



FACULTY OF LAW  
University of Lund

Ásta Einarsdóttir

# Iceland and the CFP: Possibility for derogation?

Master thesis  
20 points

Adjunkt  
Henrik Norinder

European Law

Spring 2003

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## Summary

The question of whether Iceland should apply for membership in the EU has been a much-debated issue in Iceland for years. The opposition against membership is based on many reasons. One of them, and not the least referred to, is the CFP and that Iceland cannot confer their sovereignty in the fishing sector over to the EU, as it is Icelanders' livelihood and the foundation for the nations economy and existence.

Many Icelanders are concerned that the CFP has not been very successful in the last decades in achieving its goals. In addition, the fisheries sector plays an extremely important role in the nations economy and existence. Therefore permanent derogations from the CFP are a precondition for a membership application.

The content of the *acquis communautaire* in relation to the enlargement of the Community has been referred to as the "accession" *acquis*. When the term is used in that context it refers to the whole body of rules, political principles and judicial decisions, which new Member States must adhere to, in their entirety and from the beginning when they become members of the European Union.

The experience shows that derogations are allowed only insofar as they are expressly laid down by the Acts of Accession, and even case law of the Court is found by some to support the view of a "*certainne prééminence*" of the founding Treaties in respect of the Acts of Accession.

Acceding states have different needs and sometimes they face serious difficulties in taking the Community legislation in a given field. Problems can be caused by many reasons including political and economical factors. One way of accommodating different needs is by differentiating Member States' rights and obligations. This can basically be done with temporary derogations and permanent exemptions.

Consequently, it seems that from a legal perspective Iceland would have to undertake the whole *acquis communautaire*, the CFP and recognise the exclusive competences of the EU in the fisheries sector.

Iceland cannot expect to get any permanent derogation from the CFP. The experience from the Norwegian accession negotiation shows that the principle of subsidiary cannot be referred to as an argument for derogation. Legal analysis and interpretation of the principle also confirms that Iceland cannot rely on the principle, even in the light of the immense importance that the fishing industry plays in the Iceland's economy.

On the other hand, it is not unimaginable that Iceland could get some temporary derogation from some parts of the CFP. The Community could adjust the rules of CFP to accommodate some of Iceland's needs, and could issue joint or unilateral declarations acknowledging Icelandic interests and that need is to be taken into account in drafting of new rules, similar to the Joint Declarations issued in connection with the Norwegian Accession Treaty.

## **Preface**

I dedicate this paper to the most important man in my life my two years old son, Einar. Also thank you so much mum and dad I could not have done this with out your great support. My husband always an inspiration and great help, then Kristin and Susana thank you for your moral support and precious friendship. Thank you Henrik Norinder for your encouragement, it was a pleasure to have you as my tutor.

## Abbreviations

CAP	Common Agricultural Policy
CFP	Common Fisheries Policy
CFSP	Common Foreign and Security Policy
COM	The Common Organisation of the Market in Fisheries Products
EC	European Community
EEA	European Economic Area
EEC	European Economical Community
EEZ	Exclusive Economical Zone
EMU	Economic and Monetary Union
ITQ	Individual transferable quotas
JHA	Justice and Home Affairs
TAC	Total Allowable Catch
TEC	Treaty of the European Community
TEU	Treaty on European Union
POs	Producers Organisations

# 1 Introduction

The question of whether Iceland should apply for membership in the EU has been a much-debated issue in Iceland for years. Nevertheless, the polls show that the majority of the population is against membership as it stands today. Opposition against membership is based on many reasons, one of them that is frequently referred to is the CFP and the fact that Iceland cannot confer their sovereignty in the fishing sector to the EU, because it is Icelanders' livelihood and the foundation for the nations economy and existence.

Some have argued that Icelanders should not be so reluctant to hand over their rights to control their fishing resources to the EU for the goals of the CFP are quite sensible and the nations interests would not be put in jeopardy by submitting to the CFP. Many others have stated that the CFP has not been very successful over the last decades in achieving its goals. Additionally, based on the extremely important role the fisheries sector plays in the nation's economy and existence; permanent derogations from the CFP are a precondition for a membership application.

In light of the aforementioned, if Icelanders are truly contemplating on the possibility of applying for membership, they must take on the task of analysing and understanding the nature of the Community law, the possibility of permanent derogations, whether derogations are truly needed and if so how extensive they need to be.

In this thesis an attempt is made to contribute to the two first named subjects, the nature of Community law and the possibility of permanent derogations.

The CFP and the Icelandic fisheries management system are outlined. The two systems, although aiming at the same goals, are very differently structured. The "quota system" with individual transferable quotas and an open market with no direct state aid or subsidises, while the CFP is i.e. based upon extensive aid schemes and price control.



In Chapter 2 the two most commonly known and important theoretical perspectives, the constitutional perspective and the international perspective, through which the Community law can be examined, are explained and clarified.

The CFP and the Icelandic "quota system" are reflected in Chapter 3. The aims and the critique of the CFP are outlined and the five basic elements on which the CFP is based upon; the resource management, structures, common organisation of the market, relations with third countries and enforcement, are explained.

In Chapter 4 the possibility for derogations from the CFP are discussed, both from a general perspective and in the light of the Norwegian Accession Treaty in 1992 and the Maltese Accession Treaty in 2003. The different types of derogation are explained and their placement in the Community law.

In Chapter 5 the possibility that Iceland will be granted permanent derogations from the CFP is discussed in details. References are made to the precedent given in other Accession Treaties and various arguments are discussed. Finally, some conclusions are drawn from the earlier discussions and presented.

## 2 Theoretical perspectives

The binding force of Community law can be looked at from a number of perspectives. The two most commonly known are, the constitutional perspective and the international perspective. In addition, there has been a discussion about a third way, the conceivable intermediate model.<sup>1</sup> In this the focus will be on the two most well known theories, the Constitutionalist theory and the International law theory.

According to the Constitutionalist theory "... there is no doubt that the European legal order started its life as an international organization in the traditional sense, even if it had some unique features from its inception."<sup>2</sup>

In 1963 the mutation of the European Union started i.e. the treaties mutated from being of an international law character into constitution legal order. In the Van Gend and Loos case the Court first talked of a "New Legal Order of International Law."<sup>3</sup> "The newness" of the legal order is characterised as "constitutional" and the process as "constitutionalization." The subjects of the new legal order are said to be not only states, but also individuals. Most commentators focus on the legal doctrines of supremacy of European law, the direct effect of European law, implied power and pre-emption, and on the evolution of the protection of fundamental human rights as hallmarks of this "constitutionalization".<sup>4</sup>

The Court developed the concept and took it even further by stating that the EEC Treaty has created its "[o]wn Legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply."<sup>5</sup> In the Les Verts<sup>6</sup> case the Court abandons its former vocabulary in favour of

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<sup>1</sup> For more information see, Zetterquist, Ola (2002) p. 266-283.

<sup>2</sup> Weiler, J.H.H. (1999) p. 295.

<sup>3</sup> Case 26/62, Van Gend and Loos v. Nederlandse Administratie der Belastingen (1963) ECR 1.

<sup>4</sup> Weiler, J.H.H. (1999) p. 295.

<sup>5</sup> Case 6/64, Flaminio Costa v. Enel [1964] ECR 585.

<sup>6</sup> Case 294/83, Parti Ecologiste "Les Verts" v. European Parliament [1986] ECR 1339.

explicit constitutional oratory and simply says that the Treaty has a constitutional character. Finally, the Court refers to the Treaty as a constitution in the Hauer<sup>7</sup> case. As can be seen, the main proponent of this theory is the Court, or as it is sometime called the inventor of the constitutional order perspective.

The Constitutional theory is based on the idea that there is a second contract of society at the Community level and therefore the individuals are direct legal and political persons in the Community. In nature this is a Lockian theory built on the fact that the European Union's common law and common judge makes it a political society. The fundamental laws of this political society are found in the basic treaties, which the European citizens are the authors of and have duty to obey as do all legal personalities such as the Member States and the Institutions of the European Union. In summary, this theory is based on the idea that European citizens are part of one and the same political society, and that the relationship between them, the European Community and the Member States are of a constitutional and not an international law nature, because they are all direct legal personalities within a common legal system.<sup>8</sup>

The international law perspective is based on the notion that the Community is an international law association of sovereign states. Sovereignty within the Community is almost a question of "all or nothing" because sovereignty lies either with the community or the Member States. But the existence of a sovereign does not in itself exclude the existence of pro-forma independent political assemblies with law giving power and a pro-forma independent judicial power. The important thing is that the Community is always subordinate to the right of decision of the real sovereign that is the state.<sup>9</sup>

The main proponents of this theory are Trevor C. Hartley, whilst Jack Straw and most of the Member States' governments hold this

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<sup>7</sup> Case 44/79, Hauer v. Land Rheinland-Pfalz [1979] ECR 3727.

<sup>8</sup> Zetterquist, Ola (2002) p. 249-255.

<sup>9</sup> Zetterquist, Ola (2002) p. 238.

view. The German Constitutional Court should also not be forgotten in the enumeration of advocates.

The basis of this theory is that the Community is an association of sovereign states, which is not backed up by sanctions or enforcement because it lacks its own means of coercion (the sword), rests essentially on Hobbesian grounds. According to this theory EU law derives its validity from the constitutions of the Member States, from which the international treaty derives its validity.<sup>10</sup> Or as one of the main advocates of this theory has said that "...Community law is an essentially dependent system of law. It is not valid in its own right, but owes its validity to international law and the legal systems of the Member States. Ultimately, it is controlled by the Member States: if they act together, they can change it in any way they want, and can even abolish it. If the European Court tried to take away the powers of the Member States, its judgement would not be followed in at least some of them. In Britain, Parliament retains the legal power to legislate contrary to Community law. In view of these facts, one cannot say that sovereignty (in the sense of ultimate legal power) has been passed to the Community. The Member States remain sovereign."<sup>11</sup> The advocates of the international law perspective do not look or accept that the Treaty has any constitutional characteristics, on the contrary, the effect of EU law within the Member States is explained by the Member States' own constitution. This view has been well explained in the Brunner case, in which the German Constitutional Court laid down that Community legislation overrides the attributes assigned to the Community and that in one way or another is in conflict with the German Constitution Thus it is not binding to German authorities or on German territory and that it is for the Constitutional Court to determine whether that is the case.<sup>12</sup>

According to the aforementioned outline of this theory, the European Union can be looked upon as an international organization with the prime aim to serve the Member States' interests. It is not a political

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<sup>10</sup> Zetterquist, Ola (2002) p. 241.

