



EUROPEAN PARLIAMENT

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*Committee on Legal Affairs  
The Chair*

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25.07.2011

Ms Carmen Fraga Estévez  
Chair  
Committee on Fisheries  
BRUSSELS

Subject: ***Opinion on the legal basis of the proposal for a Council decision on access by fishing vessels flying the flag of the Bolivarian Republic of Venezuela to the exclusive economic zone off the coast of French department of Guyana (COM(2010)0807 - 2010/0392(NLE))***

Dear Madam Chair,

By letter of 23 May 2011 you asked the Committee on Legal Affairs pursuant to Rule 37(2) of the Rules of Procedure, to give its opinion on the proper legal basis for adopting the proposal for a Council decision on access by fishing vessels flying the flag of the Bolivarian Republic of Venezuela to the exclusive economic zone off the coast of French department of Guyana.

The request bears on whether Article 43(3) in conjunction with Article 218(6)(b) TFEU introduced by the Council as legal bases in the referral for consultation are the appropriate ones rather than Article 43 in conjunction with Article 218(6)(a) TFEU as proposed by the Commission which provide for the consent of the Parliament.

By letter of 30 May 2011, Parliament's Legal Service provided an analysis of the legal bases put forward for the proposed Council decision. According to its conclusions, the proposal should be based on Article 43(2) TFEU in conjunction with Article 218(6)(a)(v) TFEU.

## I. Background

EU Law, namely the Fishing Authorisation Regulation<sup>1</sup> presupposes the existence of an international fisheries agreement when granting fishing authorisations to third-country vessels within the EU waters. Article 21 of that Regulation states that the Commission may issue fishing authorisations for third country fishing vessels only as far as they are "*eligible for a fishing authorisation under the agreement concerned*".

Until now, no fisheries partnership or any other international agreement between the EU and Venezuela in the field of fisheries was concluded. However, fishing vessels flying the flag of Venezuela have been allowed to operate in the exclusive economic zone of the French overseas department of Guyana for several decades. To reflect this situation, the regulations on total allowable catches (hereinafter "TAC") and quotas for fishing of various species in the maritime zones provide for a quota for Venezuelan vessels to fish in the waters of French Guyana<sup>2</sup>. These Regulations are adopted by the Council alone pursuant to Article 43(3) TFEU.

Given that the current practice is not in line with the requirements of EU Law<sup>3</sup>, the Commission made a proposal for a commitment of the EU to grant fishing rights to Venezuelan vessels. According to the Explanatory Statement, "*given the limited scope of the fishery in question, a fully-fledged fisheries agreement between Venezuela and the EU appears as disproportionate*." Therefore, this commitment was proposed to take the form of a unilateral declaration of the Council of the European Union, with the consent of the European Parliament, and serving "*a purpose similar to that of a fisheries agreement*". Thus, the Commission based its proposal on the usual legal basis for an international agreement in the field of the fisheries policy, namely Article 43 TFEU in conjunction with Article 218(6)(a) TFEU.

The Council decided to change the legal basis to Article 43(3) in conjunction with Article 218(6)(b) TFEU and to modify the content of the provisions in order to match the change in the legal basis; nevertheless, the purpose of the declaration remains the same. These modifications have the effect of replacing the consent of the Parliament by the consultation procedure.

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<sup>1</sup> Council Regulation EC No 1006/2008 of 29 September 2008 concerning authorisations for fishing activities of the Community fishing vessels outside Community waters and the access of third country vessels to Community waters, amending Regulations (EEC) No 2847/93 and (EC) No 1627/94 and repealing Regulation (EC) No 3317/94 (OJ L 286, 29.10.2008, p. 33).

<sup>2</sup> See Council Regulation (EU) No 53/2010 of 14 January 2010 (OJ L21, 26. 01.2010, p.1), which provides in Annex VIII for a certain number of fishing authorisations to be granted to Venezuelan vessels operating in French Guyana waters, and Council Regulation (EU) No. 57/2011 of 18 January 2011 (OJ L24, 27. 01.2011, p.1).

<sup>3</sup> Council Doc. 5032/2010, 12.01.2010 stated that the situation concerning landings of Venezuelan vessels in the ports of French Guyana had to be regularised before 31 December 2010 and that licences to Venezuelan vessels would otherwise not be renewed beyond that date.

## II. The proposed legal basis

The legal basis put forward for the proposed Council Decision are:

*" Article 43 TFEU*

*1. The Commission shall submit proposals for working out and implementing the common agricultural policy, including the replacement of the national organisations by one of the forms of common organisation provided for in Article 40(1), and for implementing the measures specified in this Title.*

*These proposals shall take account of the interdependence of the agricultural matters mentioned in this Title.*

*2. 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.*

*3. 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.*

*4. In accordance with paragraph 2, the national market organisations may be replaced by the common organisation provided for in Article 40(1) if:*

*(a) the common organisation offers Member States which are opposed to this measure and which have an organisation of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialisation that will be needed with the passage of time;*

*(b) such an organisation ensures conditions for trade within the Union similar to those existing in a national market.*

*5. If a common organisation for certain raw materials is established before a common organisation exists for the corresponding processed products, such raw materials as are used for processed products intended for export to third countries may be imported from outside the Union."*

and

*"Article 218(6) TFEU*

*6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.*

*Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:*

*(a) after obtaining the consent of the European Parliament in the following cases:*

