Deliverable D 4.1

Report on governance and stakeholder involvement in fisheries and analysis of EU policy framework

Due date of deliverable: M 9

Actual submission date: 31.08.2013

Start date of the project: 03/2012  Duration: 36 months

Organisation name of lead contractor: Aalborg Universitet

Project co-funded by the European Commission within the Seventh Framework Programme (2007-2013)

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SOCIOEC [289192] – Deliverable 4.1

Socio-economic effects of management measures of the future CFP

Grant agreement no: 289192
Socio-economic effects of the main management principles of the future Common Fishery Policy: impact of new policy framework and opportunities for the fishing sector to develop self- and co-management.

Report Workpackage 4.1

EUROPEAN UNION LAW AND POLICY APPLICABLE TO STAKEHOLDER INVOLVEMENT IN THE MANAGEMENT OF THE COMMON FISHERIES POLICY

August 2013

Marine Law and Ocean Policy Research Services Limited
Executive Summary

This report reviews how EU law and policy influence the possibilities for strengthening governance structures and enhancing stakeholder involvement in fishery management under the CFP. In particular, this review addresses the specific instruments that are aimed at achieving the fisheries, environmental, economic, and social objectives of the policy, and how these can be reconciled with self and co-management of the CFP. In undertaking this task, there is a description of the approach taken by the European institutions to the issues of decentralization and devolution of management, as well as stakeholder empowerment, during the course of the reform process 2011-2013.

The report also examines several legislative instruments and policy measures that have a bearing on the broader issues associated with maritime governance and stakeholder participation in decision-making including: the draft Basic Fishery Management Regulation, which was agreed in 2013; the Marine Strategy Framework Directive; the Habitats and Birds Directives; the Environmental Impact Directive and the Strategic Environmental Impact Directive; the legislative instruments that give effect to the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters; the draft Directive on Maritime Spatial Planning and Integrated Coastal Management; and the far-reaching Integrated Maritime Policy. The discussion explores how questions of competence, subsidiarity, proportionality, and delegation under the TFEU both enhance and constrain the scope for greater stakeholder participation in the management of fisheries under the reformed CFP.

The report concludes by highlighting a number of features in the new policy framework that signal a fundamental shift in the paradigm that is used for fishery management under the reformed CFP including: removing micro-management decisions from the co-decision level within the EU institutions; the decentralisation of decisions on technical matters away from the Council and Parliament; the regionalisation of fisheries management decisions; the efforts that have been made to strengthen the role and responsibilities of industry in the management and conservation of fisheries; and the vesting of additional powers in the Member States in accordance with what is permissible under the Union Treaties.
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Abbreviations

AC(s) Advisory Council(s)
ACFA Advisory Committee on Fisheries and Aquaculture
CCMLR Commission on the Conservation of Antarctic Marine Living Resources
CFP common fisheries policy
COREPER Committee of Permanent Representatives
EIA environmental impact assessment
EP European Parliament
EU European Union
FAO Food and Agriculture Organisation
FPA Fisheries Partnership Agreement
GES good environmental status
IA impact assessment [regulatory]
ICES International Council for the Exploration of the Sea
ICM integrated coastal management
ICZM integrated coastal zone management
IFM Innovative Fisheries Management
IMP integrated maritime policy
ITR(s) individual transferable rights
ITQ(s) individual transferable quota(s)
IUCN International Union for Conservation of Nature
MSP marine spatial planning
MSY maximum sustainable yield
NAFO Northwest Atlantic Fisheries Organization
NEAFC North East Atlantic fisheries Commission
NGO Non Governmental Organisation
OUP Oxford University Press
OSPAR Oslo and Paris Conventions
PO(s) Producers Organisation(s)
RAC Regional Advisory Council
SAC special area of conservation
SPA special protected area
SEA strategic environment assessment
SEAFO South East Atlantic Fisheries Organisation
STECF Scientific, Technical and Economic Committee
TAC total allowable catch
TFCs transferable fishing concessions
TFEU Treaty Functioning European Union
TEU Treaty European Union
UK United Kingdom
UNGA United Nations General Assembly
VMS vessel monitoring system
1. Introduction

1-1. The common fisheries policy (CFP) has a solid legal basis in the Treaty on the Functioning of the European Union (TFEU) and is comprised of a complex body of secondary legislation and other measures adopted by the European institutions and implemented by the Member States and the various parties that are concerned with the policy.¹

1-2. Opinions on the CFP are often divided and subject to hotly contested debate on the best way forward to ensuring a sustainable and prosperous future for the European fishing industry. One positive feature, however, is that the policy is subject to a process of continuous reform every period of 10 years or so. Most notably, 1992, 2002, and from 2011 through to 2013. Despite this on-going process of review and reform, it is also evident that many aspects of fisheries management in the EU have not been successful and have failed to deliver the anticipated benefits of sustainable fisheries, particularly in relation to the management of certain fish stocks and specific segments of the EU fleet, which in many instances have depleted the resource and remain economically unviable. As a consequence, the policy is faced with a unique set of challenges if it is to deliver the ambitious objectives set down by the TFEU and the draft Basic Fisheries Management Regulation (hereinafter the “Basic Regulation”).² Briefly stated, these objectives are aimed at establishing a policy that is environmentally, economically, and socially sustainable, and that contributes to the long-term prosperity of the fishing sector and the associated industries.³

1-3. In the context of reviewing governance structures and greater stakeholder involvement in fishery management, it should be noted at the outset that the intractable range of problems that have beset the CFP since its foundation have not always flowed from inadequacies in the legislative approach adopted by the European institutions, or indeed as a result of inadequate fishery science, but have come about in many instances as a result of poor regulatory implementation in the Member States, and in some instances as a consequence of non-compliance by the industry with their regulatory obligations.⁴ This is borne out by the findings of the Court of Auditors, as well as a number of comprehensive specialist studies on this topic.⁵ Moreover, it should not be forgotten that the CFP, similar to other EU

¹ Articles 3 (d), TFEU. For legal commentary on the CFP, see, R.R. Churchill and D. Owen, The EU Common Fisheries Policy (Oxford; OUP, 2010).
² Articles 3 (d), 39 and 208, TFEU. The most recent draft of the Basic Regulation, used for this report is appended to the Council of Ministers Interinstitutional File: 2011/0195 (COD), Brussels, 11.06.2013.
⁵ See, inter alia, European Court of Auditors’ Special Report n°7/2007, on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources together with the Commission’s replies. OJ C317/1 of 28.12.2007; A. Berg, Implementing and Enforcing European Fishery Law: The Implementation and Enforcement of the Common Fisheries Policy in the Netherlands and the United Kingdom (The Hague: Kluwer Law, 1999); C. Johnson,
policies, is largely reflective of Member State preferences regarding the form and content of secondary legislation and policy measures. Moreover, Member States when making decisions and voting in the Council of Ministers frequently ignore scientific advice and disregard the precautionary principle. Furthermore, they take decisions at a national level regarding how Union measures ought to be implemented and applied to the fishing industry at a practical level on a day-to-day basis. In other words, the CFP does not in every instance set down rigid homogenous solutions to all of the problems encountered in the management of European fisheries. Very often, there is considerable scope for the Member States to exercise their discretion regarding the adoption and implementation of specific management solutions for individual fisheries.

1-4. Despite the discretion afforded to the Member States, fisheries legislation and policy initiatives are informed nonetheless by important treaty principles and general normative rules that are prescribed in the TFEU, the Treaty on European Union (TEU) and secondary legislation including most notably the Basic Regulation. These principles include the obligation of sincere cooperation, which requires Member States to cooperate with the European institutions, as well as with each other in the implementation of EU law and policy. Furthermore, decision-making must be based upon best available scientific advice, the policy must apply the precautionary principle and the ecosystem approach to fisheries management, it must adopt a long-term perspective on policy implementation, and most importantly of all, there ought to be a clear articulation of responsibilities at EU, Member State, regional and local levels.

1-5. Amidst these objectives, a central objective of the reform is the enhancement of stakeholder involvement in the policy process from conception to the implementation of the rules in the Member States. There is nothing new in this obligation as stakeholder involvement in the CFP is a central pillar of the policy since as far back as 2002. In theory, this ought to mean giving stakeholders ownership of the policy and ensuring that there are appropriate structures in place that facilitates, where appropriate, the decentralisation and devolution of the implementation of secondary legislation and policy measures. However, it has been rarely used in reality, and in most situations, the general trend has been to roll-over TAC levels. See SEC(2011) 891, Brussels, 13 July 2011, p. 10-11.


According to the Commission, this can be shown by two elements: “First, the average percentage deviation of Council TACs decisions from scientific advice (for stocks with such advice), for the years 2003-2010, was 47%. Since 2008 this deviation has been reduced to 34% in 2010. Nevertheless, TACs are still set well above what scientist recommend. Second, the number of stocks for which scientific advice was a zero TAC, and for which the Council adopted a positive TAC, was 17 on average for the period 2003-2010. It has been decreasing since 2007 (20) to 2010 (14) but still is high. The CFP establishes the precautionary approach to ensure sustainable exploitation of stocks and to ensure that the impact of fishing on marine ecosystems is kept at a sustainable level. De facto, the principle could amount to giving environmental sustainability some degree of precedence. However, it has been rarely used in reality, and in most situations, the general trend has been to roll-over TAC levels.” See SEC(2011) 891, Brussels, 13 July 2011, p. 10-11.


the CFP. As will be seen below, however, there are divergent views on the substantive legal obligations that ought to flow from greater stakeholder engagement in the policy process. Similarly, there is the absence of consensus within the European institutions and in the Member States on how the views and interests of stakeholders ought to be reflected in the governance structures that apply to the fishing industry at an operational level on matters such as quota and fishing effort management, the allocation of resource rights, or indeed on the adoption of technical conservation measures for specific fisheries. That said, the European institutions are placing greater emphasis on the decentralisation of decision-making to facilitate the EU working more closely with regional authorities and stakeholders to ensure a robust approach to vital governance issues. Undoubtedly, the results of the SOCIOEC project can contribute to this process. Furthermore, this process is fully consistent with best practice internationally, where there is increased awareness by the FAO and other specialist bodies of the importance of stakeholder participation and the devolution of key fisheries management functions to the industry and the wider community. This shift away from centralised “command and control” structures to a more harmonious and flatter governance model is ultimately aimed at making the CFP more effective, accountable and transparent.

2. Report objectives

2-1. The purpose of this report is to review how Union law and policy measures influence the creation of appropriate governance structures that enhance stakeholder involvement in the CFP. Particular emphasis is placed on regulatory efforts that have been made to achieve decentralisation and/or devolution of decision-making and management structures. The paper examines several legal instruments and policy measures that are aimed at achieving the fishery, environmental, economic and social objectives of the policy and reviews how these can be reconciled with a policy framework that provides opportunities for the fishing sector to develop self and co-management under the proposed regulatory structure applicable to the CFP. The views of the European institutions on these matters as expressed during the course of the reform debate running from 2011-2013 are examined and summarised to give context to the discussion.

2-2. In reviewing the various governance options advanced by the SOCIOEC project, it should be borne in mind that the CFP is no longer considered a standalone policy and considerable efforts have been made by the European institutions to align the policy with an array of EU instruments that are aimed at protecting and

preserving the marine environment such as the Habitats and Birds Directives, as well as the Marine Strategy Framework Directive (MSFD). These efforts are entirely understandable, as the TFEU requires the integration of environmental protection requirements into the definition and implementation of all EU policy sectors including fisheries with a view to promoting sustainable development. Moreover, the European Commission has long-since expressed the view that ecological sustainability is a pre-requisite for the attainment of the economic and social sustainability of European fisheries.

3. Structure and content

3-1. This report is divided into six chapters in order to facilitate a discussion of the principal changes to the governance structures and the procedures for greater stakeholder involvement in fisheries management under the reformed CFP.

3-2. Chapter 1 opens by addressing a number of preliminary matters including some of the fundamental definitions that permeate any discussion of fisheries governance structures, such as what is meant by the terms “self management” and “co-management” under Union fisheries law. In addition, it focuses on the term “stakeholder” and presents a brief overview of existing stakeholder consultative bodies, as well as an assessment of their role in the policy and law-making processes in the Union since the establishment of the CFP in 1983.

3-3. Chapter 2 presents an analysis of the reform process undertaken during the period 2011-2013, with a particular focus on the debate within the European institutions on how to improve stakeholder engagement on various aspects of the

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13 Art 11 TFEU.

fisheries policy. The measures proposed by the Commission are summarised with a view to assessing whether there is a paradigm shift away from the top-down command-and-control approach to management decisions that has traditionally characterised the CFP, towards a model that is more amenable to self and co-management of fisheries. The views of the Parliament and the Council of Ministers on these questions are highlighted where relevant. As will be seen, both of these law-making institutions had a major bearing on the outcome of the reform process and on the substance of the measures that are now codified in the Basic Regulation.

3-4. Chapter 3 examines the text of the draft Basic Regulation and a number of its central features are explored including: the use of transferable fishing concessions as a mechanism for establishing systems of self and co-management of fisheries; the role of the Advisory Councils [ACs] in decision-making and fisheries management; and the process of regionalisation of the policy and how this may influence the establishment and operation of governance structures that are applicable to the CFP at the level of sea-basins such as the Baltic Sea, the Mediterranean Sea, and the Black Sea.