<sup>11</sup> Hartley, Trevor (1999) p. 179.

<sup>12</sup> Zetterquist, Ola (2002) p. 244.

society and does not have a constitutional character according to the constitutional perspective.

## **3 Iceland and the CFP**

### **3.1 The Common Fishery Policy**

The aims and scope of the Common Agricultural Policy are set out under Title II (Agriculture) of the Treaty.<sup>13</sup> As stated in Article 32 TEC the common market shall be extended to agriculture and trade in agricultural products. The provision defines agriculture as "the products of the soil, of stock farming and of fisheries and products of first-stage processing directly related to these products". Consequently, fisheries fall under the concept of agriculture.

Additionally, Article 32(4) provides that: "[t]he operation and development of the common market for agricultural products must be accompanied by the establishment of a Common Agricultural Policy among the Member States."

Accordingly, the establishment of a Common Fisheries Policy is also required.<sup>14</sup> This is further confirmed in Article 3(a) TEC where it is stated that the activities of the Community shall include a common policy in the sphere of agriculture and fisheries. Thus, it is clear that Title II of Part Two of the Treaty also applies to fisheries and, in practice, particularly to sea fishing.<sup>15</sup>

#### **3.1.1 General**

In 1970 the first common measures in the fishing sector were established.<sup>16</sup> The current Common Fisheries Policy (CFP) was, on the other hand,

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<sup>13</sup> Kapteyn, P.J.G/ Verloren van Themaat (1998) p. 1055.

<sup>14</sup> Song, Yann-huei (1998) *The Common Fisheries Policy of the European Union: Restructuring of the Fishing Fleet and the Financial Instrument for Fisheries Guidance*, *The International Journal of Marine and Coastal Law*, Vol. 13, No 4, Kluwer Law International, p. 547.

<sup>15</sup> Kapteyn, P.J.G/ Verloren van Themaat (1998) p. 1160.

<sup>16</sup> European Economic and Social Committee, *The Common Fisheries Policy, The road travelled and the challenges ahead*, European Communities, 2002, p. 5.

adopted in 1983, after difficult negotiations.<sup>17</sup> The CFP has been reviewed twice since its adoption, in 1992 and 2002. The latter review followed the extensive discussions and issuing of the so-called Green paper by the Commission.<sup>18</sup>

The objectives of the CFP are the same as assigned to the CAP.<sup>19</sup> In Article 33 TEC the following objectives are set out: (a) to increase productivity by promoting technical progress, by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour, (b) to ensure a fair standard of living for the fishing community, in particular increasing individual earnings, (c) to stabilise markets, (d) to assure the availability of supplies, (e) to ensure the supplies reach consumers at reasonable prices. In addition it is stated in Article 34(2) TEC that the common organisation shall be limited to the pursuit of the above-mentioned objectives and shall exclude any discrimination between producers or consumers within the Community.

The CFP shall, as stated in Regulation 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, cover conservation, management and exploitation of living aquatic resources, aquaculture, and the processing and marketing of fishery and aquaculture products where such activities are practiced on the territory of Member States or in Community waters or by Community fishing vessels or, without prejudice to the primary responsibility of the flag State, nationals of Member States.<sup>20</sup>

The CFP has through the year been a much debated instrument. The policy has not delivered sustainable exploitation of fisheries resources and as was stated in the Green Paper on the Future of the Common Fisheries Policy, will need to be changed if it is to do so. As far as

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<sup>17</sup> European Commission Directorate-General for Fisheries, *The New Common Fisheries Policy*, 1994, p. 8.

<sup>18</sup> Commission of the European Communities, *Green paper on the future of the Common Fisheries Policy*, Brussels, 20.302001, COM(2001) 135 final.

<sup>19</sup> Berg, Astrid (1999) p. 22.

<sup>20</sup> Article 1(1) of 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).

conservation is concerned, many stocks are at present outside safe biological limits and if current trends continue, many stocks will collapse. At the same time the available fishing capacity of the Community fleets far exceeds that required to harvest fish in a sustainable manner. As stated in the Green Paper this result of 30 years of CFP is to a good extent to blame on the habit of setting annual catch limits in excess of those proposed by the Commission on the basis of scientific advice, and for fleet management plans short of those required. Poor enforcement by the EU and the Member States also plays its part in the over-fishing.<sup>21</sup>

The CFP is based on five basic elements; resource management, structures, common organization of the market, relations with third countries and enforcement.<sup>22</sup>

### **3.1.2 Resource management**

#### **3.1.2.1. Management and conservation measures.**

According to Article 2 of Council Regulation (EC) No 2371/2002 the CFP shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions. For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimise the impact of fishing activities on marine eco-systems.<sup>23</sup> Fish stocks are a renewable natural resource; to ensure that the resource is sustainable it is necessary not

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<sup>21</sup> Commission of the European Communities, Green paper on the future of the Common Fisheries Policy, Brussels, 20.302001, COM(2001) 135 final, p. 4. See also Jensen, Carsten Lyng, A Critical Review of the Common Fisheries Policy, November 1999, <http://www.sam.sdu.dk/ime/PDF/Jensen6.pdf>.

<sup>22</sup> Director General for Research, Working Document, The Common Fisheries Policy Beyond 2002: Alternative options to the TACs and quotas system for the conservation and management of fisheries resources, Agriculture, Fisheries and Forestry Series, E-7/Finel, European Parliament, 2002, p. 24-26. See also [http://europa.eu.int/comm/fisheries/doc\\_et\\_publ/factsheets/facts/en/pcp2\\_2.htm](http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/facts/en/pcp2_2.htm)

<sup>23</sup> Commission of the European Communities, Green paper on the future of the Common Fisheries Policy, Brussels, 20.302001, COM(2001) 135 final, p. 5-6.



to over fish and ensure that there is always enough mature fish to renew stocks. Thus, juvenile fish must be left to mature and reproduce.

The Council of Ministers, decides each year on the amount of fish that EU fishermen will be allowed to catch.<sup>24</sup> This decision is based on the rules of the CFP and scientific studies. The biological, economic and social dimension of fishing is also taken into account.<sup>25</sup>

The quantities of fish allowed to be caught are determined by total allowable catches (TAC) which is divided up between the Member States with each country getting a share,<sup>26</sup> the national quota.<sup>27</sup> The division of the national quota is based on three elements: catch patterns in the past, the needs of regions particularly dependant on fishing, the loss of catches suffered by Member States resulting from the extension of fishing limits to 200 nautical miles.<sup>28</sup>

The national quotas are then to be distributed in line with the principle of relative stability. Relative stability seeks to ensure that the share of fishing among Member States is maintained at the levels prevailing when the CFP was set up or when new Member States joined the EU.<sup>29</sup>

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<sup>24</sup> TACs are set by the Council following a proposal from the Commission. The Commission relies on the advice given by the Scientific and Technical Committee for Fisheries. This Committee bases its conclusion on the advice of the International Council for the Exploration of the Sea (ICES). Although TACs are based on scientific advice, from time to time the TACs recommended by scientists are modified due to changing socio-economic circumstances.

<sup>25</sup> Commission of the European Communities, Green paper on the future of the Common Fisheries Policy, Brussels, 20.302001, COM(2001) 135 final, p. 6.

<sup>26</sup> This has caused the so-called "quota hopping". That happens when fishermen in one Member State transfer their fishing vessels to the fishing register of other Member state in order to fish out of the national quota of the latter state. See Case 246/89, *Commission v. UK* [1991] ECR I-4585 for general discussion on quota hopping and Case 221/89, *R v. Secretary of State for Transport, ex parte Factortame (Factortame II)*[1991] ECR I-3905 where the Court stated in paragraph 36 of the ruling that "it is not contrary to Community law for a Member State to stipulate as a condition for the registration of a fishing vessel in its national register that the vessel in question must be managed and its operations directed and controlled from within that Member State."

<sup>27</sup> Berg, Astrid (1999) p. 40-41.

<sup>28</sup> This is the principle of relative stability. Relative stability seeks to ensure that the share of fishing of stacks among Member States is maintained at the levels prevailing when the CFP was set up or when new Member States joined the EU.

<sup>29</sup> Joint cases C-63/90 and C-67/90 *Portuguese Republic and Kingdom of Spain v. Council of the European Communities* [1992] ECR I-5073 where it states in paragraph 28 that " that relative stability of fishing activities must be understood as meaning maintenance of a fixed percentage for each Member State and not, therefore, the guarantee of a fixed quantity of fish."

In addition to the decision on TAC and national quotas, comprehensive rules have been laid down imposing a number of duties on Member States in relation to their enforcement responsibilities, including the general duty on Member States to enforce rules on TACs quotas and other conservation measures.<sup>30</sup>

Various technical rules have been adopted i.e. protecting and limiting the capture of juvenile fish. These rules include rules on minimum mesh sizes, closing of certain areas to protect fish stocks, prohibition of some fishing gears. Other measures have also been adopted, such as rules governing the recording of landings and fishing in special logbooks, the release of young fish, limitation of the capture of other species and minimum fish sizes, below which it is illegal to land.

### **3.1.2.2. Principle of equal access**

The principle of equal access means that Community fishing vessels can fish anywhere where the Member States have quotas, irrespective of which Member States EEZ they are fishing in.<sup>31</sup> There are certain derogations from the principle of equal access.<sup>32</sup>

Firstly, the zone within 12 nautical miles of the coasts of Member States is reserved for local vessels.<sup>33</sup> Nevertheless, other Member States can enjoy some historic fishing rights within the outer six miles.