- (i) association agreements;*
- (ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;*
- (iii) agreements establishing a specific institutional framework by organising cooperation procedures;*
- (iv) agreements with important budgetary implications for the Union;*
- (v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.*

*The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.*

*(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act."*

## **II. Applicable law**

It is a settled case-law that the choice of legal basis for a Union's measure must rest on objective factors amenable to review which include in particular the aim and the content of the measure.<sup>1</sup>

In principle, a measure is to be founded on only one legal basis. If examination of the aim and the content of a Union measure reveals that it has a twofold component, falling within the scope of different bases, and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be based on a single basis, namely that required by the main or predominant purpose or component.<sup>2</sup> Only if, exceptionally, it is established that the measure simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, will that measure have to be founded on the various corresponding legal bases<sup>3</sup>.

## **III. Analysis of the legal basis proposed**

In the field of fisheries, relations between the EU and third countries are arranged in the form of a 'two-fold legal instrument'. First of all, the EU concludes an international agreement with the third country concerned whereby the parties grant access to each other's fishing vessels in their respective maritime zones and set out conditions for the use of fishing rights on the other party's waters. These agreements are concluded after the consent of the Parliament as foreseen

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<sup>1</sup> Case C-440/05 *Commission v. Council* [2007] ECR I-9097.

<sup>2</sup> Case C-91/05 *Commission v. Council* [2008] ECR I- 3651.

<sup>3</sup> Case C-338/01 *Commission v. Council* [2004] ECR I- 4829.

in Article 218(6)(a) TFEU. Subsequently, once the international agreement has been concluded, EU legislative acts are adopted in order to fix fishing opportunities for this third country.

Article 218 TFEU lays down the internal procedure for negotiating and concluding *"agreements between the Union and third countries or international organisations"*. The Council authorises the opening of negotiations, adopts negotiating directives, authorises the signing of agreements and concludes them. The Commission is mainly responsible for conducting the negotiations. The European Parliament, for its part, is consulted or (in the cases provided for by Article 218(6)(a)) has to give its consent.

Article 43(2) TFEU permits measures to be taken under the ordinary legislative procedure in order to establish provisions necessary for the pursuit of the objectives of the Common Fisheries Policy (CFP). Thus, in order to establish if Article 43(2) TFEU is the correct legal base for the proposed Council Decision, it must be determined whether granting fishing rights to third countries by the mean of international commitments could be considered part of the Common Fisheries Policy.

As stated in Recital 3 of the Commission proposal, the proposed instrument aims at providing *"an international access title for the third-country vessels in question with the proviso that they shall operate in compliance with restrictions under applicable Union law designed to conserve fish stock in the zone in question and to secure the supplies of the affected processing industry"*. This ensures that the Venezuelan vessels fishing in EU waters comply with the Union control measures in order to guarantee *"a sustainable pursuit of fishing activities"*, one of the overall objectives of the CFP, as provided for in Article 4(1) of the Basic Regulation<sup>1</sup>. In addition the "Statement of consent" specifically refers to *"any relevant"* Union rules and regulations governing fishing activities in the French Guyana, including those on fish stocks that can be targeted, the maximum number of authorised fishing vehicles or the proportion of catches to be landed at ports of French Guyana.

This demonstrates that the adoption of the proposed Council decision is an act in pursuit of the objectives of the CFP, as stated in Article 43(2), and thus has to be adopted on the basis thereof.

It should also be observed that fishing opportunities for Venezuelan vessels are already foreseen by the TAC and Quotas Regulations<sup>2</sup>, therefore adoption of another act on allocation of fishing opportunities, on the basis of Article 43(3), would be erroneous and redundant. Article 43(3) TFEU provides in fact that *"3. 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."* and therefore should be interpreted as attributing to the Council a specific power to adopt a non-legislative act the purpose and scope of which is strictly limited. None of the specifically enumerated areas in which the Council can act on the basis of Article 43(3) TFEU are the subject of the proposed decision.

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<sup>1</sup> Council Regulation (EC) No 2371/ 2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ L 358, 31.12. 2002, p.59).

<sup>2</sup> See footnote 2.

At its meeting of 11 July 2011 the Committee on Legal Affairs accordingly decided, by 21 votes in favour, with no abstention<sup>1</sup>, to recommend that the proposal for a Council decision on access by fishing vessels flying the flag of the Bolivarian Republic of Venezuela to the exclusive economic zone off the coast of French department of Guyana should be based on Article 43(2) TFEU in conjunction with Article 218(6)(a)(v) TFEU.

Yours sincerely,

Klaus-Heiner Lehne

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<sup>1</sup> The following were present for the final vote: Klaus-Heiner Lehne (Chair), Luigi Berlinguer (Vice-Chair), Raffaele Baldassarre (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Christian Engström, Marielle Gallo, Giuseppe Gargani, Kurt Lechner, Eva Lichtenberger, Toine Manders, Antonio Masip Hidalgo, Paulo Rangel, Bernhard Rapkay, Dagmar Roth-Behrendt, Francesco Enrico Speroni, Dimitar Stoyanov, Alexandra Thein, Rainer Wieland, Cecilia Wikström, Tadeusz Zwiefka.