3-5. Chapter 4 identified a range of environmental law instruments that have to be taken into consideration when discussing fisheries governance and management structures under the CFP. These include: the MSFD, the Habitats and Birds Directives, the Environmental Impact Directive and the Strategic Environmental Impact Directive, the Directive on Access to Justice in Environmental Matters, as well as the draft Directive on Maritime Spatial Planning and Integrated Coastal Zone Management. Brief mention is made of the Integrated Maritime Policy as this provides the over-arching policy setting for many new initiatives at Union, regional seas, and Member State levels.

3-6. Chapter 5 examines the legal limits on what can be achieved regarding decentralisation under Union law as a result of the exclusive nature of EU competence in relation to fisheries. This includes a brief description of how fisheries legislation and policy are made in practice and the relationship between the different roles of the EU institutions, national parliaments in the Member States, as well as the structures and procedures that are already in place for stakeholder engagement. The obligations that arise under the settled case law of the Court of Justice of the European Union are touched upon at appropriate points in the text.

3-7. The report concludes in Chapter 6 by highlighting some of the positive outcomes of the reform process and by making a number of brief observations concerning the proposed governance structures, their potential to enhance stakeholder involvement in fisheries management, as well as the legal constraints that are influencing the range of possibilities for the decentralisation/devolution of the CFP. Specifically, mention is made of the following: removing micromanagement decisions from the co-decision level within the EU institutions; strengthening the role and responsibilities of industry in the management and conservation of fisheries; and the vesting of additional responsibilities in the
Member States in accordance with the general scheme for law-making and the adoption of policy measures that are set down in the Treaties, as well as how this will influence governance structures and stakeholder involvement in management over the coming decade.

3.8 The most recent draft of the Basic Regulation, referred to in this report, is the text agreed by the Council on 11.06.2013.\textsuperscript{15}

\textsuperscript{15} Op cit. note 2.
Chapter 1

PRELIMINARY MATTERS

4. Absence of consensus on definitions

4-1. Although considerable scholarship has been undertaken on governance structures by the experts at IFM in Denmark among others,\textsuperscript{16} there is nonetheless an absence of consensus regarding the meaning of many of the key terms associated with greater stakeholder involvement in fisheries management under the CFP. In order to address this shortcoming, this paper where possible refers to the definitions that are set down in EU legislation and policy instruments. Moreover, with a view to shining the light on some of the issues discussed further on below, we take a brief look at some fundamental questions allied to these definitions such as the meaning of self and co-management of fisheries. In addition, two questions are posed: Who are the so-called stakeholders? And what does their “involvement” in management and decision-making entail in practice? The discussion goes on to touch upon the underlying rationale supporting the enhancement of stakeholder involvement in governance, regulation and the management of fisheries under the revised CFP.

4.1 What do we mean by self and co-management of fisheries?

4.1-1. As is well established worldwide, there are various models for fishery management that embrace different levels of self and co-management. With special reference to the EU, the SOCIOEC project has identified an analytical framework that looks at five different schemes of management, which are shown in Table 1 below. As noted in the project proposal, co-management within the CFP has been restricted to the two top categories, which are the least ambitious of the five schemes in terms of stakeholder engagement and their involvement in decision-making concerning the management of fisheries. Moreover, the project proposal goes on to note that the introduction of the ACs only consolidates and strengthens the “co-management by consultation” approach that has characterised the CFP since its inception.

Table 1: Analytical framework for fisheries management - SOCIOEC Project.\textsuperscript{17}

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<th>SOCIOEC: Analytical framework fisheries co-management</th>
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<td>1. Top-down hierarchical management by the state: where mechanisms for dialogue with users and stakeholders might exist, but only minimal exchange of information takes place and EU/national governments decide what information to share</td>
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<tr>
<td>2. Co-management by consultation: where extensive formal mechanisms for consultation (and feedback on use of recommendations) with users and stakeholders exist, but all decisions are taken by EU/national governments;</td>
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<tr>
<td>3. Co-management by partnership: where EU/national governments, users, and stakeholders cooperate as decision-making partners in various aspects of management;</td>
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<tr>
<td>4. Co-management by delegation: where EU/national governments have devolved de facto decision-making power to users and stakeholders in relation to various aspects of fisheries management;</td>
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<td>5. Industry self-management with reversal of the burden of proof: where government has devolved wide-ranging management authority to users and stakeholders, who must demonstrate to EU/national governments that management decisions are in accordance with the given mandate.</td>
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4.1-2. That said, some care needs to be exercised in this particular analytical exercise as there is a degree of ambiguity about the precise legal meaning of many terms that permeates any discussion of fisheries management governance structures and the CFP. As a start point, it ought to be noted that there is no generally accepted definition as to what constitutes “fisheries management” in the EU. Undoubtedly, the setting of total allowable catches for a particular stock, the subsequent allocation of quotas to the Member States, the distribution of these quotas to individual fishers or Producers’ Organisations (POs), the placing of limitations on fishing effort and fishing capacity, the adoption of technical conservation measures, are all applied for the purpose of fishery management in the EU. But “fishery management” as a concept can be much wider in ambit as is evident from the working definition used by the FAO, which reads as follows:

\textsuperscript{17}Source: Description of Work EU Project SOCIOEC No. 289192. See: http://www.socioec.eu
“The integrated process of information gathering, analysis, planning, consultation, decision-making, allocation of resources and formulation and implementation, with enforcement as necessary, of regulations or rules which govern fisheries activities in order to ensure the continued productivity of the resources and the accomplishment of other fisheries objectives.”¹⁸

The FAO goes on to point out that “fisheries management entails a complex and wide-embracing set of tasks, aimed at ensuring that the optimal benefits are obtained for the local users, State or region from the sustainable utilization of the living aquatic resources to which they have access”.¹⁹

4.1-3. In the European context, the foremost legal actors in this hierarchical process are undoubtedly the EU institutions and the Member States. Under this system, management measures tend to be highly prescriptive, decided at the centre, and are characterised by legally binding and enforceable rules. The precise distribution of competence at the national level is vested in the public bodies and agencies with responsibility to manage licenses, quotas and fishing effort, as well as capacity, at national and local levels. There is in addition, as will be seen below, a limited system of public and industry participation in governance at an EU and regional levels, which entails stakeholder consultation regarding the content and form of draft legislation and policy measures. There is little variation in this top-down approach to regulation and in the management measures that apply in the regional seas such as the Baltic Sea, the North-East Atlantic, the Mediterranean Sea, the Black Sea, as well as in third country waters and in areas beyond national jurisdiction.

4.1-4. Apart from the broadness of the term management, as is evident from the FAO definition cited above, additional care has to be taken with several other terms that pervade our discussion including: self-regulation and co-regulation. Self-regulation is often a feature of self-management. The term is somewhat of an oxymoron because it does not involve legislation or a legislative act on the part of the Union institutions. Pointedly, the EU Agreement on Better Law-Making defines “self-regulation” as follows:

“…the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sector agreements).

As a general rule, this type of voluntary initiative does not imply that the Institutions have adopted any particular stance, in particular where such initiatives are undertaken in areas, which are not covered by the Treaties or in which the Union has not hitherto legislated. As one of its responsibilities,

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¹⁸ FAO Fishery Resources Division and Fishery Policy and Planning Division. Fisheries management.
¹⁹ Ibid.
the Commission will scrutinise self-regulation practices in order to verify that they comply with the provisions of the EC Treaty.\footnote{20}

Under this Agreement, the three Institutions “agree to observe general principles such as democratic legitimacy, subsidiarity and proportionality, and legal certainty. They further agree to promote simplicity, clarity and consistency in the drafting of laws and the utmost transparency of the legislative process.”\footnote{21} In a legal context, the term “self-regulation” is regularly used to describe the situation where a special interest group exerts control over the behaviour of their members and sector by means of their own systems of over-sight.\footnote{22} Outside of the domain of fisheries, this approach to regulation is associated with commercial sectors such as banking, the fiscal services and insurance industries, as well as the press and media. In Europe, there are genuine and well-substantiated reasons why self-regulation and self-management are highly contentious as a regulatory approach to governance in light of the difficulties encountered in the banking sectors in Germany, the United Kingdom, Spain, Cyprus, Ireland and Iceland, as well as the Lord Justice Levisohn’s judicial inquiry into the operation of the media sector in the United Kingdom. That being said, there is some empirical evidence in the reform of the CFP, where the Union institutions appeared to favour a shift in emphasis away from top-down, prescriptive and legally binding measures that are applicable to the management of fisheries towards a more flexible governance model, which allows for greater input from stakeholders into the design and implementation of the policy.\footnote{23}

4.1-5. The EU Agreement on Better Law-Making defines the term “co-regulation” as meaning:

“the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations).

This mechanism may be used on the basis of criteria defined in the legislative act so as to enable the legislation to be adapted to the problems and sectors concerned, to reduce the legislative burden by concentrating on essential aspects and to draw on the experience of the parties concerned.”\footnote{24}

\begin{footnotes}
\footnote{21}Paragraph 2, ibid.
\footnote{23}See, Chapter 2 infra.
\end{footnotes}
Under this scheme, the law-making institutions share responsibility with the interested parties in the field in fulfilling the objectives of the policy. Accordingly and for the purpose of this paper, co-management is understood to mean the adoption of management/implementation measures by the relevant stakeholders (namely, the fishing industry and other interest groups) in conjunction with the appropriate regulatory or management authority in the Member State. As will be seen below, there is considerable scope under the CFP as it stands for professional organisations, fishing industry representative bodies, public interest groups, as well as a myriad of other business and commercial entities including consumer organisations, to participate in the fishery management and decision-making processes concerning the formulation and implementation of policy.

4.1-6. There are several examples of the success of this approach including the often-cited role of POs in the allocation and management of fishing quotas and fishing effort in France, the Netherlands and Denmark. Furthermore, in the submissions made by the Joint Nature Conservation Committee in the UK on the reform of the policy it is noted that there are several excellent examples of good industry practice, that appear to have attributes of both self and co-regulatory approaches, including:

“The cod avoidance measures applied within the Scottish whitefish fleet in the context of the Conservation Credits scheme can be seen as an example of good practice that could usefully be adapted to other situations. The incentives in this case are extra days at sea and care must be taken to ensure that the environmental costs of the incentives do not outweigh the benefits. A further example of good practice is the practice of the Scottish pelagic fleet that pre-samples schools of mackerel using jigging gear before deciding whether to deploy nets. This ensures that only wanted fish are caught and thus avoids discarding catches of undersized fish. The principle of Conservation Credits (i.e. some form of ‘access to resource’ reward in return for ‘good practice’) could be applied for biodiversity conservation reasons, for example to support voluntary fishing measures within designated sites. Market based certification schemes provide an appropriate mechanism for incentivising good practice.”

4.1-7. Although the EU objective of reducing the environmental footprint of fisheries is set down in Union law, the attainment of this objective is achieved by good industry practice as evident in these examples from Scotland. This thus reflects voluntary decentralisation of the policy and an alternative to the top-down process that has characterised the CFP since its foundation. Furthermore, it is underpinned by an industry understanding, based upon the practical experience of the sector, that has the prior approval of both national authorities and the Commission. Such an approach can often achieve better compliance in the absence of legally binding or

overtly prescriptive measures. There are also a number of examples of successful local co-management arrangements in the Mediterranean Sea including the Adriatic clam fishery where the use of a system of property rights has protected the biomass and increased the economic revenue from the fishery.26

4.1-8. Outside of the EU, there are several much-cited examples of industry driven management initiatives including the use of a system of private property rights (such as individual transferable quotas (ITQs)) to manage fisheries in Namibia, Iceland, Norway, Mexico, South Africa and New Zealand, to name but a few.27 In many instances, statutory bodies or regulatory agencies, retain an over-sight role in management processes but leave the task of implementation and the utilisation of property entitlements to private parties or to commercial entities.

4.1-9. From a legal perspective, outside of the domain of commercial sea-fisheries, there appears to be no hard and fast rules on how self and co-regulatory/management regimes ought best operate in practice within the EU. Indeed, they “may operate in an informal, non-binding, voluntary manner, or it may involve rules of full legal force that are enforceable in the Courts.”28 That being said, under the current architecture of the EU and the revised CFP, as will be seen below in Chapter 5, self and co-management can only be exercised in the shadow of the legislative competence vested in the European institutions by the TFEU. In practical terms, this means that the range of options for developing a system of governance for the CFP that is characterised by the principles of self and co-management is clearly curtailed by what is permissible under Unionlaw. Furthermore, it is suggested further on below that self and co-management measures are best suited and ought to be directed at the defined areas of quota and fishing effort management, capacity reduction, and to a lesser degree perhaps technical conservation measures.29

4.1-10. At first sight, self and co-management arrangements appear to be seductively simple as a management solution to reduce the environmental impact of fishing activity and to meet the obligations that arise under Union environmental legislation.30 Clearly, the examples cited above by the JNCC appear to reflect the spirit of Option 5 of the SOCIOEC Analytical Framework (Table 1), that is to say: industry self-management with reversal of the burden of proof: where government

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29 See Chapter 6, infra.
30 See Chapter 4 infra.
has devolved wide-ranging management authority to users and stakeholders, who must demonstrate to EU/national governments that management decisions are in accordance with the given mandate. In addition, such an approach is attractive because it is less rigidly prescriptive or difficult to implement at a practical level by the fishing industry as the principal stakeholders.