Secondly, there are certain rules covering fishing in the so-called Shetlands Box,<sup>34</sup> based on the sensitivity of the area.

Thirdly, in the past, special rules concerning access have applied for acceding countries. The principle did for example not apply to Portugal and Spain until 1993.<sup>35</sup>

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<sup>30</sup> Berg, Astrid (1999) p. 37.

<sup>31</sup> Berg, Astrid (1999) p. 27-28.

<sup>32</sup> Until 1993 the equal access principle did not apply to Portugal and Spain and therefore Portuguese and Spanish vessels access to other Member States waters was strictly limited and vice versa. This arrangement laid down in the Iberian Act of Accession ceased to be effective on 31 December 1992.

<sup>33</sup> Commission of the European Communities, Green paper on the future of the Common Fisheries Policy, Brussels, 20.302001, COM(2001) 135 final, p. 24.

<sup>34</sup> European Commission Directorate-General for Fisheries, The New Common Fisheries Policy, Office for Official Publications of the European Communities, 1994, p. 11-12.

### **3.1.3 Structures**

The second primarily element of the CFP relates to the excess capacity of the fishing industry, and to assist the industry in adapting to the declining fish stocks and economical reality.

In line with the rules on structural measures, funding through grants and/or loans is available for projects in all branches of fishing and aquaculture, and for market and development research. Funding is available for modernisation of the fishing fleets, as well as for eliminating excess fishing capacity.<sup>36</sup> It cannot be denied that the modernisation and technical development is contrary to the goal of the structural measures which is to reduce the capacity of the Community fleet.<sup>37</sup>

### **3.1.4 The common organisation of the market**

The Common Organisation of the Market in Fisheries Products (COM) is the third main element of the CFP. The first set of measures organising the market were launched in 1970.<sup>38</sup> The basic principles of the original COM are still visible in the COM as it is today.<sup>39</sup>

The objective of the measure was to create a common market inside the Community and to match production to demand for the benefit of both producers and consumers. These original objectives have been complemented by the creation of the Community single market.<sup>40</sup>

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<sup>35</sup> Berg, Astrid (1999) p. 37.

<sup>36</sup> [http://europa.eu.int/comm/fisheries/doc\\_et\\_publ/factsheets/facts/en/pcp2\\_2.htm](http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/facts/en/pcp2_2.htm)

<sup>37</sup> Commission of the European Communities, Green paper on the future of the Common Fisheries Policy, Brussels, 20.302001, COM(2001) 135 final, p. 10-11.

<sup>38</sup> Regulation (EEC) No 2142/70 of the Council of 20 October 1970 on the common organisation of the market in fishery products (OJ L 236, 27.10.1970, p. 5).

<sup>39</sup> Berg, Astrid (1999) p. 55.

<sup>40</sup> [http://europa.eu.int/comm/fisheries/doc\\_et\\_publ/factsheets/facts/en/pcp2\\_2.htm](http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/facts/en/pcp2_2.htm)

The COM is based on four basic instruments:<sup>41</sup> common marketing standards, management of marketing by Producers Organisations (POs), a common prices system, and a system of trade with third countries.

### **3.1.5 Relations with third countries**

At the bilateral and multilateral levels, fisheries agreements became necessary when distant-fishing vessels from the Community lost access to their traditional grounds following the extension of fisheries zones. Fishing rights for such vessels have been negotiated with many non-Community countries in return for various forms of compensation whose nature depends on the interests of the third country concerned. The Community is also involved in negotiations with international organisations and regional fisheries organisations to ensure rational fishing.<sup>42</sup>

According to the Treaty, the Member States conferred to the Community extensive powers to negotiate and undertake international agreements. Two of the most significant express treaty-making powers relate to, firstly, commercial agreements under Article 133 TEC and secondly, association agreements under Article 310 TEC.<sup>43</sup>

Under the original EEC Treaty the express external competences were limited to the common commercial policy in Article 133 EC, whose scope has been broadly interpreted.<sup>44</sup> In addition the Community can, under Article 310 EC, conclude with one or more States or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure.

Neither in Article 32-37 TEC, nor in other Treaty Article is it specially mentioned that the Community has powers to negotiate and undertake international agreements concerning fisheries. The powers

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<sup>41</sup> Berg, Astrid (1999) p. 56. See also detailed rules in Council Regulation (EC) No 104/2000 of 17th December 1999 on the common organisation of the markets in fishery and aquaculture products (OJ L 17, 21.1.2000, p. 22).

<sup>42</sup> [http://europa.eu.int/comm/fisheries/doc\\_et\\_publ/factsheets/facts/en/pcp2\\_2.htm](http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/facts/en/pcp2_2.htm)

<sup>43</sup> Emiliou, Nicholas (1996) p. 31.

<sup>44</sup> Opinion 1/94 on the WTO Agreement 1994 ECR I-5267.

conferred to the Community in the field of fisheries are, on the other hand, derived from Article 133 TEC covering the Common commercial policy.<sup>45</sup>

### **3.1.6 Enforcement**

The CFP enforcement system is two folded.<sup>46</sup> The authorities in the Member States, on one hand, are responsible for the proper enforcement of the common fisheries policy measures in the waters and territories under their jurisdiction. They must also ensure that vessels flying their flags comply with regulations in force wherever they operate.

There is also a Community Inspectorate.<sup>47</sup> Its role is to ensure that enforcement is carried out effectively, fairly and equally across the Community in all areas of the CFP. The EU inspection service also checks that Member States extend enforcement to the vessels flying their flags which fish in a third country and international waters.<sup>48</sup>

### **3.2.7 Mediterranean fisheries**

As stated above special rules apply for fishing within 12 nautical miles, and in certain secluded areas such as the Shetlands. The rules concerning fisheries in the Mediterranean are also a different in many ways from the general rules of the CFP.

The Mediterranean links countries of very different cultural, religious, ethnical and economic heritage and background. Fishing fleet of the four Member State adjacent to the Mediterranean is about 22% of the Community's fleet in tonnage, but around 34% in respect of engine power. The number of vessels is around 46% of the Community vessels with a catch of around 12% of the total catch of the Community. The value of the

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<sup>45</sup> Cases 3,4, and 6/76 Kramer 1976 ECR 1279.

<sup>46</sup> [http://europa.eu.int/comm/fisheries/doc\\_et\\_publ/factsheets/facts/en/pcp7.htm](http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/facts/en/pcp7.htm)

<sup>47</sup> The Community's Inspectorate created in 1983, now numbers 25 inspectors.

<sup>48</sup> [http://europa.eu.int/comm/fisheries/doc\\_et\\_publ/factsheets/facts/en/pcp2\\_2.htm](http://europa.eu.int/comm/fisheries/doc_et_publ/factsheets/facts/en/pcp2_2.htm)

catch is on average very high so the total value of the catches in the Mediterranean is much higher than 12%.<sup>49</sup>

In contrast to the structural and market policies, which have been fully implemented, conservation and management measures have only been partially applied in the Mediterranean. The main reason for this is the specific characteristics of the Mediterranean fisheries. These special characteristics are due to the following reasons.<sup>50</sup>

Firstly, the continental shelf is generally very narrow and most fisheries take place in waters under the jurisdiction of the coastal States with most States not claiming jurisdiction beyond the 12-mile territorial sea.

Secondly, vessels flying the flag of non-Mediterranean States conduct intensive fishing of tuna and of other valuable fish resources in international waters. The Mediterranean fisheries are small-scale and coastal fleets predominantly consist of small fishing boats in both national and international waters, and centuries-old traditions and institutions still play a significant role in Mediterranean regions.

Thirdly, fisheries play an important role in the economy of a number of areas. Indeed a major part of the Community's regions dependant on fisheries is situated in the Mediterranean.

## **3.2 The Icelandic Fishery Policy**

### **3.2.1 General**

The Icelandic fisheries system is based on economical considerations and the aim of sustainable exploitation of the resource.

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<sup>49</sup> Pálsson, Óttar, Stefánsson, Stefán Már (2003) p. 82 and Communication from the Commission to the Council and the European Parliament laying down a Community Action Plan for the conservation and sustainable exploitation of fisheries resources in the Mediterranean Sea under the Common Fisheries Policy, Brussels, 9.10.2002, COM (2002) 535 final, p. 4-6.

<sup>50</sup> See further Commission of the European Communities, Green paper on the future of the Common Fisheries Policy, Brussels, 20.302001, COM (2001) 135 final, p. 19.

Fisheries management in Iceland is based on the "quota system" which was introduced in 1984.<sup>51</sup> When the quota system was originally introduced all fishing vessels holding commercial fishing permits were allocated a fixed quota share of the species subject to decisions on total allowable catch (TAC). The quota share for each vessel was based on the catch performance for the species concerned during a specified number of years preceding the entry into force of the law.<sup>52</sup>

At the beginning of each fishing year<sup>53</sup> the TAC for individual species is divided between all the fishing vessels which hold a quota share for the species concerned. Both quota shares and catch quotas may be transferred between vessels.

Although the transfer of harvest rights between fishing vessels is not valid until it has received the confirmation of the Directorate of Fisheries, there are in fact few limitations on transfers of either quota shares or catch quotas between fishing vessels. There is an active market for harvest rights and their price is determined by current supply and demand.

The ideology behind the Icelandic quota system is simple. The aim of dividing up TACs among individual fishing vessels was to prevent the wasted effort involved in competing for limited catch. In order that the introduction of the system would cause a minimum of disruption, harvest rights were allocated to fishing vessels on the basis of their past catch performance. The decision to have a fixed quota and quota shares transferable from one vessel to another was intended to increase the cost-effectiveness of fishing and allow vessel operators flexibility.

In addition to the aforementioned rules on transferable quotas, various other technical rules are laid down to encourage optimal exploitation of the living marine resources. Some relevant examples of these

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<sup>51</sup> <http://www.fiskistofa.is/dirfish> Pálsson, Óttar, Stefánsson, Stefán Már (2003) p. 82 and Communication from the Commission to the Council and the European Parliament laying down a Community Action Plan for the conservation and sustainable exploitation of fisheries resources in the Mediterranean Sea under the Common Fisheries Policy, Brussels, 9.10.2002, COM (2002) 535 final, p. 4-6.

