benefit seems to be the shorter deadline for consultation.

⁶⁷DR I/102, p. 2977. Available at <https://dre.pt/application/file/25346153>. Accessed 31 January 2017.

⁶⁸O.J. L 252/2 (2005). The Regulation No. 1568/2005 amends Regulation (EC) No. 850/98, of 30 March.

⁶⁹The Portuguese submission to the Commission on the Limits of the Continental Shelf (CLCS) was formally deposited in 11 May 2009, with the No. 44. See the official website of the CLCS: http://www.un.org/depts/los/clcs_new/commission_submissions.htm. Accessed 31 January 2017.

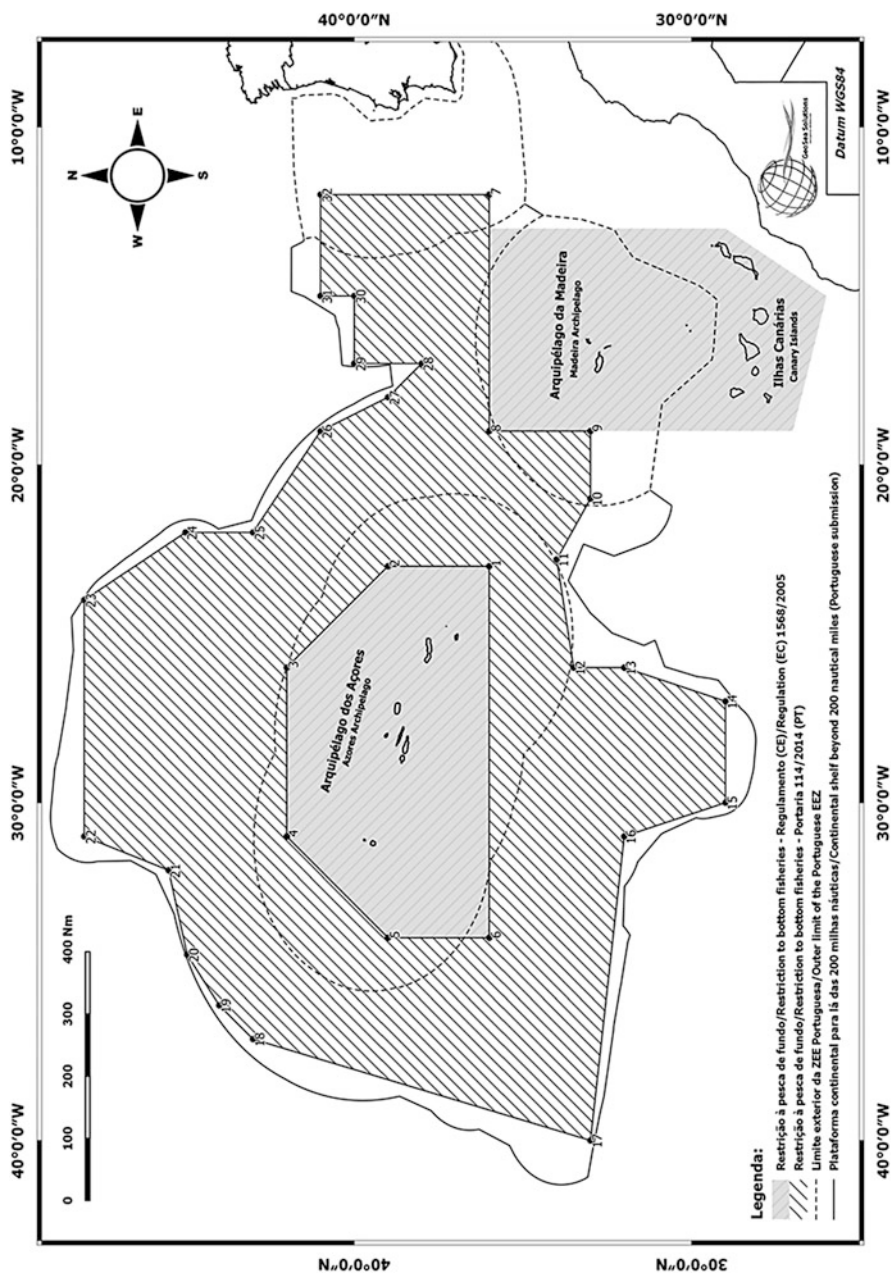


Fig. 1 Restriction to bottom fisheries. Courtesy of GeoSea Solutions, Lda

Porto, on 9 May 2012,⁷⁰ and in Brussels, on 24 March 2014,⁷¹ are based on principles of reciprocity and national treatment.

4 Concluding Remarks: Balance and Tension Between Exclusive and Shared Competences

Article 11 of Regulation No. 1380/2013 is applicable to MPAs only. The provisions do not raise any relevant critic in the case of the need for the adoption of conservation measures applicable to fishing vessels flying the flag of the coastal Member State. Presumably the designation of an MPA would facilitate the adoption of restrictive or prohibitive measures applicable to fishing vessels flying the flag of other Member States; nonetheless, in the 12 nautical mile zone, the adoption of measures by the coastal Member State seems to be easier when there is no MPA (Art. 20).

Therefore, when the conservation measures to be adopted by the coastal Member State are liable to affect fishing vessels flying the flag of other Member States, within the 12 nautical mile zone, the decision-making process set out by Art. 20(2)(3)(4) should prevail over Art. 11, that is:

First, the conservation measures should be adopted by the coastal Member State, with obligations of prior coordination (Art. 6(4)), consultation, motivation and publicity;

Second, the European Commission can play an important external control.