4.1-11. Any such developments, however, will have to be fully consistent with the firm requirements of Union law that pertains to the protection of the environment. 31 Moreover, the case law of the Court of Justice of the European Union clearly constrains what can be achieved in this regard in relation to the transposition into national law of the objectives of conservation and biodiversity related instruments such as the MSFD, the Habitats and Birds Directives. 32 As a general approach, the Court insists on strict transposition and has rejected, for example, the use of voluntary contracts or voluntary arrangements between farmers and land-owners as a means of meeting the requirements of the Birds Directive. 33 In particular, the Court has expressed the view that “a faithful transposition becomes particularly important in a case ...in which the management of the common heritage is entrusted to the Member States in their respective territories.” 34 This is particularly important in relation to directives that are transboundary in their application and scope. The latter will often be the case in relation to the management of fisheries under the CFP.

4.1-12. In conclusion, self and co-management arrangements that are based on a voluntary agreement between, for example, a PO and the national fisheries authority, do not appear to pass the strict test of legal certainty and clarity, and are unlikely to set down legally binding obligations enforceable in court, all of which are pre-requisite requirements for the transposition of Union environmental directives into national law. The Commission has published guidelines on the use of environmental agreements but these arrangements have limited application in sectors such as climate change. 35 Significantly, none of the Directives discussed in this paper contain a clause that allows for their implementation by means of environmental agreement between the sector and the national/Union body. Accordingly, there is little scope for the use of environmental agreements or voluntary contracts as instruments to achieve self and co-management for the implementation of the obligations that arise under Union environmental directives as they apply to the CFP.

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31 See J. Scott, Environmental Protection: European Law and Governance (Oxford, OUP, 2009), passim.
32 See Chapter 4 infra.
4.2 Who are the stakeholders?

4.2-1. One can pose the obvious and relatively straightforward question: Who are the stakeholders involved in the CFP? Surprisingly enough, again there appears to be no simple or definitive answer to this question from a legal perspective, as the term “stakeholder” remains open textured and undefined in the Basic Regulation. In marked contrast, the regulatory impact assessment published by the Commission on the reform of the CFP sheds some light on this issue as it lists the principal stakeholders concerned with the policy as well as their primary areas of interest. This information is reproduced in Table 2 below.  

Table 2: Stakeholders, description of stakeholder, key interests

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Description of stakeholder</th>
<th>Key interests</th>
</tr>
</thead>
<tbody>
<tr>
<td>Catching sector in the EU</td>
<td>EC vessel owners, operators and crew.</td>
<td>Maintaining profitability and livelihoods.</td>
</tr>
<tr>
<td>Dependent businesses &amp; communities</td>
<td>Business and communities dependent upon fisheries for their livelihoods.</td>
<td>Maintaining profitability and livelihoods.</td>
</tr>
<tr>
<td>Processing Sector</td>
<td>Those processing raw material both imported and caught within EC waters</td>
<td>Maintaining profitability and livelihoods, stable supplies.</td>
</tr>
<tr>
<td>Sector Regulators</td>
<td>National, regional and local bodies regulating fishing</td>
<td>Ensuring an efficient, effective and practical management framework that balances a wide range of stakeholder needs.</td>
</tr>
<tr>
<td>Sector research</td>
<td>Scientific research bodies contributing to the conservation and management of stocks</td>
<td>Contribution to an effective fisheries management regime through the timely access to high quality, robust data from fishery dependent and independent sources.</td>
</tr>
<tr>
<td>Consumers</td>
<td>Those consuming fisheries</td>
<td>Availability, cost, quality</td>
</tr>
</tbody>
</table>

### Third countries

- **Products**
  - and nutritional values of fisheries products with varying degrees of environmental scrutiny.
- **Fishing sector in competition with EU fleets.**
- **Aquaculture producers, exporters to the EU.**
- **Authorities in third countries receiving payments under FPA or private agreements**
  - Conflicting interest between those who see the EU as a very important export market and as a source of revenue and small local fishing communities that face competition from external fleets of the EU on access to local resources.

### NGOs, the civil society and EU citizens

- **Non-governmental organizations advocating sustainable management of fisheries.**
  - To maintain fish populations, marine biodiversity, and the amenity value of oceans, rivers and lakes.
- **The wider public with an interest in and concern for fisheries and the marine environment**
  - Maintaining livelihoods, social and cultural heritage.

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4.2-2. From the information presented in Table 2, it is evident that there are many broad categories of stakeholders and other interested parties concerned with the CFP. These include the fishing sector, which may be viewed as the dominant stakeholder interest in any discussion concerning reform of the structures and procedures that apply to EU fisheries management. Indeed, the SOCIOEC project goes as far as to state that “all stakeholders have importance, but in view of the fact that fishers are the ones being asked to modify their behaviour and who will experience change in their activities and, potentially, incomes. It is therefore vital that the project objectives/outcomes should have agreement from the fishers.”

37 Significantly, the Communication published by the Commission in 2007 on rights-based management tools in fisheries defines rights-based management as “a formalised system of allocating individual fishing rights to fishermen, fishing vessels, enterprises, cooperatives or fishing communities”. Following on from this, it is tempting to say that stakeholder involvement in the CFP can be viewed primarily, but not exclusively, as the integration of the views or the wishes of the fishing industry into the decision-

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making processes by means of a system of governance that embraces the principles and ideals of co-management and self-management as set out in the regulatory framework.

4.2-3. Substantial efforts have been made to ensure that the Union approach to stakeholder engagement under the CFP is not limited solely to industry representation. This is evident from the Council Decision establishing the [Regional] Advisory Councils [ACs], which provides a much broader spectrum of representation and makes two very broad classifications of stakeholder-led organisations, namely: the “fisheries sector” and “other interest groups.” The former is defined as meaning “the catching sub-sector, including ship-owners, small-scale fishermen, employed fishermen, producer organisations as well as, amongst others, processors, traders and other market organisations and women’s networks.” The latter includes all of the following: “amongst others, environmental organisations and groups, aquaculture producers, consumers and recreational or sport fishermen.” The use of the phrase “among others” clearly suggests that this list is neither inclusive nor exclusive but remains a representative list. The scientific community for instance could come within the scope of the latter definition and there are specific provisions in the Council Decision on the ACs for taking their views into consideration in the decision-making process. Similarly, the meetings of the AC General Assembly are open to the public. The wide scheme for stakeholder engagement set down in Annex III of the draft Basic Regulation supports this inclusive approach to representation.

4.2-4. This broad-brush approach to participation and representation under existing structures clearly suggests that the term “stakeholder” is not a term-of-art in EU fisheries law with specific legal meaning. Accordingly, it can have several meanings in different management and regulatory contexts under the CFP. Furthermore, governance structures and stakeholder involvement in management can be viewed from many perspectives ranging from broad stakeholder engagement on soft policy issues to their active participation in core management questions such as the right of stakeholders to manage fisheries resources, or their exclusive entitlement to property or user rights for a defined period under a fishery management plan. The latter can equate to “usufruct” in civil law systems, that is to say the right of enjoyment of a resource that remains in common ownership.

4.2-5. One further additional point can be made in relation to the information displayed in Table 2 and that is that the interests of stakeholders differ significantly. What is more, the scope for their greater involvement with the law-making and

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44 See section 8.5 infra.
45 See, B. Kuemlango, H. Teigene, “An Overview of Legal Issues and Broad Legislative Considerations for Community Based Fisheries Management” available from FAO.
policy processes under a reformed CFP may thus vary considerably in line with these interests.

4.3. What does stakeholder “involvement” in the CFP mean?

4.3-1. This is very much one of the core question to be addressed in the SOCIOEC project and again there are many possible answers that depend on how we define the term “involvement” in governance, management, or decision-making under the CFP. Perhaps a useful starting point is to draw some parallels with the legal requirements that arise in relation to public participation in environmental decision-making and access to justice under the Aarhus Convention. In this context, one has to distinguish very carefully the various roles for stakeholder involvement in fisheries management, governance and regulation from the very general “environmental” obligations that arise under this Convention and how these are applied to the wider public.

4.3-2. At one level, involvement under the Aarhus Convention may just entail notification and consultation regarding various decisions concerning the environment, as well as access to environmental information. Participation in the policy and decision-making processes pursuant to the CFP, on the other hand, can take many different forms including notification and consultation regarding the formulation and implementation of fishery management plans and programmes, as well as legislative proposals concerning various aspects of the CFP. In this context, there is some evidence of industry involvement in the formulation of the rules underpinning the CFP since its inception and most notably so since the establishment of the ACs. Moreover, with the coming into force of the Aarhus Convention, there is a major shift in emphasis on the wider landscape of EU law including the CFP towards improving the quality of stakeholder and public participation in environmental decision-making at national and regional levels within the EU. These obligations are set down in Directive 2003/35/EC and a number of related instruments pertaining to the Aarhus Convention, which clearly foresees that public participation in respect of the drawing up of certain plans and programmes relating to the environment. There are also different levels of participation in decision-making required by the MSFD, the EIA, and the SEA Directives.

4.3-3. Instructively, one study has identified three categories of public participation in shaping environmental policies and laws made by government and regulatory bodies. These categories are shown in Table 3 below. Again, one has to exercise

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48 Section 10 infra.

care in relation to this particular analysis as stakeholder involvement in the CFP takes a number of forms from a legal perspective and does not appear to tally exactly with the various schemes foreseen under the rubric of environmental law. For instance, under the CFP, it consists predominantly of the various processes that are in place for keeping the industry and other stakeholders informed of policy decision, as well as the content and shape of draft legislation at the EU and national levels. In some Member States, however, it goes well beyond this and could very well be described as “pluralistic and deliberative participation” by vesting industry or POs with a direct role in quota allocation and utilisation by means of a system of a property right or user entitlements.

Table 3: Stakeholder participation in decision-making (Adapted from source: S. Bell et al., Environmental Law, 8 Ed., (Oxford, OUP, 2013)

<table>
<thead>
<tr>
<th>Types of stakeholder participation</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Pluralistic participation, within which industry and other representative bodies speak and act on behalf of their constituent members.</td>
</tr>
<tr>
<td>• Stakeholder participation, within which proposals that have already been formulated are transmitted to interested parties to comment upon and refine.</td>
</tr>
<tr>
<td>• Deliberative participation, which consists of “agreeing the ground rules” - that is involving the stakeholder in determining what general policies and strategies should be adopted – before moving to the stage of specific proposals for implementation.</td>
</tr>
</tbody>
</table>

4.3-4. As will be seen further in Chapter 3 below, however, the general trend in EU law is to widen consultation in decision-making and many initiatives now stem from EU and national legislation that give effect to the Aarhus Convention, as well as by procedural mechanisms that apply under various EU Directives including those concerning environmental impact assessment, as well as the MSFD. Indeed, it should also be noted that the European Parliament tabled an amendment to draft Basic Regulation during the reform process, which stated that all actions taken by the Union and by Member States under the CFP must comply fully with the Aarhus Convention. In substance, these requirements are aimed at enhancing “deliberative participation” and would ensure that the wider public have full access to information about the policy, participate in fisheries management plans and programmes, and have access to justice in fisheries and environmental matters. This approach of course brings many benefits including increased transparency and legitimacy, and thereby reduces the potential for environmental or resource related conflicts and disputes. Moreover, there is considerable support in the specialist

50 Amendment 109, European Parliament First Reading, 6 February 2013.
literature for the view that deliberative participation results in better decisions.51 At practical and operational levels, however, such an approach would make fishery management incredibly complex and it is important to point out that these schemes under EU environmental instruments fall well short of pluralistic participation, whereby the fishing industry and other representative bodies are vested with the powers to act and make decisions on behalf of their constituents under the CFP concerning the allocation and use of a public resource.

4.3-5. Finally, as seen above, there are a number of diverse schemes for better laws and policy implementation that have evolved in various sector policies other than fisheries.52 Some of these schemes have a clearly defined role for stakeholders in the regulatory and decision-making processes but have only limited application to the CFP because of the exclusive nature of EU competence in relation to the adoption of conservation measures.53

4.4 Self-regulation and co-management in the North Sea shrimp fishery

4.4-1. In order to understand how a system of self-regulation and co-management operate in practice it may be best to look briefly at a functioning example. The management of the North Sea shrimp (C. crangon) fishery appears to be an excellent example of what can be achieved by industry lead initiatives in the domain of self and co-management under the CFP.54 In this particular instance, the objectives of the industry lead Agreement (or Plan) underpinning the management of this particular fishery are four-fold, namely: (1) to promote and maintain a productive and sustainably managed population of North Sea brown shrimp; (2) to limit as much as possible the impact of the brown shrimp fishery on the ecosystem of the brown shrimp and associated species; (3) to establish and maintain good relationships between stakeholders in the brown shrimp fishery; and (4) to maintain a good collaboration with the managing authority.

4.4-2. The management authority is the Fisheries Directorate in the Ministry of Agriculture, Nature Management and Food Quality. The participants in the Agreement are the signatory parties to the management plan, who must hold a license for brown shrimp fishing and be a member of one of the designated POs. The latter must be recognised by the Member State and have signed the management plan. Membership is open to participants from three Member States: the Netherlands, Germany and Denmark. The other stakeholders involved directly in management under the said Agreement include the following: the Dutch Fish

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52 See section 4.1 supra.
53 Some additional information is available from the EU database at: http://www.eesc.europa.eu/self-and-coregulation/full.asp?w=n&ID=81. There have been a number of Commission publications on the subject of "Smart Regulation" including COM(2010)543.
Product Board, the Ministry of Agriculture, Nature Management and Food Quality, the North Sea Foundation, the Waddenzee Foundation and the World Wide Fund for Nature. The latter list of stakeholders is revised periodically.