<sup>51</sup> See further Commission /fishman/itq.html

<sup>52</sup> At the introduction of the "quota system" the main rule was that quota share for each vessel was based on the catch performance of the vessel in the 3 previous years.

rules are temporary and permanent closures of fishing areas, rules on outfitting of gear like mesh size, regional limitations on various types of equipment, and many other significant measures enabling optimal exploitation of fishing stocks.<sup>54</sup>

In attempt to ensure the sustainability of the stocks, the so-called precautionary approach is applied in Icelandic fisheries management. That means showing caution in cases where scientific information is insufficient. Nevertheless it is not exercised in the strictest sense, prohibiting fishery until enough scientific evidence has been gathered to prove beyond any doubt that it will not have detrimental effects on the stock's long-term conservation.

### **3.2.2 Decision on the Total Allowable Catch (TAC)**

Decisions on TACs for individual species are taken by the Minister of Fisheries and based on the advice of the Icelandic Marine Research Institute. Assessments by the Marine Research Institute on the size of individual stocks are based on comprehensive data obtained from a variety of sources.

At the beginning of the 1990s it proved necessary to substantially reduce the TAC for cod in Icelandic waters, since the stock was declining and scientists observed that stock recruitment had been very poor in the preceding years.<sup>55</sup> This decision was received with widespread understanding, both in the fisheries sector and the nation at large. Vessel operators and fishermen reacted responsibly to the perceived necessity of reducing the cod catch since they were convinced that they would reap the rewards of the stock's recovery. This was ensured through the Icelandic ITQ system. The system provides vessel owners with a permanent share of the TAC and it is therefore in their own best interests to build the stocks up to a

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<sup>53</sup> The fishing year is set from September 1 each year to August 31 in the following year

<sup>54</sup> Close to the Sea, Ministry of Fisheries Iceland, p. 6.

<sup>55</sup> <http://www.colby.edu/personal/t/thtieten/fish-ice.html>



level that will give them a larger share on a long-term basis. One could therefore say that it was, and is, the management system as such that makes vessel owners overcome short-term thinking.<sup>56</sup>

At present Icelanders are beginning to enjoy the benefits of having substantially reduced cod catches in the early years of the last decade, although there are fluctuations. Currently, the TAC for cod has been increased from a low of 155 thousand tonnes in 1995 to 220 thousand tonnes in 2000, and for the fishing year 2003-2004 it is expected to raise by another 30000 tonnes.

### **3.2.3 Individual transferable quotas**

Fisheries management with individual transferable quotas creates flexibility for vessel operators. At the same time, transfers reduce the need for centralised decisions by the authorities. This is because individual vessel operators can increase or reduce their harvest rights and change their composition in accordance with what they feel is cost-effective. This is possible without infringing the rights of others, since full payment is made. Payment for harvest rights is either made in monetary form or by exchanging rights. Trading in catch quotas takes place through a public auction market, the Quota Exchange. Anyone wishing to buy or sell catch quotas must register a bid or offer with the Exchange and trading in each individual species takes place at the same trading price for a single day.

### **3.2.4 Ownership of Icelandic enterprises in fisheries**

The cost-effectiveness of fishing in Iceland has increased substantially due to the quota system. Many enterprises have merged to allow increased efficiency in fishing and processing and also to spread operating risks.

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<sup>56</sup> The experience of the Icelandic management system, Speech delivered by Fisheries Minister Árni M. Mathiesen in Bruxelles Jan. 25th. 2001.

Both management and ownership of enterprises has changed drastically in recent years and presently most of the country's larger fishery enterprises are listed on the stock market. Previously, fishery enterprises were often family businesses, whereas now numerous individuals, pension funds and companies have holdings in these enterprises. It has been estimated that those enterprises now listed on the stock market control some 50% of the harvest rights and it is clear that the number of companies listed on the stock market will increase in coming years.<sup>57</sup>

### **3.2.5 Limitations on foreign investments and fishing**

According to Icelandic laws foreigners are not allowed to invest directly in fisheries and processing of fish at the first level. The main aim of this rule is to keep foreigners out of the fisheries, but nevertheless the rule also covers investment in processing because it is a sensitive economical activity in fierce competition with foreign companies.

Direct investment in fisheries and processing is allowed up to a limit if certain requirements are fulfilled. Foreigners are also prohibited from fishing in the Icelandic EEZ, a rule that has existed since 1976 when Iceland extended its EEZ to 200 miles.<sup>58</sup> Consequently, possibilities for foreigners to invest in the Icelandic fisheries industry are very limited. Direct investment is forbidden and indirect investment is only allowed if certain criteria are met.

When the EEA Agreement was negotiated Iceland was granted derogations from the right of establishment and free movement of capital as regards investments in the fisheries industry.

The derogation from the right of establishment is spelt out in point 9 in Annex VIII of the EEA Agreement.

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<http://government.is/interpro/sjavarutv/sjavarutv.nsf/pages/raedaibrussel>

<sup>57</sup><http://www.subpesca.cl/eventos/expopesca2002/documentos/radherra%20Chile%20ministers.pdf>

<sup>58</sup> Close to the Sea, Ministry of Fisheries Iceland, p. 3-4.

"Notwithstanding Articles 31 to 35 of the Agreement and the provisions of this Annex, Iceland may continue to apply restrictions existing on the date of signature of the Agreement on establishment of non-nationals and nationals who do not have legal domicile in Iceland in the sectors of fisheries and fish processing."

The derogation granted from free movement of capital are outlined in Annex XII to the Agreement. The most important text of the derogation states the following:

"Notwithstanding Article 40 of the Agreement and the provisions of this Annex, Iceland may continue to apply restrictions existing on the date of signature of the Agreement on foreign ownership and/or ownership by non-residents in the sectors of fisheries and fish processing.

These restrictions shall not prevent investments by non-nationals or nationals who do not have legal domicile in Iceland in companies which are only indirectly engaged in fisheries or fish processing. However, national authorities shall have the right to oblige companies which have, wholly or partly, been acquired by non-nationals or nationals who do not have legal domicile in Iceland to divest themselves of any investments in fish-processing activities or fishing vessels."

### **3.2.6 State aid and the fishing industry**

State aid granted to the fishing industry can cause imbalance between the efficiency of the fishing fleet and the fishing stocks, and can distort competition.<sup>59</sup>

The CFP sets out a wide system of state aid providing funds for the fishing industry in the EU. The Icelandic fishery industry, on the other hand, does not enjoy any direct state aid. Thus, the Icelandic Government has, in the international arena been an active advocate for the prohibition of state aid in the fishing sector.

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<sup>59</sup> Commission of the European Communities, Green paper on the future of the Common Fisheries Policy, Brussels, 20.302001, COM(2001) 135 final, p. 11.

## 4 Possible derogations from the CFP

### 4.1 General

#### 4.1.1 Acquis Communautaire

The concept of *acquis communautaire* made its first appearance at the time of the accession of the UK, Ireland and Denmark to the EEC, in 1972, and has ever since been referred to, whenever the conditions to be met by candidate states for accession are mentioned. It is a stated condition that acceding states should accept, in particular, the whole of the *acquis communautaire*.<sup>60</sup>

Prior to the Maastricht Treaty<sup>61</sup> the concept had been used in at least four different contexts: the enlargement of the Community,<sup>62</sup> the development of the European construct, association with third countries and the Agreement on the European Economic Area. It is important to note that in each of these instances, the concept has a different meaning and carries a different weight.<sup>63</sup>

The content of the term in relation to the enlargement of the Community has been referred to as the "accession" *acquis*. When the term is used in that context it refers to the whole body of rules, political principles and judicial decisions, which new Member States must adhere to, in their entirety and from the beginning, when they become members of the European Union.<sup>64</sup> Derogations are allowed only insofar as they are

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<sup>60</sup> Delcourt, Christine, The *acquis communautaire*: Has the concept had its day? *Common Market Law Review*, Vol. 38, 2001, p. 830.

<sup>61</sup> The [Treaty on European Union](#), which was signed in Maastricht on 7 February 1992.

<sup>62</sup> Advocate General Cosmos stated in Opinion delivered 9 July 1998, the following in paragraph 9: "... pre-existing Community law is an '*acquis communautaire*' for the new Member States and that, consequently, the entire body of rules of Community law has full effect in the new Member States of the Union and binds those States under the conditions laid down in the Treaties and by the Act of Accession."

<sup>63</sup> Gialdino, Carlo Curti, *Common Market Law Review*, Vol. 32, 1995, p. 1089-1090.

<sup>64</sup> Gialdino, Carlo Curti, *Common Market Law Review*, Vol. 32, 1995, p. 1090. See also Resolution of the European Parliament adopted on 15 July 1993, where at para. 5 it "stresses once again the fact that all the candidate States must accept the *acquis*

expressly laid down by the Acts of Accession, and even here case law of the Court is found by some to support the view of a "*certainne prééminence*" of the founding Treaties in respect of the Acts of Accession.<sup>65</sup> The important case law concerning derogations in the Acts of Accession will be outlined below.

Acceding states have different needs and sometimes they face serious difficulties in taking over the Community legislation in a given field. This can be caused by many reasons, such as political and economical factors. To accommodate these different needs the Community has in the past officially granted special treatment to the acceding states.

One way of accommodating different needs is by differentiating Member States' rights and obligations. That can basically be done with temporary derogations and permanent exemptions. Below the two types of derogations will be outlined.

#### **4.1.1.1 Transitional periods**

Transition periods, allowing for temporary derogations from specific EU laws or policies, have so far been the main Community method of accommodating diversity. Two types of temporary derogations are possible: those allowing new Member States to adjust gradually to the adoption and implementation of the *acquis* and those granting extra time to incumbent Member States<sup>66</sup> to adjust to the consequences of enlargement.<sup>67</sup>

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communautaire, including the Treaty on European Union, as well as the goal of further European integration, and insists that there be no further opt-outs similar to those obtained by the UK and Denmark. (OJ 1993, C 255/207).