In a future revision of Art. 11 of Regulation No. 1380/2013, this decision-making process, which favors the prescriptive competence of the coastal Member State with respect to fishing vessels flying the flag of other Member States, should be extended to the exclusive economic zone and the continental shelf.

Only these interpretations ensure coherence and compatibility with the environmental (and prescriptive) competence of the coastal Member State as fully respected by the *Birds* and *Habitats* Directives (Art. 6) and by the MSFD (e.g., Arts. 13 and 15), according to the principle of conferral of competences and the principles of subsidiarity and proportionality. Otherwise, the other Member States will benefit from a significant power to influence the degree of environmental protection in maritime zones that are not under their jurisdiction, and the European Union will be legitimized to exercise regulatory powers that genuinely belong to the coastal Member States:

⁷⁰Related to tuna (traditional pole-and-line fishing gear) and black scabbard fish (longline fishing gear). Exclusive economic zones adjacent to Madeira and Canary Islands. See Art. 9(1) of Decreto No. 8/2013, of 9 May, DR I/89, p. 2756, available at <https://dre.pt/application/file/260696>. Accessed 31 January 2017.

⁷¹Exclusive economic zones adjacent to mainland (Atlantic Ocean only). See Decreto No. 21/2014, cit., Art. 3.

Within the 12 nautical mile zone, Art. 19 must be interpreted together with Art. 20 when the conservation measures are applicable only to fishing vessels flying the flag of the coastal Member State, that is:

First, the tacit system of control set out by Art. 19 – based on Arts. 258 and 260 TFEU – should prevail over the regime established by Art. 20(4).

Second, measures adopted by the coastal Member State under Art. 19 must eventually take into account the measures adopted by other coastal Member States under Art. 20(2).

The conservation of ecosystems, especially in the exclusive economic zone and continental shelf, must be included in the scope of Art. 19 by means of an extended interpretation. Only this interpretation complies with the link of nationality (flag), the shared nature of the environmental competence, and the global system enshrined in Regulation No. 1380/2013. This understanding was followed by Portugal in Portaria No. 114/2014 in articulation with the duties set out by the MSFD.

In the framework of the exclusive competence of the European Union—conservation and management of fishery resources—there is an important devolution of regulatory powers to the coastal Member State (e.g., Arts. 19 and 20), inclusively when fishing vessels flying the flag of other Member States are liable to be affected by the measures (Art. 20). In the framework of the shared competences—MPAs and conservation of ecosystems (Arts. 11 and 19; exception of Art. 20)—under a literal interpretation, there is a controversial appropriation of regulatory powers by the European Union, with possibly important consequences at the external level. All in all, the pretension of the fisheries framework to dominate the environmental protection is clearly evidenced in Regulation No. 1380/2013. Besides issues of conflicting competences and proportionality, acknowledging the importance of an effective control by the European Union to avoid distortion and manipulation, the fundamental question is whether that dominance is the best option for the oceans' health and the consequent sustainability of fisheries.

References

- Churchill R, Owen D (2010) *The EC Common Fisheries Policy*. OUP, Oxford
- European Commission (2012) *Links between the Marine Strategy Framework Directive (MSFD 2008/56/EC) and the Nature Directives (Birds Directive 2009/147/EEC (BD) and Habitats Directive 92/43/EEC (HD))*. Interactions, overlaps and potential areas for closer coordination. <http://ec.europa.eu/environment/nature/natura2000/marine/docs/FAQ%20final%202012-07-27.pdf>. Accessed 31 January 2017
- Molenaar EJ, Elferink AGO (2009) Marine protected areas in areas beyond national jurisdiction. The pioneering efforts under the OSPAR convention. *Utrecht Law Rev* 5(1):5–20
- Owen D (2004) Protecting marine SACs and SPAs from fishing activities: who has the power to impose restrictions. In: Jürgen Ritterhoff J, Gubbay S, Zucco C (eds) *Marine protected areas and fisheries*. Proceedings of the International Expert Workshop held at the International Academy for Nature Conservation, Isle of Vilm, Germany. Bundesamt für Naturschutz, Bonn, pp 61–65
- Ribeiro MC (2013) *A protecção da biodiversidade marinha através de áreas protegidas nos espaços marítimos sob soberania ou jurisdição do Estado: discussões e soluções jurídicas contemporâneas. O caso português*. Coimbra Editora, Coimbra

- Ribeiro MC (2014) Marine protected areas: the case of the extended continental shelf. In: Ribeiro MC (ed) 30 years after the signature of the United Nations Convention on the Law of the Sea: the protection of the environment and the future of the Law of the Sea. Coimbra Editora, Coimbra, pp 179–207
- Rosas A (2015) EU External Relations: Exclusive Competence Revisited. *Fordham Int Law J* 38 (4):1073–1096
- Schwarz K-A (2004) Legal aspects of marine protected areas and fisheries. In: Jürgen Ritterhoff J, Gubbay S, Zucco C (eds) *Marine protected areas and fisheries. Proceedings of the International Expert Workshop held at the International Academy for Nature Conservation, Isle of Vilm, Germany. Bundesam für Naturschutz, Bonn*, pp 45–56
- Wouters J, Jong S, Marx A, De Man P (2009) Study for the Assessment of the EU's Role in International Maritime Organisations. Final Report, Leuven Centre for Global Governance Studies, Katholieke Universiteit Leuven

Open Access This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits any noncommercial use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