4.4-3. Each participant in the fishery is required to sign the management plan and must be a member of one of the prescribed POs, which is also party to the management plan. The POs in turn are responsible for ensuring compliance of the relevant laws and regulations in the management plan by their members. Moreover, participants must comply with all relevant national and international regulations for the fishery. The management plan deals with many of the standard issues in fishery management including: access, spatial planning measures, fishing effort limitations, temporal closures, and technical conservation measures addressing matters such as by-catch. There appears to be fairly robust enforcement and compliance provisions in the Agreements. For instance, compliance with fishing effort limitations and other management instruments is verified by an inspector, appointed by the Co-operative Association of the POs. There are designated places for the landing of catch and a broad range of measures to reduce the environmental impact of fishing activity including provisions that provide for the designation of closed areas. Significantly, participants and other stakeholders can propose adjustments the list of closed areas and the Co-operative Association must evaluate any such proposals. Arguably, the most impressive feature of this particular management scheme is the range and gravity of the penalties that can be invoked by the Co-operative Association if there is a breach of the rules by the members including a fine up to EUR 250,000 if there is a breach of the catch-reduction rule set down in the management plan.

5. Rationale for greater stakeholder involvement in governance, regulation and management

5-1. The European institutions view communication and greater engagement with stakeholders as “essential” for the achievement of the objectives of the CFP. The case supporting greater stakeholder involvement in the management and regulation of fisheries is usually based on the need to increase legitimacy, transparency, and accountability. This is underpinned by arguments associated with improving economic efficiency through the establishment of a system of private property rights and the implementation of responsible fishing practices through market-based incentives and goal-based approaches. Sometimes, it is perceived as a useful mechanism in addressing difficult aspects of the policy such as the reduction of fishing effort and surplus capacity in the fleet. Significantly, under the both the 2002 and 2013 Basic Regulation, greater stakeholder involvement in the CFP is also predicated on the view that the CFP will benefit from the knowledge and experience of fishermen and of other stakeholders.

55 Recital 28, draft Basic Regulation.
5-2. This approach to fishery management is founded on the belief that the fishing industry is best placed to implement management measures as they have a clear understanding of the tasks and challenges encountered in the practical aspects of conservation and resource utilisation. There is also support for the view that self and co-management will result in higher levels of compliance and accountability by the sector, as the industry has greater interests at stake in protecting private property rights. On a similar note, enhanced stakeholder engagement and enhanced private property rights will reduce the costs associated with the monitoring, control and surveillance of fisheries, as well as the inherent costs associated with the hierarchical top-down approach to fisheries management. This is based on an understanding that self-management and co-management are characterised by communication, cooperation and a consensus-based approach to decision-making regarding the adoption of conservation and management measures. The economic case is strengthened if the costs associated with self-regulatory measures are borne by the industry and this in turn leads to greater efficiencies regarding the utilisation of public resources for the purpose of management, administration and oversight. This latter point is highlighted by the Commission in the Green Paper on the reform of the CFP. The redistribution of costs to industry is not evident however in the substantive provisions of the draft Basic Regulation.

5-3. At a pan-European level, the raison d’être for enhanced stakeholder involvement is founded on the view that the traditional centralised top-down approach to fisheries management makes it difficult for the CFP to respond to regional variations at sea-basin level in the EU. Decentralisation or devolution thus accords with the ecosystem approach as articulated by a number of regional seas bodies including the OSPAR Commission, which has called for greater involvement of stakeholders in decision-making concerning sustainable uses of the regional seas. Indeed, greater stakeholder involvement in decision-making concerning oceanic resources is identified in a whole raft of environmental instruments since the early 1990’s, including; Principle 10 of the 1992 Rio Declaration on Environment and Development; Agenda 21 of the 1992 United Nations Conference on Environment

and Development; and the IUCN principles on ocean governance, which stress that decision-making ought to be transparent, accountable and inclusive.

5-4. On a similar vein, the FAO Code of Conduct for Responsible Fisheries provides that: States should, to the extent permitted by national laws and regulations, ensure that decision making processes are transparent and achieve timely solutions to urgent matters. States, in accordance with appropriate procedures, should facilitate consultation and the effective participation of industry, fishworkers, environmental and other interested organisations in decision making with respect to the development of laws and policies related to fisheries management, development, international lending and aid. In addition to the various soft law instruments, there are many concrete obligations set down by various international and regional treaties including the Aarhus Convention, which points out that “improved access and public participation in decision-making enhance the quality and the implementation of the decisions.” There is a summary of the rationale and the main arguments supporting enhanced stakeholder involvement in the CFP shown in Table 4 below.

Table 4: Rationale for enhanced stakeholder involvement in the CFP.

<table>
<thead>
<tr>
<th>Rationale for enhanced stakeholder involvement in the CFP</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Promotion of accountability and responsible fishing practices</td>
</tr>
<tr>
<td>• Raise awareness of management issues and industry driven solutions</td>
</tr>
<tr>
<td>• Improve transparency and the quality of decision-making by benefiting from industry knowledge and expertise</td>
</tr>
<tr>
<td>• Improve conservation and sustainability of the resource through buy-in</td>
</tr>
<tr>
<td>• Improve legitimacy in the eyes of stakeholders</td>
</tr>
<tr>
<td>• Facilitate management decisions that reflect local and regional conditions for specific fisheries</td>
</tr>
<tr>
<td>• Improve economic efficiency such as the reduction of the costs associated</td>
</tr>
</tbody>
</table>

62 See Agenda 21, Chapter 17, paragraph 23.2, in UN Doc. A/CONF.151/26/REV.1, Vol. 1, 12 August 1992
64 Art. 6.13 of the FAO Code of Conduct for Responsible Fisheries
with top-down fishery management

- Less reliance on traditional law enforcement, easier to implement at a practical level
- Improve compliance by industry
- Accords with international best practice both within and outside of the EU including the fishery management regimes in Namibia, Iceland, Norway, Mexico, South Africa, and New Zealand.
- Complements the central thrust of EU law and policy concerning environmental decision-making, good governance and better regulation

6. Institutions and bodies that provide a platform for stakeholder engagement under the CFP

6-1. There is scope for all stakeholders including representatives of the fishing industry to express their concerns regarding the CFP by means of the democratic processes that operate in the European institutions. This is achieved by means of the institutional structures and procedures established under the treaties and secondary legislation, namely: the European Parliament; the advisory bodies of the Union (the Economic and Social Committee and the Committee of the Regions); and through direct contacts with interested parties by means of the specialist fisheries consultative and representative bodies mentioned below including the ACs.

6-2. In this context, it is pertinent to note that stakeholder involvement, to some degree or other, in the policy predates the CFP by well over a decade and can be traced back to an Advisory Committee for Fisheries, which was first established in 1971, and subsequently renamed the Advisory Committee on Fisheries and Aquaculture (AFCA) in 1999. 66 The same year, the Sectoral Social Dialogue Committee for Sea Fisheries replaced the Joint Committee for Fisheries. As will be seen below, one of the most important developments in the reform of the policy in 2002 was the creation of specialist stakeholder consultative structures, the Regional ACs (RAC), which were tasked with improving the channels for dialogue between stakeholders and the Commission as regards policy decisions in fisheries management. This in turn was an important step in the regionalisation of the CFP and in the establishment of bottom-up involvement by stakeholders in the decision-making processes in a formal and legislative manner.

6-3. Today, the principal stakeholder consultation bodies for the CFP are the ACs and they have a solid legal basis in the Basic Regulation and in a number of secondary instruments. The ACs came into operation by means of Commission Decision with the first established for the North Sea in 2004. There is a number of new ACs established under the draft Basic Regulation and these will be examined in further detail in Chapter 3.

6-4. There are a number of Europe-wide bodies that are consulted by the Commission from time to time on draft legislation and these include: Europêche, the EU Fish Processors' Association, the EU Federation of National Organizations of Importers and Exporters of Fish, the European Association of Fish Producers' Organisations, and the Federation of European Aquaculture Producers. These bodies have a less formal consultative role than the ACs in the preparation of draft legislative measures.

6-5. POs are the backbone of the CFP and facilitate the decentralisation of many management decisions at an operational level in the Member States. More specifically, the Commission maintains a list of over 200 recognised POs in the fishery and aquaculture sector and they play a significant role in fishery management in several Member States including the administration and management of quotas. They are voluntary associations and are aimed at ensuring, in the first instance, the optimum conditions for the marketing of fishery products. They thus play a key part in market intervention and in price stability, as well as ensuring that the supply of fishery products matches consumer demand. For this purpose, each PO is required to adopt an operational programme that addresses the following: (a) a marketing strategy for bringing the volume and quality of supply into line with market requirements; (b) a catch plan or production plan depending on the species; anticipatory measures for adjusting the supply of species that are difficult to market;


69 Churchill and Owen, op. cit., supra

70 OJ C225/9, 30.7.2011.
and the penalties to be imposed on their members.\textsuperscript{71} As will be seen below, their role extends to promoting methods that encourage sustainable fishing and in some Member States this includes the collective management of quotas.\textsuperscript{72} Their potential in playing an enhanced part in co-management arrangements under the CFP was flagged during the course of the reform debate 2011-2013.\textsuperscript{73} We will return to this matter in Chapter 6.

6-6. Mention should also be made of the Scientific, Technical and Economic Committee for Fisheries (STECF).\textsuperscript{74} The former is an independent body made up of experts in the fields of marine biology, marine ecology, fisheries science, nature conservation, population dynamics, statistics, fishing gear technology, aquaculture, and the economics of fisheries and aquaculture.\textsuperscript{75} They are consulted by the Commission at regular intervals on matters pertaining to the conservation and management of living aquatic resources, including biological, economic, environmental, social and technical considerations.\textsuperscript{76} Members of STECF are appointed in their personal capacity and they must act independently of Member States and the interests of the various stakeholder groups, including the ACs.\textsuperscript{77}

\textsuperscript{72} See, for example, Marine Management Organisation, Rules for the management of UK fish quotas for ICES areas I, II, IV, VI, VII and associated areas and Vb (Faroese waters) in 2013. Available at: http://www.marinemangement.org.uk/fisheries/management/documents/quotas/ukrules2013.pdf
\textsuperscript{73} See Chapter 2 infra.
\textsuperscript{74} Art. 31(4) of Council Regulation (EC) No. 2371/2002, \textit{ibid}.
\textsuperscript{77} Art. 2(2) of Commission Decision 2005/629/EC
Chapter 2

REFORM PROCESS AND PROPOSALS

7. Background to the reform package

7.1-1. The reform of the CFP has its origin in the 2002 Basic Regulation (Council Regulation (EC) No. 2371/2002),\(^7\) the Court of Auditor’s report on control and enforcement of European fisheries law,\(^7\) as well as the coming into force of the Lisbon Treaty, which brought about several important changes to the law-making procedures in the EU institutions.

7.1-2. The Commission published a Green Paper on the reform of the policy in 2009.\(^8\) This paper concluded that the policy was not achieving many of its key objectives and that the sector had “few incentives to behave as a responsible actor accountable for the sustainable use of a public resource”.\(^8\) The Commission suggested among other measures that that “co-management arrangements” could be developed to reverse this shortcoming in the future.\(^8\) This was founded on the belief that sustainable fisheries could be achieved in Europe by 2020 and that the CFP would be characterised, among other matters, by full stakeholder participation in the decision-making processes concerning policy implementation.\(^8\)

7.1-3. After an extensive period of public consultation (reviewed below),\(^8\) the Commission published its package of reform measures in July 2011. This was comprised of a number of elements including legislative proposals on the following: a new management regulation;\(^8\) a new regulation on the common organisation of the market in fishery and aquaculture products,\(^8\) as well as a regulation on the European Maritime and Fisheries Fund. In parallel with these important legislative initiatives and to engender public debate, the Commission published

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\(^7\) European Court of Auditors’ Special Report n°7/2007, on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources together with the Commission’s replies. OJ C317/1 of 28.12.2007.


\(^8\) COM(2009)163 final at 11.

\(^8\) Ibid.

\(^8\) Id at 4.


communications on the external dimension of the policy and on the reform of the policy; as well as a report on the reporting obligations applicable to the conservation and sustainable exploitation of fisheries resources.

7.1-4. Essentially this package is made-up three concrete legislative proposals and two soft-law policy initiatives. The legal basis for the three legislative proposals was rooted in Article 43(2) of the TFEU and this entails detailed scrutiny of the proposed measures by the European Council and Parliament under the ordinary legislative procedure, as well as obtaining the opinion of the European Economic and Social Committee and the Committee of the Regions. The view of these bodies on the most appropriate governance structures for the CFP therefore merits further consideration here. First, however, it is necessary to take a brief look at the approach advocated by the Commission in the Green Paper.

7.2 Approach to governance advanced by the Commission in Green Paper

7.2-1. The views of the Commission on the reform of governance structures and stakeholder involvement in management are set out in the Green Paper on the reform of the CFP. As a start point, it ought to be noted that the Green Paper is an elaborate document and addresses many aspects of the CFP. As such, it is a discussion document and not legally binding. Moreover, it is also important to keep in mind that the Commission’s proposals on the decentralisation of management and a greater role for the industry in the policy process did not evolve in a vacuum and were informed by the views of the social partners in the Social Dialogue Committee on Sea Fisheries and the European Transport Workers’ Federation, as well as many of the other consultative bodies mentioned in section 6 above.