<sup>65</sup> Gialdino, Carlo Curti, *Common Market Law Review*, Vol. 32, 1995, p. 1091.

<sup>66</sup> See for example the arrangement laid down in the Iberian Act of Accession which delayed the application of the equal access principle regarding Portugal and Spain and therefore Portuguese and Spanish vessels access to other Member States waters was strictly limited and vice versa. This arrangement ceased to be effective on 31 December 1992.

<sup>67</sup> See Philippart, Eric and Sie Dhian Ho, Monika, *Pedalling Against the Wind*, Strategies to strengthen the EU's capacity to act in the context of enlargement, WRR Scientific Council for Government Policy, Working Documents, p. 94, where they state that three forms of differentiation are relevant in the context of enlargement: transitional periods, a core *acquis* test encompassing a systematic identification of transitional periods and permanent exemptions. In this paper I do not discuss the core *acquis* test specifically, but include it in the discussion on transitional periods.

Transitional periods can be effective in shortening the timetable for accession. This is because the accession can take place without all the candidates have implemented the entire *acquis* that can be beneficial if there are some practical problems in implementing the *acquis*. If, on the other hand, the candidate countries are not willing to implement parts of the *acquis* or the existing Member States object, then transitional periods are not as feasible from a political standpoint as they are only likely to delay the problems.

In a Strategy Paper in 2000 and again in 2002 the Commission emphasised that though the accession negotiation is based on the principle that the acceding countries are to implement the whole "*acquis communautaire*", nevertheless it stated that a number of transitional measures had been granted.<sup>68</sup> The Commission distinguished between three types of transitional measures.<sup>69</sup>

The first category was the acceptable measures. These measures are of technical nature that are "limited in time and scope" and do not have "a significant impact on competition or the functioning of the internal market".

Secondly, are measures that can be negotiated which "include requests with a more significant impact, in terms of competition or the internal market, or in time and scope".

Finally, requests for transitional measures posing fundamental problems were considered unacceptable.

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<sup>68</sup> Enlargement Strategy Paper, Report on progress towards accession by each of the candidate countries, Commission of the European Communities, Brussels, 8.11.2000, COM (2000) 700 final, p. 27. This view was repeated in Towards the Enlarged Union, Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries, Commission of the European Communities, Brussels, 9.10.2002, COM (2002) 700 final, p. 12.

<sup>69</sup> Enlargement Strategy Paper, Report on progress towards accession by each of the candidate countries, Commission of the European Communities, Brussels, 8.11.2000, COM (2000) 700 final, p. 27. See also Philippart, Eric and Sie Dhian Ho, Monika, Pedalling Against the Wind, Strategies to strengthen the EU's capacity to act in the context of enlargement, WRR Scientific Council for Government Policy, Working Documents, W 115, p. 94.

#### 4.1.1.1.1 Case law concerning temporary derogations

The Court has, in many instances, ruled in cases concerning disputes involving transitional measures provided for derogations to acceding countries in the Acts of Accession.

In its judgement in the *Potato case*<sup>70</sup> dated in the late seventies, the Court ruled in a dispute concerning the interpretation of UK's Act of Accession. The Court stated that "the provisions of the Act of Accession must be interpreted having regard to the foundation and the system of the Community, as established by the Treaty."

In this case dispute arose regarding the refusal of the UK to abolish restrictions on the importation of potatoes. The Commission had notified the UK that under Article 9(2) of the Act of Accession that the importation restrictions be brought to an end. Article 9(2) set the general limit on transitional measures stating that the measures should all be terminated at the end of 1977.

The UK, on the other hand, referred to Article 60(2) stating that under that provision UK was entitled to maintain the restrictions until the implementation of a common organisation of the market for potatoes. Since potatoes "are not yet covered by any common organization of the market, the UK can maintain its national organization for that sector". Therefore the UK maintained that it was not bound by Article 42 of the Act of Accession where it was stated that "quantitative restrictions on imports and exports shall, from the date of accession, be abolished between the Community as originally constitute and the new Member States and between the new Member States themselves."

The Court ruled that "although Article 60(2) of the Act of Accession unquestionably constitutes a derogation from the rule laid down in Article 42, it cannot be regarded as being in addition a "special provision" within the meaning of Article 9(2) of that Act. Since Article 9(2) lays down, as a principle of the Act of Accession that "the application of the transitional measures shall terminate at the end of 1977", the reservation which it makes

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<sup>70</sup> Case 231/78, *Commission v. UK*, [1979] ECR 1447.



cannot be given a broad interpretation. On the contrary, the reservation is to be interpreted as relating “only to special provisions which are clearly delimited and determined in time and not to a provision, such as Article 60(2), which refers to an uncertain future event.”<sup>71</sup>

Then the Court concluded “the Act of Accession cannot be interpreted as having established for an indefinite period in favour of the new Member States a legal position different from that laid down by the Treaty for the original Member States”.<sup>72</sup> The Court then argued that if Article 60(2) were regarded as a special provision within the meaning of Article 9(2) of the Act of Accession providing for an indefinite extension of the transitional period in the sector, it would in “effect establish a persisting inequality between the original Member States and the new Member States” and although it was “justified for the original Member States provisionally to accept such inequalities, it would be contrary to the principle of the equality of the Member States before Community law to accept that such inequalities could continue indefinitely.”<sup>73</sup>

According to this judgement derogations in the an Act of Accession are to be interpreted in a narrow way and in a line with the Treaty in an attempt to avoid all inequalities between the incumbent Member States and the acceding country. Consequently, the Court in the fore-mentioned case bluntly rejected the UK reasoning in an attempt to protect the principle of equality of the Member States before the Community law.

The Court confirmed this position in the *Greek Banana case*<sup>74</sup> where a dispute arose regarding a system of import licenses for bananas. In its ruling the Court came to the conclusion that “Article 65(2) of the Act of Accession of the Hellenic Republic, which authorizes, during a transitional period and to the extent strictly necessary to ensure the maintenance of a national market organization, derogations from the principle of the free movement of agricultural products must, like all the derogations provided for in the Act of Accession, be interpreted in such a way as to facilitate the

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<sup>71</sup> Case 231/78, para. 16.

<sup>72</sup> Case 231/78, para. 17.

<sup>73</sup> Case 231/78, para. 17.

achievement of the objectives of the Treaty and the application of all its rules."

In the *Kirk case*<sup>75</sup> the Court reviewed measures adopted by the UK prohibiting vessels registered in Denmark from fishing within its 12-mile coastal zone. According to Article 103 of the 1972 Act of Accession, a derogation was granted from the principle of equal access so that the Member States could restrict fishing by nationals of other Member States in waters under their sovereignty or jurisdiction, situated within a limit fixed at 6 nautical miles. This derogation was to be examined by the Council before 31 December 1982. The Council did not adopt a new provision before that deadline.

In the light of the lack of action by the Council the UK adopted its own rules extending the limit out to 12 nautical miles. They claimed that after the end of the transitional period and because the Council did not act as provided for in the Act of Accession, a "legal vacuum which the Member States were entitled to fill as "trustees" of the common interest by measures approved by the Commission"<sup>76</sup> was created.

The Court did not agree on this rhetoric and stated that it followed from the provisions of the Act of Accession that "the measures derogating from a fundamental principle of Community law, namely non-discrimination, were limited to the transitional period and that the power to bring into force any provisions thereafter was entrusted to the Community authorities, in particular to the Council".<sup>77</sup> The Court then maintained that it "cannot be conceded from the fact that the Council failed to adopt such provisions within the period provided for in Article 103 that the Member States had the power to act in the place of the Council, in particular by extending the derogation beyond the prescribed time."<sup>78</sup>

In the *Kirk case* the UK referred to the Case *Commission v. UK* where the Court held that in the absence of Community rules, Member

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<sup>74</sup> Joint cases 194/85 and 241/85, *Commission v. Hellenic Republic* [1988] ECR 1037.

<sup>75</sup> Case 63/83 *Regina v. Kent Kirk*, [1984] ECR 2689.

<sup>76</sup> Case 63/83, para. 17.

<sup>77</sup> Case 63/83, para. 14.

<sup>78</sup> Case 63/83, para. 15.

States have the power to take temporary measures for the conservation of fishery resources in order to avoid irreparable damage contrary to the objectives of the common conservation policy. The Court stated, on the other hand, that in the *Kirk case* it was clear that "the disputed measure was not intended to achieve such an objective. National rules which prohibit access to national waters and which are not intended to achieve an objective of conservation can not be covered by the power of Member States, recognized in the aforementioned judgement [...], to take temporary conservation measure."<sup>79</sup>

From reading these two cases one can imagine that if the UK rules extending the fixed limit from 6 nautical miles to 12 had been based on objective reasoning and the aim of conservation of fishery resources in order to avoid irreparable damage contrary to the objectives of the common conservation policy, then the Court would have concluded this case in a different manner. Nevertheless, it is clear from the Court's reasoning that the powers of the Member States to act within provisions providing for derogations in Acts of Accession are very limited, even in instances where the Council fails to act.

#### **4.1.1.2 Permanent exemptions**

In addition to derogations limited in time there is the notion of permanent derogations. This means that the Member States in question are exempted from some parts of the *acquis*, and are therefore exempted from certain rights<sup>80</sup> or obligations.

Permanent derogations can be of help in solving problems for which temporary derogations are of little help.<sup>81</sup> This applies especially when there is an unwillingness to implement the *acquis communautaire*, either by the acceding country or by some of the current Member States.

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<sup>79</sup> Case 63/83, para. 19.

<sup>80</sup> The Decision of the Berlin European Council (March 1999) was that candidate countries will not be eligible for direct income support after accession.

<sup>81</sup> Philippart, Eric and Sie Dhian Ho, Monika, Pedalling Against the Wind, Strategies to strengthen the EU's capacity to act in the context of enlargement, WRR Scientific Council for Government Policy, Working Documents, W 115, p. 94.

Permanent derogations can also solve problems relating to major, constant objective differences between the incumbent Member States and a candidate.<sup>82</sup>

Permanent derogations are very feasible from a financial perspective. Long-term inability of candidate countries can be dealt with by giving permanent derogation, instead of granting transitional periods for an uncertain time, which can be a very doubtful exercise.<sup>83</sup> On the other hand, one has to keep in mind that permanent derogations contradict the enlargement orthodoxy, that is that the candidate countries are to take over all of the *acquis*.

The principle of taking over the whole *acquis* has undoubtedly suffered a loss of credibility from the permanent opt-outs granted to incumbent Member States in the context of integration initiatives.<sup>84</sup> Candidates can refer to fairness when they refer to these opt-out clauses. It would be possible for the candidate country to refer to the principle of non-discrimination by regarding the exclusion of new Member States from parts of the EU *acquis* by unilateral announcement by one or more of the pre-existing Member States..

Permanent derogations can create many disadvantages for the EU legal system, as some of the harmony in the system is lost, as the same *acquis* does not apply for all of the Member States. Thus a part of the goal of the EU, legal harmony is lost.

The Swedish snus derogation can be named as one example of the various permanent derogations granted to acceding countries in their Accession Treaty with the EU and the incumbent Member States. On the 1st January 1995 Sweden became a member of the EU along with Austria and Finland. The Accession Treaty between the EU, the Member States and

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<sup>82</sup> Philippart, Eric and Sie Dhian Ho, Monika, Pedalling Against the Wind, Strategies to strengthen the EU's capacity to act in the context of enlargement, WRR Scientific Council for Government Policy, Working Documents, W 115, p. 102 where they refer to discussions that CEECS should be exempted from elements of the environmental *acquis* if the situation in the CEECS clearly differs from the EU, e.g. lower population density in some CEECS.

<sup>83</sup> See Chapter 4.1.1.1.

the acceding countries was based on the principle that the *acquis communautaire* should be fully applicable to Sweden from the date of accession.<sup>85</sup> But Sweden before the drafting of the Accession Treaty had already solved most of its problems concerning the internal market within the framework of European Economic Area.

In the Accession Treaty Sweden did not obtain any permanent derogations of real importance. Sweden was, for example, not exempted from the EMU, in spite of the fact that the UK and Denmark had already been granted exemptions from the obligation to participate in the EMU. Sweden got, on the other hand, permanent exemptions for the marketing and sale of wet snuff (snus) in Sweden and the sale and use of especially long and heavy trucks, primarily for timber transport.<sup>86</sup>

The snus derogation was originally introduced in 1994 into the EEA Agreement as a subject of a decision in the EEA Joint Committee incorporating Council Directive 92/41/EEC.<sup>87</sup> The Joint Committee Decision<sup>88</sup> stipulated that the Community prohibition on oral tobacco should not apply to marketing in Iceland, Norway and Sweden.

In the drafting of the Treaty of Accession the Joint Committee Decision was transposed into Chapter X of Annex XV of the Treaty of Accession, where it is stated that "[t]he prohibition in Article 8a of Directive 89/622/EEC, as amended by Directive 92/41/EEC, concerning the placing on the market of the product defined in Article 2 (4) of Directive 89/622/EEC, as amended by Directive 92/41/EEC, shall not apply in

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<sup>84</sup> See, for example, the opt-outs of the UK and Denmark from the single currency stage of EMU.

<sup>85</sup> Article 112(2) of the Accession of Austria, Finland and Sweden (1994) states that "[w]ithout prejudice to the outcome of that review, at the end of the transitional period referred to in paragraph 1 the EC *acquis* will be applicable to the new Member States under the same conditions as in the present Member States."

<sup>86</sup> Bernitz, Ulf, Sweden and the European Union: On Sweden's Implementation and Application of European Law, *Common Market Law Review*, Vol 38, [2001], p. 909.

<sup>87</sup> Council Directive 92/41/EEC of 15 May 1992 amending Directive 89/622/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning the labelling of tobacco products (OJ L 158, 11.6.1992, p. 30).

<sup>88</sup> Decision of the Joint Committee No. 7/94 of 21 March 1997 amending protocol 47 and certain Annexes to the EEA Agreement.

Sweden and Norway, with the exception of the prohibition to place this product on the market in a form resembling a food product."<sup>89</sup>

Those who advocated the snus derogation referred to the three following arguments.<sup>90</sup> Firstly, to the legality principle stating that the snus prohibition was based on health concerns that were not part of the competences of the EU. The provision setting out EU competences in the field of health protection, at the time, was Article 129. Secondly, the subsidiarity principle stating that the matter was not an exclusive EU competence<sup>91</sup> and it was not established that it could not be handled on a national level just as efficiently as on the Community level. In that context the Swedes pointed out that of the 6000 tons of snus used in Europe each year 5300 were used in Sweden.<sup>92</sup> Thirdly, they stated that the proportionality principle was disregarded because less restricted measures were possible, such as making it subject to the relevant restrictions on marketing and sale used for general tobacco products.

Regardless of the fore-mentioned arguments it is clear that the solution satisfied overriding political concerns both in Sweden and the Community. Those who use snus in Sweden would no longer oppose Swedish membership in the Union as they could continue their habit.

## **4.2 The positioning of permanent derogations in different Community legislation**

The basic rules concerning the CFP are based on Treaty provisions. Therefore, the derogation must be given in legislation the same effect as the Treaty. This can be done by changing the Treaty or by incorporating the derogations into the Accession Treaty in question.

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<sup>89</sup> In the Treaty of Accession of Austria, Finland and Sweden (1994).

<sup>90</sup> See Lidgard, Hans Henrik, Swedish snus confronts basic EU principles, p. 132-133.

<sup>91</sup> In the Accession negotiation Norway asked for some derogations from the CFP and referred to the subsidiarity principle, but the EC stated that the principle was not relevant because the EU has exclusive competences in the fishery sector. Refer to further in chapter 4.3.1.

<sup>92</sup> Lidgard, Hans Henrik, Swedish snus confronts basic EU principles, p. 127.

In Article 48 (Title VIII) of the TEU the rules governing amendments of the Treaty are set out. Article 88(1) states that "[t]he government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded". If the council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favour of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The amendments made will then enter into force after being ratified by all the Member States.

Article 49 TEU deals with the accession of new Member States to the EU. These provisions replace the relevant repealed provisions of the Treaties establishing the EC. . These provisions demonstrate particularly clearly the unity of the Union structure, as applicants cannot accede to the Communities alone, nor may they accede to just one of CFSP and JHA.<sup>93</sup>

When new countries join the EU they do so by negotiating a special agreement, an Accession Treaty. Accession Treaties are considered to be a part of the Treaty and have the same effect. Nevertheless, one must keep in mind that the Accession Treaties must be interpreted in the light of the Treaty and the fundamental principles of Community law. Therefore, derogations which are based on provisions are not clearly delimited and determined in time have been overruled by the Court.<sup>94</sup> In addition the Court, upholding the constitutional perspective has stated as although it was "justified for the original Member States provisionally to accept such inequalities, it would be contrary to the principle of the equality of the Member States before Community law to accept that such inequalities could continue indefinitely."<sup>95</sup>

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<sup>93</sup>Kapteyn, P.J.G/ Verloren van Themaat (1998) p. 52-53.

<sup>94</sup> Case 231/78, Commission v. UK, [1979] ECR 1447.

<sup>95</sup> Case 231/78, para. 17.

Derogations in Act of Accession can be spelled out directly in its provisions, explicitly stating the derogation, or as an adaptation to a secondary legislation incorporated into the Accession Treaty. Additionally, the contracting parties have issued Joint Declarations, though having no legal binding force reflecting the political will of the contracting parties at the time of accession and therefore can possibly have a meaning in an international law context.<sup>96</sup> Unilateral Declarations issued by a candidate country or one or more of the incumbent Member States will have an even lesser value.

Consequently, it is possible, according to Community law, to lay down derogations for individual candidate countries in its Act of Accession. It must be emphasised that the Community has always in past membership negotiations put forward the claim that the candidate country takes over the whole *acquis communautaire*, binding and unbinding acts and the case law. The reason is the fundamental principle of non-discrimination and that all of the Member States are to enjoy the same rights and shoulder the same obligations according to Community law.<sup>97</sup>

### **4.3 Permanent derogations from the CFP: Common experience from earlier negotiations**

In its accession negotiation, Norway and Malta (in the beginning of the nineties and in 2002 respectively) , tried to negotiate for certain goals in the fishery sector. Both countries had specific goals and made certain claims at the beginning of the negotiations. In both instances the EU approached their claims but did not derogate from the basic principle that acceding countries are to accept the *acquis communautaire* without any permanent derogations.

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<sup>96</sup> The incumbent Member States and Norway issued Joint Declaration concerning specific issues regarding the fishery sector in the Norwegian Accession Treaty.

<sup>97</sup> Pálsson, Óttar, Stefánsson, Stefán Már (2003) p. 226.



The negotiation goals and the outcome of the negotiation procedures are outlined below.

#### **4.3.1 Norway's accession negotiations**

In 1992 there was a referendum in Norway, following membership negotiations on whether the country should become a member of the EU. Norwegian voters rejected the Agreement that had been negotiated and chose to stand outside the EU.

This meant that the Norwegian voters rejected the Agreement and Norway did not become a member of the EU, that time. Nevertheless, the Agreement negotiated can give guidance on how an Accession Treaty with Iceland could be concluded. Iceland will undoubtedly try to negotiate for derogation in the field of CFP as the Norwegians did. One has to keep in mind that Iceland relies much more heavily upon fishing and fish processing than Norway, a fact that would certainly play an important role in future negotiation and drafting of the conditions for Icelandic accession to the EU.

In its accession negotiation with Norway four objectives regarding fisheries and fishery management were emphasised.<sup>98</sup>

Firstly, Norway wanted to keep control over fisheries north of 62° N. According to this demand Norway wanted to take all decisions concerning TACs and quotas and retain the competences to negotiate on fishing rights in the area with Russia. They also wanted Norwegian technical rules to be applied in the area, even towards EU ships; rules concerning opening and closures of fishing boxes and that discard of fish would be prohibited. Finally, Norwegians wanted to be responsible for, and operate the surveillance and surveillance measures, which would take place out on sea and in landing harbours.