7.2-2. Throughout the Green Paper, there are several references to the enhancement of stakeholder involvement in the policy process. Significantly, the Commission make a number of suggestions regarding the development of self- and co-management under a revised CFP. One of the key passages in the Green Paper on this subject is worth quoting in full and reads as follows:

“Very little can be achieved if the forthcoming reform fails to motivate the catching sector, the processing and seafood chain as well as consumers to support the objectives of the policy and take responsibility for implementing them effectively. It is critical to the success of reform that industry should understand the need for it, support it and have a genuine stake in its

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89 Report on Reporting Obligations on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, COM(2011) 418.
successful outcome. In a mostly top-down approach, which has been the case under the CFP so far, the fishing industry has been given few incentives to behave as a responsible actor accountable for the sustainable use of a public resource. Co-management arrangements could be developed to reverse this situation.

There are two closely linked aspects to involving the industry more closely: responsibilities and rights.

The industry can be given more responsibility through self-management. Results based management could be a move in this direction: instead of establishing rules about how to fish, the rules focus on the outcome and the more detailed implementation decisions would be left to the industry. Public authorities would set the limits within which the industry must operate, such as a maximum catch or maximum by-catch of young fish, and then give industry the authority to develop the best solutions economically and technically. Results-based management would relieve both the industry and policy-makers of part of the burden of detailed management of technical issues. It would have to be linked to a reversal of the burden of proof: it would be up to the industry to demonstrate that it operates responsibly in return for access to fishing. This would contribute to better management by making the policy considerably simpler and removing the current incentives for providing false or incomplete information. Proportionality should be observed and the impact on preserving a competitive industry when implementing results-based management.

There are already many examples of such self-management through bottom-up initiatives in the European catching sector. Some Producer Organisations (POs) manage the quota uptake of their members and provide for private penalties against those who overshoot their individual quota at the expense of others. There are examples of groups of vessels that have taken on the burden of proof by providing full documentation of their catches, often as a response to processors’ and retailers’ pressure to improve traceability. These initiatives could be generalised by turning the POs into bodies through which the industry takes responsibility for documentation and quota/effort management.

Giving the industry more responsibility requires that safeguard mechanisms are in place and implemented by the Community.

There are cases where the catching sector shoulders greater responsibility to adapt the size of the fleet and their management costs. In some cases, this has been achieved by giving rights to the industry, which has encouraged them to use their investments more efficiently and eliminate surplus capacity.
In the context of a CFP, which gives more rights to the catching sector and relieves the industry the burden of the micro-management it will be relevant to raise the issue of sharing the costs of fisheries management. So far the fishing industry has been given free access to a public resource and management costs have been largely incurred by taxpayers.

Rights, responsibility and accountability should of course go hand in hand: those who exercise responsibility in a proper and effective manner should be the ones to enjoy the access to fish stocks.\textsuperscript{91}

7.2-3. In the Green Paper, the Commission also draws attention to a number of related issues that are relevant to the enhancement of stakeholder involvement in the CFP. More specifically, they focus on the hierarchy for decision-making and the failure of the policy to distinguish decisions concerning the principles of fisheries management from the practical aspects of policy implementation. As a result of this approach, the Commission noted that all decisions tend to be taken at the highest political level by the Council of Fisheries Ministers and implemented subsequently by means of regulations, which are binding on the Member States and the sector. As a matter of practice, this regulatory approach allowed little scope for a more flexible approach to the technical task of implementation and gave the industry little say in key management decisions. In order to address this shortcoming, the Commission advocated the drawing of a clear hierarchical distinction between decisions concerning the fundamental principles underpinning the policy and the technical task of implementing policy detail in the Member States.

7.2-4. Two reform options to address this challenge are mentioned in the Green Paper.

1. The first option entails greater use of the comitology procedure in the European institutions, which would allow the Council to delegate a greater role for the Commission acting in cooperation with Member States and the European Parliament.

2. The second option is far more innovative and focuses on establishing “specific regional management solutions implemented by Member States, subject to Community standards and control”. Essentially, this would entail the taking of decisions on fundamental principles at the EU level (such as those pertaining to MSY) and the delegation of implementation decisions at Member State level subject to the caveat that Member States would work at the level of the marine region in relation to shared stocks and ecosystems.

The underlying rationale for both options (delegation to the Commission and co-management at a regional level) is that it will lead to a simpler and cheaper policy and will allow “governments and the industry to adapt the implementation of the

\textsuperscript{91} Green Paper, Reform of the Common Fisheries Policy, COM(2009)163 final, 22.04. 2009, pp.11-12
policy to their needs and to find the best solutions both technically and economically”.

7.2-5. Significantly, the Green Paper does not elaborate a case for an augmented role for the ACs in fisheries management. Indeed this appears to be a notable feature of the views expressed by the Commission, which is focused on the advisory role of stakeholders in relation to decision-making at a regional level under a revised CFP (emphasis added). Furthermore, regarding the overall hierarchy for decision-making under the CFP, the Green Paper is very clear that decisions on principles would remain entirely within the remit of the EU and the Member States and that implementing decisions ought to be devolved and/or decentralised to national and regional authorities in the Member States. Perhaps the most notable innovation advanced by the Commission in relation to fishery management is the advancement of a system of Transferable Fishing Concessions and this proposal is examined in further detail below.

7.2-6. The Commission preference thus appears to reflect Option 2 with elements of Option 3 under the SOCIOEC Analytical Framework. In hindsight, the Commission never really embraced a truly partnership approach and appear to have run the entire reform process as a consultative process to the frustration of many in the stakeholder community including the [R]ACs. There were of course a number of Union institutional reasons and limitations stemming from the law reform procedures why this was the case.

7.3 Results of public consultation on Commission’s legislative proposal

7.3-1. The Commission received written contributions from well over 350 public and private parties regarding their proposals for the reform of the policy. In addition, there were in excess of 200 meetings with representatives of the Member States, ACFA, the ACs, trade unions, NGOs, as well as representatives of the fishing sector. Although it is not within the purview of this paper to review all of the contributions received during the public consultation process, it is nevertheless interesting to note that there was general support for the adoption of a decision-making structure where the European institutions agreed on the policy and principles underpinning the CFP and where there is scope for policy implementation by means of devolved structures that are closer to industry and to stakeholders in the Member States.

7.3-2. In relation to decentralisation/devolution, the report on the outcome of the public consultation exercise provides as follows:

“A significant number [of those consulted] identifies the need for a separate regional body, with varying degrees of powers and responsibilities. Most, including the European Parliament [EP], envisage a mainly advisory body to discuss and prepare proposals for policy and legislation adoption by the EU

92 Ibid.
93 See Chapter 3 below.
institutions. Associating the stakeholders and others involved, the regional body would then be used for dialogue and discussion. The Baltic region is sometimes mentioned as a possible pilot of a Member State organisation that develops and decides on applied regulations (e.g. discards, national quota management). Others envisage a regional body as the implementing entity for long-term plans with some room for operative regulating powers and implementation decisions. Some advocate devolution of powers (e.g. technical details and effort regulation). Some contributions suggest a combination of functions. On the composition most see the regional body as a Member State-led entity, in a number of cases membership of industry and stakeholders is advocated, while in other contributions the stakeholders keep an advisory function through the RAC [AC]. The European Community is envisaged as a member in some contributions while in others as an active observer/collaborator. Some propose a transformation of the RAC [AC] into a regional advisory body with both Member States and stakeholders.

On the RAC [AC] there are some clear messages: their success should be expanded through strengthening them, and (according to the RAC themselves) by giving more weight to their advice, particularly is cases of unanimity of the advice. The European Parliament explicitly requests adequate funding. Some propose a change of composition to better balance the industry with the other interests and non-represented stakeholders.94

7.3-3. Significantly, the industry was broadly, if somewhat cautiously, supportive of the concept of self-management subject to an assessment of the risks and benefits, and provided that it empowers fishermen to decide the best technical solutions and marks a shift away from micro-management.95 In contrast, the majority of environmental NGOs were reluctant to embrace self-management on the grounds that it would require greater oversight as well as the implementation of more robust control and enforcement Mechanisms.96 On the other hand, many NGOs were supportive of the concepts of participatory governance or co-management.97 Overall, the majority of stakeholders (which includes the European Parliament and some Member States) were of the view that industry responsibility in management is closely allied with their involvement in the decision-making process.

7.3-4. One of the guiding principles of the CFP is that it is based upon the best available scientific advice and that decisions are founded upon accurate scientific information on the status of fishing stocks, the level of fishing activity, as well as the environmental impact of fishing practices on the broader marine environment and marine ecosystems more specifically. One of the outcomes of the public consultation process concerning the reformed CFP is that there was general agreement among stakeholders that the policy should be based on science and on a

95 Ibid.
96 Id.
97 Id.
better cooperation between the fishing sector and scientists. Furthermore, the consultative structures established under the revised policy should provide appropriate channels for the fishing industry and other interested parties to engage in the collection and delivery of scientific information for use in the policy process that informs fishery management decisions.

7.3-5. In summary, the public consultation process revealed that there was general support for a clearer chain of responsibilities combined with regionalisation, as well as the vesting of the industry with different degrees of responsibilities under new governance structure underpinning the CFP. If one applies the analytical framework that is used by SOCIOEC as shown in Table 1 above, then it appears that Option 3 co-management by partnership is the preferred management model according to the results of the public consultative process. Essentially, this scheme provides a plinth for EU/national governments, users, and stakeholders to cooperate as decision-making partners in various aspects of fishery management under the CFP.

7.4 European Parliament calls for a new fisheries governance model

7.4-1. The views of the European Parliament deserve careful consideration as it exercises significant powers under the ordinary legislative procedure in the European institutions. In recent years, the Parliament has become a powerful advocate of the need to enhance the role of industry as well as other interest groups in the management and implementation of the CFP. In particular, the Parliament has pushed vigorously for a move away from the traditional hierarchical approach to fisheries management and sought greater engagement with a wider spectrum of stakeholders in the policy process. Thus it is unsurprising to note that the Parliament has sought to empower the ACs and other actors in the formulation and implementation of the CFP. Indeed, this is a consistent theme running through the European Parliament’s debate and various resolutions during the course of the CFP reform process. Outside of the domain of commercial sea fisheries, it is interesting to note that there is nothing unique in this position as the Parliament has been a longstanding proponent of new or alternative governance models in many sectors including employment, social policy and environmental policy.

7.4-2. The call for a new governance model for fisheries is clearly evident in the European Parliament Resolution of the 25 February 2010, which addressed the topics of management models, decentralisation, the need for greater industry responsibility and supervision of fisheries management and implementation measures. In supporting a major shift away from the hierarchal nature of decision-making and law-making under the CFP, the Parliament recommended that

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99 See supra.
100 See, for example, European Parliament Resolution of 24 April 2009 on ‘Governance within the CFP: the European Parliament, the Regional Advisory Councils and other actors’ 2008/2223(INI).
the responsibilities for developing and implementing individual operating plans for fisheries should be devolved to Member States and regional bodies.\(^{103}\) On a similar vein, the Parliament called for the abandonment of the traditional top-down approach to fisheries management and its replacement with a bottom-up decision-making process for the CFP.\(^{104}\) The preference for a non-hierarchical process of decision-making is somewhat confused by an oblique reference to the concept of “horizontal decentralisation” in the Resolution.\(^{105}\) Regrettably, there appears to be no further elaboration as to what this concept could mean for the practical aspects of fisheries management on a day-to-day basis in the Member States.

7.4-3. Instructively, the overlapping concepts of decentralisation and regionalisation are perceived as closely aligned if not symbiotic by the Parliament. The underlying rationale for enhanced stakeholder involvement in the policy according to the Parliament is that the involvement of stakeholders in the design and management of fisheries management measures will lead to a more effective policy in the longer-term. Moreover, it will lend itself to a more coherent approach to the tasks that must be undertaken in other maritime policy areas. One key point is the unequivocal rejection by the Parliament of any attempt to adopt a single EU fisheries management model for the CFP. Following on from this, the Parliament requests the Commission to explore the options for the adoption of new fisheries management models that are complementary to the TAC / quota system.\(^{106}\) This includes models that are connected with the management of fishing effort and the use of individual transferable fishing rights.