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<sup>98</sup> See discussion on the Norwegian negotiation objectives in Pálsson, Óttar, Stefánsson, Stefán Már (2003) p. 188-189 where they refer to Sislet, p. 104 and 38 and Norsk posisjonspapir (NPP) 6 and 12.10.1993.

The Norwegians claimed that their demands were in line with the Community principle of subsidiarity, due to the vital role that fisheries play in the economy and existence of the communities in northern part of Norway. The EU rejected that argument stating that the principle of subsidiarity was only applicable when the competences were shared between the Community and the Member States.<sup>99</sup> The EU maintained that in the fisheries sector the competences are strictly with the EU and not shared with the Member State, therefore, the principle of subsidiarity is not applicable. In addition, they pointed out that the principle of subsidiarity can only be applied where only one Member State has any interest, and that was not the case in the waters north of 62°N.<sup>100</sup>

The final text in the Act of Accession regarding the waters north of 62°N was outlined in Article 49, where it is stated that "until 30th June 1998 Norway shall be authorised to set the levels of the rates of exploitation in the form of catch limitations for resources located in the waters falling under its sovereignty or within its jurisdiction north of 62°N, with the exception of mackerel". Then it stated that "[t]he full integration of the management of those resources into the Common Fisheries Policy after that date shall be based on the existing management regime as reflected in the Joint Declaration on the management of fisheries resources in waters north of 62°N."

Norway was granted some transitional periods for up to three years concerning the levels of the rates of exploitation in the form of catch limitations, technical measures applicable and national control measures in its waters.

The full integration of the management of the resources and control measures into the CFP were to be taken in accordance with the procedure provided for in Article 43 referring to the Joint Declaration on the

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<sup>99</sup> In Article 5 TEC the principle of subsidiarity is outlined as follows: "[i]n areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community."

<sup>100</sup> Pálsson, Óttar, Stefánsson, Stefán Már (2003) p. 189-190.

management of fisheries resources in waters north of 62°N. The provisions of the Joint declaration will be outlined below.

Regarding external resources, it was decided that as from accession the Commission would manage fisheries agreements concluded by Norway with third countries. However, "until 30 June 1998, the agreement with Russia of 15 October 1976 on mutual fishing relations shall be managed by the Kingdom of Norway in close association with the Commission."<sup>101</sup>

Norway and the incumbent Member States issued a Joint Declaration attached to the Act of Accession on the management of fisheries resources in waters north of 62° N.<sup>102</sup> In the declaration the Contracting Parties noted the vulnerable and sensitive eco-system of the Barents Sea and northern waters, and recognized the vital need to maintain sound management, based on sustainable conservation and optimal utilisation of all stocks in these waters.

In addition, they agree on the integration of these waters into the CFP, and that such integration should be based on the existing management regime in order to continue and improve current technical, control and enforcement standards.

To ensure efficient and rapid management decisions within the framework of the CFP, the Contracting Parties agreed to establish regional marine research and scientific institutions close to the relevant waters that should continue to make important contributions to the decision-making process. Regarding external competences the Contracting Parties "agree[d] that the negotiations with Russia conducted within the framework of the CFP should be inspired by the principles and practices developed in the Joint Norwegian-Russian Fisheries Commission."

Secondly, Norway emphasised that the fishing resources in the Norwegian EEZ would be maintained. This meant that the distribution of quotas would be in accordance with the principle of relative stability, the

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<sup>101</sup> Article 52 of the Accession Treaty.

<sup>102</sup> See 10. Joint Declaration on management of fisheries resources in waters north of 62° N

national quota would only be used by that particular nation, and that the 12 nautical mile limitation would be unchanged.

The EU did not agree to this request for they considered the principle of relative stability applied only to those stocks where TAC had been decided. The EU also considered that to accept the ownership of Norway to the 200 Exclusive Economic Zone (EEZ) was not compatible with Community law. In addition a few of the incumbent Member States insisted upon fishing rights in the Norwegian EEZ and they were granted some rights.

In a joint declaration concerning the 12-mile limit the Contracting Parties "recognize the major importance to Norway of the maintenance of viable fishing communities in coastal regions. When reviewing the present arrangements on access to waters within the 12-mile limit in order to decide on future arrangements, the institutions of the Union will pay special attention to the interests of such communities in the Member States." <sup>103</sup>

Thirdly, Norway would get unlimited access to the internal market and get full market access for fishery products.

Many of the incumbent Member States considered it not wise to grant full market access to Norwegian products right away for it could disrupt the balance on the market for fishery products in the EU. The Member States referred to, as a precedent the accession of Spain and Portugal and the transitional period established on a request from the incumbent Member States at the time, before Spain and Portugal fully participated in the CFP.

In Article 53 of the Act of Accession the conditions for trade in fisheries products was outlined. According to the Article certain fishery products<sup>104</sup> coming from Norway and for consignment to the other Member States, were for a period of four years from the date of accession, subject to a trade monitoring system. In Article 53(2) it stated that "[t]his system,

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<sup>103</sup> 11. Joint Declaration on the 12-mile limit

<sup>104</sup> The products identified were salmon, herring, mackerel, shrimps, scallops, Norwegian lobster, redfish and trout

managed by the Commission, shall stipulate indicative ceilings allowing for unhampered trade up to the ceilings. It will be based on dispatch documents issued by the country of origin. In the event of the ceilings being exceeded or of serious market disturbances, the Commission may take the appropriate measures in accordance with established Community practice. Such measures shall under no circumstances be more stringent than those applied to imports from third countries."<sup>105</sup>

Fourthly, Norway wanted to maintain the operation of the Norwegian sales organisation, after having amended it to comply with the community rules.

The EU responded by pointing out that the Community system was flexible and that no one was obliged to be a member in the Producers Organisation according to the CFP.

#### **4.3.2 Malta**

In a press release from the Department of Information in Malta just days before the election on the accession to the EU, it was stated that on the whole, the package negotiated by the government with the EU was a good deal reflecting the socio-economic situation in Malta. It stated that Malta had been granted 77 specific tailor-made arrangements in its negotiations with the EU, "some of which are permanent derogations, making Malta the only candidate country to be awarded such concessions. These include an arrangement to maintain our system of work permits for foreigners in the unlikely event of a large influx of foreign labour into the jobs market and an arrangement to keep property prices stable whereby non-residents will not be able to purchase a second property in Malta unless they have resided here for five years. Furthermore, Malta's Accession Treaty specifically

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<sup>105</sup> This provision allowed for unlimited access to the internal market and full market access for fishery products, but also giving the Community a possibility to act if the conditions spelled out in the provision were existing.

recognises the country's status of neutrality and the supremacy of its abortion laws."<sup>106</sup>

In an addition to the aforementioned derogations, and in spite of the fact that fisheries are not one of the pillars of the economy, the Maltese government requested a derogation from the CFP, granting Malta a specific management regime within 25 nautical miles of baselines of Malta.<sup>107</sup> Fisheries only represent a small sector of the economy, accounting for 3% of national GDP, providing employment for approximately 2 500 people and 95% of production is exported to the EU (mainly Italy).<sup>108</sup>

The EU underlined that such a management scheme should be established within the Community framework and corresponded to genuine conservation needs.<sup>109</sup> Malta agreed to undergo the *acquis communautaire* and recognised the competences of the EU in the fisheries sector.<sup>110</sup> It was agreed upon that EU would, during the interim period make amendments to Council Regulation (EC) No 1626/94 of 27th June 1994 laying down certain technical measures for the conservation of fishery resources in the Mediterranean, thus conforming with certain guidelines specified in the relevant Annex to the Accession Treaty.<sup>111</sup>

These guidelines are based on limitations of vessel size, capacity and number, in addition to prohibitions on using certain fishing gear.<sup>112</sup>

According to the aforementioned, Malta did not get any permanent derogation from the CFP, only a specified management scheme based on genuine conservation needs.

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<sup>106</sup> <http://www.doi.gov.mt/EN/commentaries/2003/03/bus06.asp>

<sup>107</sup> Pálsson, Óttar, Stefánsson, Stefán Már (2003) p. 227.

<sup>108</sup> <http://europa.eu.int/scadplus/leg/en/lvb/e04112.htm>

<sup>109</sup> <http://europa.eu.int/comm/enlargement/negotiations/chapters/chap8/index.htm>

<sup>110</sup> CONF-M 45/02.

<sup>111</sup> See first indent in Chapter 3 of Annex III, where detailed guidelines are drawn up.

<sup>112</sup> See an outline of the guidelines available on: <http://europa.eu.int/comm/enlargement/negotiations/chapters/chap8/index.htm>

### 4.3.3 Conclusion

As outlined, Norway started with some negotiation objectives concerning permanent derogation from CFP, regarding the management of the fishing resources north of 62°N. Norway referred to the important role of fisheries in the economy of the coastal areas in Northern Norway. The EU did not accept these views and the final conclusion was that Norway did not receive any permanent derogations. The incumbent Member States and Norway, on the other hand, issued few Joint Declarations, outlining the common understanding.

Declarations as those issued attached to the Act of Accession are not legally binding<sup>113</sup> and do not have the same effect as the basic text of the Act or the Treaty. Joint Declarations like those in question can, nevertheless, have some effect when translating the agreement and of course when drafting the new rules set out in the Act of Accession. Nevertheless, one has to keep in mind that "the provisions of the Act of Accession must be interpreted having regard to the foundation and the system of the Community, as established by the Treaty."<sup>114</sup>

Malta, as stated above, did not either get any permanent derogation from the CFP, but instead the EU accepted a certain management system in the waters extending 25 nautical miles from the baseline of the Maltese coast. The guidelines for that system were set out in an annex to the Accession Treaty, therefore, they are an integral part of the Accession Treaty giving the Maltese a good stronghold it and a binding force that cannot be disregarded.

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<sup>113</sup> Pálsson, Óttar, Stefánsson, Stefán Már (2003) p. 228-229.

<sup>114</sup> Case 231/78, Commission v. UK, [1979] ECR 1447.

## 5 Icelandic possibility for permanent derogations from the CFP

The fishing industry, including fisheries and fish processing, plays a fundamental role in Iceland. Throughout the last century fishing and fish processing was the driving force of economic development. Today, it accounts for about 15 % of the gross domestic income, occupies 11 to 12 % of the working force, and generates 70-75 % of export revenue. The government has for a long time tried to reduce the reliance on fisheries in the export trade and to increase diversity in the production of goods for export. Nevertheless, the fisheries share in merchandise export has remained at a steady level for many years.<sup>115</sup>

In addition to this economical importance, many consider the exclusive control of Iceland's EEZ as an important part of Iceland's independence and a vital part of Iceland's struggle for independence from foreign rule. Iceland did not achieve full control over the EEZ and without a fight. Both the extension of the fishery zone to 50 nautical miles and later to 200 nautical miles, caused serious disputes with the countries, like the UK, that had been fishing in the area. Thus, and in the light of the immense importance that fisheries play for Iceland's economy and the fact that it is a way of living that many Icelanders are very reluctant to confer to the EU, the control of this vital resource and pillar of the countries economy is extremely important. This is especially true in the light of the poor result from CFP in ensuring the sustainability of the stocks in Community waters. Iceland cannot afford to manage the resource with an inefficient system that does not ensure sustainable exploitation of the resource.

It is important to look at the precedents given by in the Norwegian and later the Maltese negotiation when regarding the possibility for Iceland to negotiate for a permanent derogation instead of taking the whole *acquis* in the fisheries sector.

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<sup>115</sup> <http://www.chamber.is/lecture.htm>



As outlined in Chapter 2, the nature of Community law can be looked at from many perspectives. The dominant ones are the constitutional perspective and the international perspective. The principle of taking over the whole *acquis communautaire* is based on the constitutional perspective, leaving very little room for derogations. The latter perspective, allows for more room for derogations because the competences of the EU are all conferred from the Member States. Or as Hartley stated about the Community: "[u]ltimately, it is controlled by the Member States: if they act together, they can change it in any way they want, and can even abolish it."<sup>116</sup>

As discussed earlier, acceding countries have received a great number of temporary derogations that are limited in time and scope and do not have a significant impact on competition or the functioning of the internal market or even with a more significant impact, in terms of competition or the internal market.<sup>117</sup> Acceding countries have also received a handful of permanent derogations. The permanent derogations are similar in that they do not differentiate between the Member States in areas that can cause some fundamental problems and serious difficulties for the functioning of the internal market and the unity of the Member States.

The incumbent Member States have received important opt outs, such as the UK and Denmark in respect of EMU.<sup>118</sup> None of the countries that have acceded to the EU over the last decade have received permanent derogations of that importance.

In the last enlargements of the EU two candidates got some derogations from the CFP. Norway got substantial temporary derogations

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<sup>116</sup> Hartley, Trevor (1999) p. 179.

<sup>117</sup> See discussion in Enlargement Strategy Paper, Report on progress towards accession by each of the candidate countries, Commission of the European Communities, Brussels, 8.11.2000, COM (2000) 700 final, p. 27.

<sup>118</sup> See Búrca, Gráinne, Craig, Paul (1998) p. 46, where it states that along with "Article 40 TEU and the new Article 11 EC, this title demonstrates that differentiated integration or, more simply, flexibility is no longer to be thought of as an aberration within the EC and EU legal order, nor as a temporary solution or a means of gradually easing all Member States into a uniform system. Title VII TEU, along with Article 40 TEU and Article EC, constitutionalizes and legitimates a mechanism for allowing different degrees of integration and co-operation between different groups of States, thus providing a general legal basis n

and the incumbent Member States and Norway issued Joint Declarations on the guidelines for the setting up of new rules after the interim period had elapsed. These guidelines were worded in a general manner, and one has to keep in mind that Joint Declarations, even though they have some value as instruments according to international law, do not have a significant value according to Community law.<sup>119</sup>

In its accession negotiation Norway referred to the principle of subsidiarity, based on the fact that the economy in Northern Norway is largely dependent upon fisheries and fish production. The EU rejected the argument referring to the traditional interpretation of the principle that it only applies where the competences of the Member States and the EU are shared.<sup>120</sup> Therefore it seems that Iceland could not refer to the subsidiarity principle as it is outlined in the Treaty and interpreted by the EU as the EU has exclusive competences in the field of fisheries. It should not though be forgotten that Iceland relies heavily upon fisheries, much more so than any other country in the world, and that fact could result in some recognition of the important role of fisheries for Iceland.<sup>121</sup>

In the negotiation with Malta the EU responded to Malta request for exclusive zone extending to 24 nautical miles, by setting up that system inside the CFP structure. Therefore, waters around Malta are in fact governed by the CFP. The guidelines for the setting up of the rules governing fishing in the area were spelled out in Annex III to the Accession

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the future for the sorts of cases - such as the Social Protocol and the EMU opt-outs - which had been individually negotiated in response to various political deadlocks in the past."

<sup>119</sup> Pálsson, Óttar, Stefánsson, Stefán Már (2003) p. 228-229.

<sup>120</sup> See Article 5 TEC where the principle of subsidiarity is outlined and Kapteyn, P.J.G./Verloren van Themaat (1998) p. 1168 where it is stated that the CAP "contributes, albeit negatively, to the possible or impossible operationalisation of the principle of subsidiarity". Then it is pointed out that CAP and policies of price intervention leads to a far-reaching centralization of legislation at the highest level and that "every actual or potential divergent application or interpretation of the rules concerned involves the possibility of distortions, which in turn may affect the proper functioning of the common organizations of the market ..."

<sup>121</sup> In the 11 Joint Declaration on the 12-mile limit in the Norwegian Accession Treaty the contracting parties "recognize the major importance to Norway of the maintenance of viable fishing communities in coastal regions". When reviewing the arrangements on access to waters within the 12-mile limit in order to decide on future arrangements, "the institutions of the Union will pay special attention to the interests of such communities in the Member States."

Treaty, thereby giving the Maltese a strong foothold, which other Member States will have difficulties in challenging.

In line with the aforementioned it seems, from a legal perspective, that Iceland would have to undertake the whole *acquis communautaire*, the CFP and recognise the exclusive competences of the EU in the fisheries sector.

Even though the possibility of permanent derogation from the CFP can be ruled out Iceland could expect some temporary derogations allowing the Icelandic fishing industry a number of years to adjust to the CFP.

This refusal of granting permanent derogations could nevertheless be compensated by a review of the CFP legislation opening up for the possibility of customising the rules to Iceland's special needs. The result from that review could be, up to a limit, insured beforehand by outlining explicit guidelines in the Accession Treaty, similar to the guidelines in the Maltese Accession Treaty. The Norwegian method could also be an option, but a much less desirable one, that the Contracting Parties issue some Joint Declarations outlining common understanding and what basic principles should be taken under consideration in the review and drafting of new rules under the CFP.

## 6 Conclusion

The content of the *acquis communautaire* in relation to the enlargement of the Community has been referred to as the "accession" *acquis*. When the term is used in that context it refers to the whole body of rules, political principles and judicial decisions, which new Member States must adhere to, in their entirety and from the beginning, when they become members of the European Union.

The experience shows that derogations are allowed only insofar as they are expressly laid down by the Acts of Accession, and even here case law of the Court is found by some to support the view of a "*certainne prééminence*" of the founding Treaties in respect of the Acts of Accession.

Acceding states have different needs and sometimes they face serious difficulties in taking the Community legislation in a given field. That can be caused by many reasons, such as political and economical factors. One way of accommodating different needs is by differentiate in Member States' rights and obligations. This can be done with temporary derogations and permanent exemptions.

The basic rules concerning the CFP are based on Treaty provisions. Therefore, the derogation must be given in a legislation having the same effect as the Treaty. This can be done by changing the Treaty or by incorporating the derogations into the Accession Treaty in question.

Derogations in Act of Accession can be spelled out directly in its provisions, explicitly stating the derogation, or as an adaptation to a secondary legislation incorporated into the Accession Treaty. Additionally, the contracting parties have issued Joint Declarations, though having no legal binding force reflecting the political will of the contracting parties at the time of accession and can therefore possibly have a meaning in an international law context.

As stated in Chapter 4.3.1, Norway did not receive any permanent derogations from the CFP even though Norway referred to the

important role of fisheries in the economy of the coastal areas in Northern Norway. Nevertheless, the incumbent Member States and Norway, issued few Joint Declarations, outlining their common understanding.

Declarations like those attached to the Norwegian Accession Treaty are not legally binding and do not have the same effect as the basic text of the Act or the Treaty. Joint Declarations such as those in question can, nevertheless, have some effect when translating the agreement and of course when drafting the new rules set out in the Act of Accession.

Malta, as stated above, did not get any permanent derogation from the CFP, but instead the EU accepted a specific management system in the waters extending 25 nautical miles from the baseline of the Maltese coast. The guidelines for that system were set out in an annex to the Accession Treaty. Therefore they are an integral part of the Accession Treaty giving the Maltese a good stronghold it and a binding force that cannot be disregarded.

Consequently, it seems that from a legal perspective Iceland would have to undertake the whole *acquis communautaire*, the CFP and recognise the exclusive competences of the EU in the fisheries sector.

In line with the aforementioned I consider that Iceland cannot expect to get any permanent derogation from the CFP. The experience from the Norwegian accession negotiation shows that the principle of subsidiary cannot be related upon. Legal analyses and interpretation of the principle also confirms that Iceland cannot rely on the principle, even in the light of the immense importance that the fishing industry play in the Iceland's economy.

I, on the other hand, believe that Iceland could get some temporary derogation from some parts of the CFP, and that the Community would agree on some review and adjustment of the rules of CFP to accommodate some of Iceland's needs. Guidelines for the review and adjustment should preferably be spelled out in the Accession Treaty, giving it much more vigour than a common understanding outlined in joint or unilateral declarations acknowledging Icelandic interests.

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