7.4-4. The Parliament considered that any change in the management model underpinning the CFP should be introduced initially on a transitional basis in the Member States with a view to avoiding sudden changes at a EU level and to ensure that existing arrangements including the principle of relative stability are fully respected.\(^{107}\) Again this line of reasoning is founded on the view that greater participation by stakeholders and clearer objectives for the policy will result in better understanding, acceptance and implementation of management measures by the fishing industry.\(^{108}\) One central thread running through the Parliament’s perspective concerns the enhanced role that ought to be played by the ACs, as well as other stakeholders such as the European Fisheries Control Agency in the fisheries decision-making process.\(^{109}\) In relation to this particular role, the Parliament calls for a stronger regional element in decision-making that reflects the regional specificities of ecosystems and natural production conditions.\(^{110}\) Furthermore, it advocates strongly that EU and national funding should only be provided for activities that are

\(^{103}\) Para 71 of European Parliament Resolution 2009/2106(INI).
\(^{104}\) Paras A and 91 Para 71 of European Parliament Resolution 2009/2106(INI).
\(^{105}\) Para 77 of European Parliament Resolution 2009/2106(INI).
\(^{106}\) Para 82 of European Parliament Resolution 2009/2106(INI).
\(^{107}\) Ibid.
\(^{110}\) Ibid.
based on “ecologically, economically and socially sustainable” practices in relation to fisheries.111

7.4-5. The topic of enhanced stakeholder involvement on the CFP is a central and overriding consideration in the approach taken by the Parliament to the reform of the policy during the period 2011-2013. Significantly, the Parliament supported a shift away from the hierarchical forms of decision-making and policy-formulation. From a legal perspective, this of course gives rise to a new challenge to the traditional forms of law-making underpinning the CFP and to the whole concept of governance by means of detailed EU fisheries legislation and regulation per se. Interestingly, the management models that place the stakeholders at centre stage are advanced by the Parliament as a panacea without any real discussion of their effectiveness or any empirical examination of relevant evidence concerning their long-term prospects of achieving sustainable fisheries. Accordingly, it appears that the Parliament is largely supportive of a governance system that entails a high degree of self-management by industry with devolved authority to users and stakeholders. Some of the language in the Parliamentary resolutions is vague and lacks legal clarity and therefore it is difficult to say precisely what such a system of empowerment means in practice under the CFP. Nevertheless, the approach advocated by Parliament is perhaps most closely aligned with Option 4 as set out in the SOCIOEC Analytical Framework, shown in Table 1 above.

7.5 Evolving position of the Council of Ministers on a new governance model for the CFP

7.5-1. The position of the Council of Ministers regarding governance structures and stakeholder involvement in fisheries management has evolved considerably over the lifetime of the reform debate 2011-2013. At the outset, the Council supported broadly the Commission’s conclusions in the Green Paper regarding the need for greater stakeholder involvement in decision-making under a revised CFP. They endorsed the need for regionalisation and Member States stressed the importance of close consultations with stakeholders to ensure that they later accepted the outcome of the reform process.112 Notably, many Ministers identified the devolution of decision-making to regional/national levels as one of the key topics for discussion and further consideration during the reform process.113 As far back as 2010, several Member States had already identified the devolution of decision-making to regional/national levels and closer involvement of stakeholders as a key element in the reform of the policy, as well as a differentiated management approach for industrial and coastal / small-scale fleets.114 However, it should also be pointed out that the views of the Member States on this issue were not entirely

111 Id.
113 Ibid.
114 See press Release on the 3025th Council meeting, Agriculture and Fisheries, Luxembourg, 29 June 2010, at pp.8-9.
consistent and unambiguous. Thus, for example, the results of the FP 7 MEFEO research project (Making the European Fisheries Ecosystem Plan Operational) demonstrate that the majority of Member States were concerned with the process of regionalisation on the grounds that it would create just another layer of decision-making and thus increase administrative costs and place further burdens on tight budgets for fisheries management at national levels.\(^{115}\)

7.5-2. Nevertheless, during the course of their deliberations on the Commission legislative proposal for a new draft Basic Regulation, the Council debated several of the key governance issues including an enhanced role for the ACs by providing them with a legal basis in submitting recommendations on how to simplify rules on fisheries management.\(^{116}\) Moreover, the Council supported the codification of stakeholder involvement in the policy process as one of the principles of good governance for the CFP.\(^{117}\) On the one hand, it should also be noted that the Council has not pursued the concepts of self and co-management of fisheries with the same vigour as the Parliament or in line with the initial thought-provoking views expressed by the Commission in the Green Paper on the reform of the policy as outlined above.\(^{118}\) During the intense period of negotiations conducted in 2012-2013, on the other hand, the Council appears to have accepted decentralisation and devolution as core management concepts as is evident from the substance of the Draft Basic Regulation, which is examined in Part 3 below.

7.5-3. In general, however, it will be seen in many of the substantive provisions in the draft Basic Regulation that there is not a radical or fundamental shift away from the top-down approach at EU/Member State levels to enhanced stakeholder involvement in governance under the CFP. Indeed, at first sight, if one applies the SOCIOEC Analytical Framework shown in Table I above, the approach of the Council falls clearly into Option 2: co-management by consultation where extensive formal mechanisms for consultation (and feedback on use of recommendations) with users and stakeholders exist, but all decisions are taken by EU and national governments.\(^{119}\)

7.5-4. Nevertheless, there are a number of elements in the basic Regulation that reflects a shift in the Council’s position towards greater stakeholder engagement and regionalisation as will be evident in Chapter 3 below. These must be welcomed as positive steps towards greater decentralisation of the policy. Moreover, these elements have significant potential to develop into a co-management by partnership approach (Option 3 in Table 1) if they are allied to the iterative processes under a range of marine environmental legislation, reviewed in Chapter 4, that are increasingly important for the practical implementation of the CFP. Here we can see a perceptible shift towards consultation and participatory processes for stakeholder

\(^{115}\) See: http://www.liv.ac.uk/mefepo/.

\(^{116}\) Partial general approach on the CFP basic regulation adopted at Council meeting 12 June 2012.

\(^{117}\) *Ibid.*, Article 4(d), Draft Basic Regulation.

\(^{118}\) See section 7.2 *supra*.

\(^{119}\) See section 4.1 *supra*.
engagement under the MSFD, the Habitats and Birds Directives, as well as the EIA and SEA Directives.

7.6 Summary of the views of Union institutions and the public

7.6-1. Although it is not clear-cut, if one applies the SOCIOEC Analytical Framework to the preferences expressed by the Union institutions and the public, during the reform process 2011-2013, then it appears that there was a preference for the introduction of a new governance scheme which entails a partnership approach to the tasks of fishery management. This aligns closely with Option 3 above with some support for elements of Option 4.

Table 5: Summary of the institutional and public views on a new governance model (2011-2013).

<table>
<thead>
<tr>
<th>Institutions and the public</th>
<th>SOCIOEC Analytical Framework</th>
</tr>
</thead>
<tbody>
<tr>
<td>European Commission</td>
<td>Option 2 with elements of Option 3</td>
</tr>
<tr>
<td>Public and stakeholders</td>
<td>Option 3 (co-management by partnership)</td>
</tr>
<tr>
<td>European Parliament</td>
<td>Option 4 (co-management by delegation)</td>
</tr>
<tr>
<td>Council of Ministers</td>
<td>Option 3 (co-management by partnership)</td>
</tr>
</tbody>
</table>
Chapter 3

BASIC FISHERY MANAGEMENT REGULATION

8.1 A fresh regulatory perspective for the CFP

8.1-1 This part of the report examines several key aspects of the draft Basic Regulation and explains how new provisions in the regulatory code are aimed at strengthening governance structures and devolving certain aspects of fishery management under the CFP. The discussion starts out by highlighting the regulatory impact assessment of the Commission’s legislative proposal and then moves on to identify some of the innovative features in the regulatory framework and to explain how these have the potential to impinge upon governance structures and stakeholder engagement. Specific mention is made of the following: the use of transferable fishing concessions as a mechanism for establishing systems of self and co-management of fisheries; the role of ACs in decision-making and fisheries management; the process of regionalisation of fisheries management as advanced by the Basic Regulation.

8.1-2 As pointed out in the introduction to this report, the text of the draft Basic Regulation used for this discussion is the text presented by CORPER to the Committee on Fisheries on 11 June 2013. Although there was political agreement on the Council position in relation to this text, a second reading of this instrument is scheduled for the European Parliament on the 22 October 2013. Accordingly, some of the provisions discussed below may be revised, when the law-making procedures are completed in the European institutions, in the fullness of time.

8.2 Regulatory Impact Assessment

8.2-1 After completing wide consultation with interested parties and circulating the draft legislative act to national parliaments in the Member States, the Commission presented a proposal for a new basic fisheries management regulation to the Council and Parliament in July 2011. This proposal addressed many of the concerns voiced by the European institutions and the Member States on the issues of governance and stakeholder involvement in management, that were highlighted above. In line with standard procedure, the legislative proposal was subject to comprehensive regulatory impact assessment (IA), which is the analytical framework that assesses the various options for regulatory and policy intervention by the Commission. The aim of this exercise is to identify both the positive and negative

120 See text of Draft Regulation appended to the Council of Ministers Interinstitutional File: 2011/0195 (COD), Brussels, 11.06.2013.
122 See Chapter 2 supra.
123 As part of this process, the Commission publishes an Impact Assessment Report (IAR), which reflects the views of the various stakeholders on the policy reform options. In order to do that
impacts of the proposed measures, as well their conformity with the principles of proportionality and subsidiarity. The importance of this exercise should not be underestimated as the Court of Justice has referred to the results of IA in judicial proceedings when reviewing the legality of EU legislation in other policy sectors.\textsuperscript{124}

8.2-2. According to the IA, the main problems of the CFP are the lack of environmental sustainability, economic sustainability, social sustainability, as well as complexity in the regulatory framework.\textsuperscript{125} The latter made regulatory compliance difficult to achieve and reduced industry responsibility. As regards fisheries governance, the IA states the following:

"The decision-making does not distinguish between principles and strategies on the one hand and implementation and detailed rules on the other. Decisions are taken (by the Council of Ministers) in a top-down manner, with a tendency to micromanage the fisheries activities (i.e. the Baltic Technical Measures regulation lays down a provision that gives step by step instruction on how to repair a certain gear). This results in a policy which is increasingly complex, and difficult to manage and enforce.

Furthermore, there is no clear hierarchy of objectives in the current CFP, which incentivizes policy decisions based on short-term economic and social considerations, at the expense of long-term environmental sustainability.

The combination of these two elements reduces the quality of governance."\textsuperscript{126}

8.2-3. The IA notes that there is substantial support among stakeholders for the elimination of short-term focus, top-down and micro-management that has characterised the CFP since its establishment.\textsuperscript{127} Moreover, the IA records the call for a move to a governance model with increased regionalization and which distinguishes between high level, long-term objectives and basic, downstream implementation. Significantly, the IA notes that many stakeholders including environmental NGO, several Member States and the fishing industry, supported a results-based approach to fishery management. Results based management is defined in the IA as follows:

the IAR follows a well established methodology which identifies the structure, problem, performance and problems of the current CFP, the need for EU involvement, the justification for reform, an assessment of the objectives of the policy, as well as an assessment of the effectiveness of the reform options and their environmental, economic and social impact. A central element in this process is risk assessment and an examination of potential risk mitigation measures that are capable of ameliorating policy shortcomings. On the whole, the IA undertaken on the draft Basic Regulation is a rigorous exercise and provides considerable information concerning the rationale underpinning EU reform proposals.

\textsuperscript{124} See Case C-58/08 The Queen, on the application of Vodafone Ltd v Secretary of State for Business, Enterprise and Regulatory Reform, [2010] ECR I-04999.
\textsuperscript{125} SEC(2011) 891, Brussels, 13 July 2011, p.6.
\textsuperscript{126} SEC(2011) 891, Brussels, 13 July 2011, p. 10-11.
\textsuperscript{127} SEC(2011) 891, Brussels, 13 July 2011, p. 29-30.
“...a governance environment where the (political) decision making obliges the implementing actors to ensure that the implementation process and products contribute to achievement of the desired results (formulated in light of the objectives, targets and standards set in legislation)”.  

8.2-4. The IA notes that the revised regulatory scheme for the CFP as set out in the Basic Regulation has a number of features including integrated multi-annual plans by fishery (and sea-basin) and is predicated on the aforementioned results-based management approach (target and harvest rules for all stocks in the fishery). Management measures under the revised scheme will focus on stock composition, discards, ecosystem objectives for non-target species, as well as other biodiversity targets.

8.2-5. According to the IA, a key instrument is the establishment of a system of Individual Transferable Rights (ITRs) for EU fisheries to eliminate overcapacity in the fishing fleets of the Member States. The IA notes that this particular tool will facilitate self-management and co-management under the CFP. Moreover, the IA suggests that simplification of the legal framework combined with increased self-responsibility for the industry ought to improve compliance with the policy and reduce the cost of enforcement. The downside of this approach is that there will be additional financial costs, which will have to be borne by the Member States in relation to the acquisition of scientific advice and by industry in relation to the administration of the ITRs. In the case of the Fisheries Partnership Agreements concluded by the EU with third countries, the IA suggests that this approach would entail the transfer of the cost of licence fees to vessel owners. The IA also reviews a number of other options that would see a significant improvement in governance resulting from the coordinated regional approaches by Member States, as well as increased stakeholder representation and participation. Again, the IA notes that that these options would also entail significant increases in costs and require additional research prior to their adoption and implementation under the reformed CFP.

8.3. Regulatory features impinging upon governance

8.3-1. The Basic Regulation is a multifaceted instrument and has a number of features that set down the parameters for improving the governance structures applicable to the CFP and strengthening the avenues that are open for greater stakeholder involvement in fisheries management at national and regional levels. As such, the Basic Regulation defines the general framework that applies to fisheries under the CFP, sets down the basic principles and standards, as well as the timeframe for the adoption of management and implementation measures. In addition, it addresses the role of industry, the Member States, the European Commission, and the various bodies and competent authorities that operate at

128 SEC(2011) 891, Brussels, 13 July 2011, footnote 99 at p. IX.
national and EU levels. When one studies the text of the Basic Regulation, it is evident that the provisions on decentralisation, regional flexibility and the simplification of the regulatory framework, all have the potential to bring about some major changes to the traditional *modus operandi* of the CFP. They will thus re-orientate the policy towards a governance model that meets the needs of the sector over the coming decade.

8.3-2 As a start point, it should be noted that the Basic Regulation retains the rules that restrict access to resources within the 12 nautical mile zones of Member States on the grounds that these measures help conservation by restricting fishing effort in the most sensitive zone of Union waters.129 As noted in the Preamble, these rules have also preserved traditional fishing activities on which the social and economic development of certain coastal communities is highly dependent.130 Significantly, the European Parliament sought, during the course of the reform debate 2011-2013, to strengthen these rules to give preferential access for small scale, artisanal or coastal fishermen.131 There was also consensus in the European institutions that the Basic Regulation must provide a legal basis for Member States to adopt conservation and management measures for stocks in Union waters applicable solely to Union fishing vessels flying their flag.132 Notably, the Basic Regulation reflects European institutional agreement on the prohibition on discards, as well as the retention of the principle of relative stability. The latter aims to ensure the relative stability of fishing activities by allocating fishing opportunities among Member States based on a predictable share of the stocks for each Member State.133 As such, it clearly curtails the scope for the development of a system of private property rights in relation to fisheries at a pan-European level. Furthermore, the Basic Regulation also provides that the interests of each Member State shall be taken into account when new fishing opportunities are allocated.134 Importantly for Member States on the periphery of the Union, the Council has also sought for the codification of the Hague Resolution and its inclusion in the Basic Regulation.135 This Resolution, which was first adopted in 1976, is aimed at safeguarding and taking “full account” of the particular needs of regions where local communities are especially dependent on fisheries and related activities.136 The basic principles of resource allocation under the CFP as reflected in the principle of relative stability and the Hague Resolution will thus undoubtedly shape the future axis along which management measures will evolve. In other words, the development of any system of self or co-management of fisheries in the Member States or at a regional seas level will have to respect the principles of relative stability and the Hague Resolution.137

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129 Recital 14, Rev 5 of Revised 3-column table of Basic Regulation, 5.03.2013.
130 Ibid.
131 See Chapter 2 supra.
132 Ibid.
133 Article 16(1), Draft Regulation, Brussels, 11.06.2013.
134 Ibid.
136 Ibid.
137 See Chapter 6 infra.
8.3-3. There is however considerable scope under the Basic Regulation for enhancing the role of the fishing industry in the policy process. As may be recalled from the debate during the reform process, the European Parliament has sought to vest operators in the fishing industry with a greater say in the design and implementation of multi-annual fishing plans, and to provide them with the means to work in conjunction with scientists and the Union institutional partners, as well as national bodies, in formulating and implementing specific management solutions. The Parliament reflecting perhaps their green credentials has sought to ensure that access to fishery resources “should be based on transparent and objective environmental and social criteria, as a means of promoting responsible fishing, which would serve to ensure that those operators who fish in the least environmentally damaging way and provide the greatest benefits for society are encouraged.” During the course of the first reading of the Basic Regulation, as pointed out above, the Parliament emphasised that the CFP must ensure: “a decentralised and regionalised approach to fisheries management; appropriate involvement of stakeholders, in particular of ACs and social partners, at all stages - from conception to implementation – of the measures; and the need to carry out environmental and strategic impact assessments.”

8.3-4 The Preamble of the Basic Regulation suggests that Member States “distribute quotas between vessels in a mix reflecting as much as possible the expected composition of species in the fisheries. Mismatch between available quotas and actual fishing pattern could be adjusted through quota swaps with other Member States, including on a permanent basis.” The Preamble calls upon Member States to consider facilitating vessel owners’ pooling of individual quotas for example in POs or in groups of vessel owners. The latter recommendation is of course fully consistent with giving industry greater responsibility in management decisions at local levels in the Member States.

8.3-5. In the main, however, the principal means advanced by the European institutions to enhance governance structures and to expand the scope for stakeholder involvement in the management of fisheries appears in the form of a three strand approach codified in the Basic Regulation, which entail (1) the voluntary establishment of a system of transferable fishing concessions; (2) the enhancement of the role of the ACs in the policy and decision-making processes; (3) and the adoption of regional management solution to specific issues such as by means of the adoption of multiannual plans for agreed fisheries. These three strands are reflected in several substantive provisions of the Basic Regulation that merit separate consideration below as they have the potential to enhance stakeholder engagement

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138 See Chapter 2 supra.
141 Recital 19, Draft Regulation, Brussels, 11.06.2013.
142 Ibid.
and industry involvement in the practical aspects of fishery management and resource allocation and utilisation in the Member States.

8.4 Transferable fishing concessions as a delivery mechanism for self and co-management

8.4-1. From the outset of the reform process, there was considerable disparity in the views articulated by the European institutions (the Commission, Council and Parliament) and indeed in the Member States regarding the precise mechanisms that ought to be used to improve stakeholder engagement and responsibility in the practical aspects of fishery management. Most notably, the utilisation of transferable fishing concessions (TFCs) as a mechanism for the decentralisation of fisheries management decisions to industry and as a means to empower stakeholders under the revised CFP was very much disputed within the European institutions. For instance, a brief perusal of the preparatory documents and the text of the Basic Regulation reveals that the Commission in a bold and innovative move proposed the introduction of a system of TFCs for all vessels over 12 meters and for all vessels with towed gear irrespective of size. In a relatively oblique manner, the term “transferable fishing concessions” is defined as follows:

“the revocable user entitlements to a specific part of fishing opportunities allocated to a Member State or established in management plans adopted by a Member State in accordance with Article 19 of Regulation (EC) No 1967/2006, which the holder may transfer to other eligible holders of such transferable fishing concessions.”

8.4-2. In accordance with this definition, TFCs appears to have three fundamental features, namely: (1) the establishment and vesting of clearly identifiable economic entitlements or rights to fishers; (2) transferability; and (3) a market based approach to the allocation, utilisation and transferability of such rights subject to a number of conditions. This approach to fishery resource management is informed by the experience in Denmark and elsewhere in the EU including Estonia, Finland, Germany, Italy, Latvia, Lithuania, Malta, the Netherlands, Poland, Portugal, Sweden and the UK. There are also many examples of the success of this approach in fishery management outside of the EU as mentioned previously.

8.4-3. The rational for the introduction of TFCs is based upon international best practice and the experience in some of the Member States since the introduction of individual transferable quotas in specific fisheries. The Commission cites, for

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143 Rev 5 of Revised 3-column table of Basic Regulation, 5.03.2013.
145 See Chapter 1 supra.
instance, studies undertaken by the World Bank, the FAO and the scientific community which indicate that TFCs "halts, and even reverses widespread [fishery] collapse", as well as being a useful means of driving economic growth within the sector.\textsuperscript{146} At the EU level, central to the application of TFCs is the notion of stakeholder empowerment and engagement. Again in the words of the Commission:

"If designed correctly TFCs can be an effective tool for vessel owners to plan their fishing activity along market developments, land all catches and plan their investments. They also offer the possibility to fishermen to leave the industry in exchange for financial compensation. Experience shows that TFC like systems also increase operators responsibility and facilitate discard reduction."\textsuperscript{147}

8.4-4. On a similar vein, the Commission’s proposal for a Basic Regulation points out such a system would “contribute to industry-induced fleet reductions and improved economic performance while at the same time creating legally secure and exclusive TFCs of a Member State's annual fishing opportunities.”\textsuperscript{148} The empirical data cited by the Commission is equally impressive in so far as it notes that the introduction of TFCs in Denmark in 2003 resulted in 50% decrease in the pelagic fleet size, and a 30% reduction in the number of demersal vessels, while at the same time both fleets increased their profitability.\textsuperscript{149} Similarly, the Commission instance the case of Estonia, which introduced a TFC system in 2001 and by 2009 the fleet is reported as decreasing by 40% in size. In Spain, there appears to be a similar success in so far as the so-called Gran Sol fleet decreased by 30% between 1992 and 1997. What is significant in this context is that TFCs appear to be well established as both a capacity reduction mechanism and a means to improve profitability. Furthermore, a number of academic papers have been published exploring the utility of applying such as system to the CFP.\textsuperscript{150}

8.4-5. The scheme is voluntary and not fully agreed at the time of writing. Nonetheless, it is interesting to note that the Commission have identified five principles governing the utilisation of the so-called "concessions" under the CFP. These principles are shown in Table 6 below.\textsuperscript{151}

\footnotesize
\begin{itemize}
\item \textsuperscript{146} (Costello et al., 2008), World Bank and FAO, [FAO], 2008
\item \textsuperscript{147} European Commission, CFP reform - Transferable Fishing Concessions. Available at: http://ec.europa.eu/fisheries/reform/docs/tfc_en.pdf
\item \textsuperscript{148} SEC(2011) 891, Brussels, 13 July 2011
\item \textsuperscript{149} European Commission, CFP reform - Transferable Fishing Concessions. Available at: http://ec.europa.eu/fisheries/reform/docs/tfc_en.pdf, at p.3
\item \textsuperscript{151} European Commission, CFP reform - Transferable Fishing Concessions. Available at: http://ec.europa.eu/fisheries/reform/docs/tfc_en.pdf, at p.3
\end{itemize}
Table 6: Commission’s Proposal on Five Principles Transferable Fishing Concessions

<table>
<thead>
<tr>
<th>Commission’s Proposal</th>
<th>Five Principles - Transferable Fishing Concessions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Marine resources are and must remain a public good. TFCs cannot confer property rights over marine resources, but only user rights to exploit them for a limited time. After the time is up the TFC has to fall back to the Member State, who is free to allocate it again using the same allocation criteria or different ones.</td>
<td></td>
</tr>
<tr>
<td>2. Selling, leasing or swapping of TFCs can only happen under strict conditions as only owners of registered and active vessels with the purpose to use them on a licensed and active vessel, can buy TFCs.</td>
<td></td>
</tr>
<tr>
<td>3. Relative stability must be respected.</td>
<td></td>
</tr>
<tr>
<td>4. Member States have to withdraw TFCs in case of a serious infringement by the vessel owner.</td>
<td></td>
</tr>
<tr>
<td>5. Member States have to reserve quotas and TFCs for new fishermen who are looking to enter the fishery.</td>
<td></td>
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</tbody>
</table>

8.4-6. In the main, TFCs are best understood as an enabling instrument that confers on the holder “user rights” for a specific period, subject to the terms and conditions decided by the Member States after obtaining the prior approval of the Commission. Clearly, the suggested system is not a scheme of private property rights and is more akin to the traditional systems that have been used for the allocation of resource rights in some Member States such as Denmark. Management is based on the allocation of a fixed percentage of the national quota for a specific fish stock. Crucially, there is stakeholder empowerment to a significant degree in so far as POs play a central role in the management of TFCs, including the selling and leasing of TFCs among their members. Moreover, this could extend to collective management by a PO of TFCs of several members, which the Commission believe could “allow for real-time swapping and proper production planning.” The design of the national system of TFCs should “favour coastal communities dependant on fishing, more environmentally friendly fishing practices and the artisanal fleets.” In this regard, the Commission cites the case of Denmark of using TFCs to support coastal communities in the cod and sole fisheries. The mechanics on how this system ought to operate in practice are set out in what the Commission describes rather aptly as a “toolbox” of measures. This has four principal characteristics as shown in Table 7 below.

152 Ibid.
153 Id.
Table 7: Commission’s Proposal Transferable Fishing Concessions Toolbox

<table>
<thead>
<tr>
<th>Commission’s Proposal Transferable Fishing Concessions Toolbox</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The exclusion of small scale fishing (&lt;12m with passive gear), in order to ensure that fishing rights of this important segment will not be sold to larger vessels;</td>
</tr>
<tr>
<td>2. The prevention of excessive concentration by avoiding that too many fishing rights end up in the hands of a few vessel owners [this the Commission suggest must be done by setting maximum percentages of a given resource that can be held by any given vessel owner];</td>
</tr>
<tr>
<td>3. Reserving a part of national quotas for coastal communities that depend on small-scale fleets;</td>
</tr>
<tr>
<td>4. Limiting the transferability to inside specific fisheries (e.g. whitefish concessions can only be traded with other whitefish concession holders, not to a pelagic concession holder).</td>
</tr>
</tbody>
</table>

8.4-7. TFCs as set out in the Commission’s proposal would only establish user entitlements to a Member State's part of the annual fishing opportunities on the basis of historical data. Moreover, concessions would be transferable and leasable, in order to decentralise management of fishing and to ensure that the fishers retiring from the industry will not be dependent upon financial assistance from the Union.

8.4-8. The approach of Parliament to TFCs as since codified in the Basic Regulation appears to be fundamentally different from the scheme proposed by the Commission outlined above. Parliament has sought to ensure that each Member State should be allowed to choose its method of allocating the fishing opportunities assigned to it without an allocation system being imposed at Union level. In their view, this approach would be informed with the principle of subsidiarity. In this way, Member States would retain discretion in establishing a system of TFCs. Furthermore, Parliament got approval for its demand that Member States must, when distributing fishing opportunities, use transparent and objective environmental and social criteria, such as the impact of the fishery on the environment, the history of compliance and the contribution to the local economy.\(^\text{154}\)

\(^{154}\) Article 16 (1), Draft Regulation, Brussels, 11.06.2013.
8.4-9. During the process of law making and negotiations in the European institutions, the view of the Council on TFCs shares some similarities and differs in other respects from the position taken by both the Commission and Parliament. The view of the Council, articulated during the course of the Irish Presidency, is that TFCs could be introduced voluntarily with a view to adapting fishing capacity to available fishing opportunities. In this regard, each Member State would have full discretion in establishing or maintaining such a system. Moreover, Member States must decide how fishing opportunities assigned to them in accordance with Article 16 of the Basic Regulation, and which are not subject to a system of TFCs, may be allocated to vessels flying its flag, for example by creating individual fishing opportunities. In this regard, the Basic Regulation also sets down an obligation on Member States to inform the Commission of the allocation method used for such a purpose. Furthermore, for the allocation of fishing opportunities pertaining to mixed fisheries, Member States must take account of the likely catch composition of vessels participating in such fisheries. Again the approach of the Council is to use TFCs as a tool for capacity reduction aimed at ensuring the alignment of the number of Union fishing vessels with available resources. If one has to pick out the most distinctive outcome of the debate on the proposed measures in the European institutions on the Basic Regulation, it is that the TFC systems will be voluntary and that Member State are obliged to establish a registry of any such concessions.¹⁵⁵ The latter requirement, it must be assumed, is aimed at ensuring that the method of allocation remains transparent and susceptible to public and industry scrutiny.

8.4-10. At the Council meeting with the Parliament on 27-28 May 2013, it was agreed that the criteria for Member States’ allocation of fishing opportunities available to them as referred to in Article 16 would include environmental, social and economic criteria on an objective and transparent basis, including the following: the impact of fishing on the environment; the history of compliance; the contribution to the local economy and historic catch levels. Furthermore, within the fishing opportunities assigned to them, Member States shall endeavour to provide incentives to fishing vessels deploying selective fishing gear or using fishing techniques with reduced environmental impact, such as reduced energy consumption or habitat damage. The utility of TFCs in strengthening governance and enhancing the role of stakeholders in management are highlighted again in Chapter 6. Suffice to note here that it is difficult to see how industry can be empowered without resorting to such a system in one form or another in the future. Indeed, experience in the Netherlands has shown that the negative effects associated with TFCs can be addressed through the design of the system under the CFP.¹⁵⁶

8.4-11. There are major negative aspects to this aspect of fishery management that also needs to be flagged. More specifically, there is a fundamental mismatch in relation to the ITQ experiences worldwide and the Commission’s principles as set out in the IA and shown in the three tables above. In practice, experience in the Union

¹⁵⁵ Article 27, Draft Regulation, Brussels, 11.06.2013.
and elsewhere suggests that in many instances fishing rights have *de facto* been alienated and are no longer considered a public good. In Denmark, for example, fishermen have become very wealthy overnight as a result of the introduction on ITQs but this has made it almost impossible for the next generation to buy a vessel. The large reduction in capacity happened precisely because the initial rights were given away by the State as holders of the public right for free. Furthermore, the introduction of ITQs or TFCs does not always lead to a better management environment in so far as large fishing companies with commercial and political influence will often bring pressure to bear on the regulatory framework so that their activities are not constrained by the rules.

8.4-12. In terms of the SOCIOEC Analytical Framework for governance and stakeholder engagement, the introduction of TFCs appears to be orientated towards (Option 3 in Table 1), co-management by partnership: where EU/national governments, users, and stakeholders cooperate as decision-making partners in various aspects of management.

### 8.5 Little enhancement of the functions of the ACs

8.5-1. The Basic Regulation is aimed partly at improving stakeholders' involvement in the policy process.\(^\text{157}\) Closing a lacuna in the regulatory framework, it provides for the establishment of four new ACs, covering: the outermost regions (West Atlantic, East Atlantic and Indian Ocean); aquaculture; markets; and the Black Sea.\(^\text{158}\) Notably, the Basic Regulation does not vest the ACs with any fundamental powers in relation to the management of fisheries, apart from emphasising their consultative role in the formulation of new measures for the sustainable exploitation of marine biological resources.\(^\text{159}\)

8.5-2. The consultative role of the ACs extends to instances where there is “evidence of a serious threat to the conservation of marine biological resources, or to the marine eco-system” and this situation requires immediate action and the adoption of special legislative measures.\(^\text{160}\) In such instances, the ACs may submit their written comments on the adoption of temporary measures or emergency measures by the Commission or the Member States to address such threats.\(^\text{161}\) Likewise, they have an advisory role regarding the design and implementation of pilot projects into the “practicable methods for the avoidance, minimisation and elimination of unwanted catches in a fishery”.\(^\text{162}\) On a similar vein, multiannual plans should be adopted in consultation with the ACs, operators in the fishing

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\(^{157}\) Recital 53, Draft Regulation, Brussels, 11.06.2013.

\(^{158}\) Article 52, Draft Regulation, Brussels, 11.06.2013.

\(^{159}\) Article 7(2), Draft Regulation, Brussels, 11.06.2013.

\(^{160}\) Article 13, Draft Regulation, Brussels, 11.06.2013.

\(^{161}\) Article 13(2) and 13(a), Draft Regulation, Brussels, 11.06.2013.

\(^{162}\) Article 14(a), Draft Regulation, Brussels, 11.06.2013.
industry, scientists and other stakeholders having an interest in fisheries management.\(^{163}\)

8.5-3. There are several substantive provisions in the Basic Regulation on the establishment and function of ACs.\(^{164}\) The Basic Regulation states that the AC’s are established to promote a balanced representation of all stakeholders and to contribute to the achievement of the objectives of the CFP (emphasis added).\(^{165}\) Furthermore, it opens-up a number of possibilities regarding the future amendment of the mandate of the ACs in so far as the Commission is empowered to make amendments to Annex III by means of delegated acts in relation to the areas of competence for ACs, as well as regarding their composition and function.\(^{166}\) Of relevance to stakeholders is the general obligation placed on the Commission under the Treaty and the proposed regulation to carry out appropriate consultations during its preparatory work for the adoption of delegated acts.

8.5-4. The three principal tasks of the AC are as follows: (1) to make recommendations to the Commission or to the relevant Member State(s) on fisheries management and the socio-economic and conservation aspects of fisheries and aquaculture, particularly in relation to the simplification of regulatory measures; (2) to inform the Commission and Member States of problems relating to fisheries management and aquaculture in their area of competence and to propose solutions to these problems; and (3) to contribute to the collection and supply of scientific information for the development of conservation measures.\(^{167}\) Moreover, one crucial change to their role under the Basic Regulation is that their advice must be taken into account regarding regional cooperation on conservation measures including multiannual plans and on the adoption of joint recommendations pursuant to Article 17 of the Regulation.\(^{168}\) Apart from setting down a requirement to reply within two months, the Basic Regulation does not place any express obligation on the Commission or the Member States to adopt any recommendation, suggestion and information received from an AC on fishery management or any other matter. There is, however, an obligation placed on the Commission and the Member State concerned to provide detailed reasons or an explanation where the final measures adopted diverge from the contribution received from an AC.\(^{169}\) In principle, this provision leaves open a possibility for the ACs to make recommendations regarding the establishment of appropriate schemes of self and co-management of fisheries, including as noted previously on the use and allocation of transferable fisheries concessions for this purpose.

8.5-5. The composition, functioning and funding of ACs are also dealt with in some detail in the Basic Regulation.\(^{170}\) Regarding the composition, the regulation provides

\(^{163}\) Recital 17 and Article 9, Draft Regulation, Brussels, 11.06.2013.

\(^{164}\) Articles 52 through to 54, Draft Regulation, Brussels, 11.06.2013.


\(^{166}\) See Chapter 5 infra.


\(^{168}\) Article 53(2), Draft Regulation, Brussels, 11.06.2013.

\(^{169}\) Article 53(3), Draft Regulation, Brussels, 11.06.2013.

that they shall be composed of two general classifications of participants, namely: (a) organisations representing the fisheries and, where appropriate, aquaculture operators, and representatives of the processing and marketing sectors; (b) other interest groups affected by the CFP such as environmental organisations and consumer groups. Considerable more detail on their function and functioning is provided in Annex III of the Basic Regulation shown below in Table 8.

8.5-6. In relation to proposed structures, three comments may be made about the role and mandate of ACs. Firstly, the structures must consist of a general assembly and an executive committee. Apart from meeting the requirements set down by Annex III of the Basic Regulation, each AC appears to have a degree of discretion regarding the adoption of more precise organisational measures. Secondly, there are clear limits on this discretion in so far as the Commission is in charge of much of the detail and is vested with power to regulate on the composition and the functioning of ACs by means of a delegated legislative act.\(^{171}\) Moreover, in line with the Treaty, the Commission can only act within the limits of the authority delegated by the Council and Parliament. The Commission must notify the European Parliament and the Council simultaneously as soon as it adopts a delegated act.\(^{172}\) Thirdly, as pointed out previously, ACs have a clear legal mandate and role in the formulation of multiannual plans for fisheries. In this context, the Basic Regulation provides that these plans should be adopted in consultation with the ACs, operators in the fishing industry, scientists and other stakeholders having an interest in fisheries management.\(^{173}\)

Table 8 - AC functions and funding as per Annex III of Basic Regulation

| a. | In the general assembly and executive committee, 60% of the seats shall be allotted to representatives of fishermen and for the Aquaculture AC, aquaculture operators, and representatives of the processing and marketing sectors, and 40% to representatives of the other interest groups affected by the Common Fisheries Policy, for example environmental organisations and consumer groups. |
| b. | Except for the AC for Aquaculture, at least one representative of the catching subsector from each Member State concerned shall be member of the executive committee. |
| c. | The members of the executive committee shall, where possible, adopt recommendations by consensus. If no consensus can be reached, dissenting opinions expressed by members shall be recorded in the recommendations adopted by the majority of the members present and voting. |
| d. | Each AC shall designate a chairperson by consensus. The chairperson shall act impartially. |
| e. | Each AC shall adopt the measures necessary to ensure transparency and the

\(^{171}\) Arts 54(4) and 55, Proposal for a new Basic Regulation, COM(2011) 425 final, Brussels, 13.7.2011. On delegated powers, see Chapter 5 infra.

\(^{172}\) See Chapter 5 infra.

\(^{173}\) Recital 17, Draft Regulation, Brussels, 11.06.2013.
respect of all opinions expressed.

f. Recommendations adopted by the executive committee shall be made available immediately to the general assembly, the Commission, Member States concerned and, upon request, to any member of the public.

g. The meetings of the general assembly shall be open to the public. The meetings of the executive committee shall be open to the public unless, in exceptional cases, decided otherwise by a majority of the executive committee.

h. European and national organisations representing the fisheries sector and other interest groups may propose members to the Member States concerned. These Member States shall agree on the members of the general assembly.

i. Representatives of national and regional administrations that have fisheries interests in the area concerned and researchers from the Member States' scientific and fisheries research institutes and from the international scientific institutions that advise the Commission shall be allowed to participate in AC meetings as active observers. Any other qualified scientist may also be invited.

j. Representatives of the European Parliament and of the Commission may take part as active observers in AC meetings.

k. When issues that affect them are discussed, representatives of the fisheries sector and other interest groups from third countries, including representatives from RFMOs, that have a fishing interest in the area or fisheries covered by an AC, may be invited to participate as active observers.

l. ACs may apply for Union financial assistance as bodies pursuing an aim of general European interest.

m. The Commission shall sign a grant agreement, with each AC to contribute to its operational costs, including translation and interpretation costs.

n. The Commission may carry out all verifications it considers necessary to ensure compliance with the tasks assigned to the ACs.

o. Each AC shall transmit annually its budget and a report of its activities to the Commission and to the Member States concerned.

p. The Commission or the Court of Auditors may, at any time, arrange for an audit to be carried out either by an outside body of its choice or by the Commission or the Court of Auditors departments themselves.

q. Each AC shall appoint a certified auditor for the period during which it benefits from Community funds.

8.5-7. In terms of the SOCIOEC Analytical Framework for governance and stakeholder engagement, the role and functions of the ACs as codified in the Basic Regulation appears to be orientated towards (Option 2 in Table 1).
8.6 The on-going process of regionalisation and decentralisation

8.6-1. The approach taken by the EU to the codification of a regionalised approach to fisheries management and the decentralisation of decision-making are both evident in the Basic Regulation. Indeed, regionalisation and decentralisation appear to be the twin-pillars on which the reformed policy is founded. In this context, there is a clear link between regionalisation/decentralisation and the establishment and role of the ACs. There is also reference to the “regionalisation process” in the provisions dealing with the obligations on catch-landings and on discard plans. Moreover, the Preamble of the Basic Regulation clearly states that the policy should aim to be coherent with other EU sector policies that apply in the Baltic Sea, North Sea, Celtic Seas, Bay of Biscay and the Iberian Coast, Mediterranean and Black Sea. This individual sea-basin approach is entirely consistent with the regional approach to management of all maritime activities advanced by the MSFD. There are also provisions in the Basic Regulation that allow for a specific regionalised approach to the management of fisheries in the EU’s outermost regions (Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands). Arguably, a regionalised approach could also be adopted in the areas where the special needs of regions and the populations are particularly dependent on fishing and related activities in line with the 1976 Hague Resolution.

8.6-2. The main provisions on regionalisation are embedded in Article 17 of the Basic Regulation, which deals exclusively with this subject and establishes a framework for regional cooperation by Member States on the adoption of conservation measures that apply to one or more geographical regions. Although these provisions are slightly attenuated and bearing in mind that the Commission has the residual powers to adopt measures by means of delegated or implementing acts, it is nonetheless very significant that Article 17 vests Member States with the power to submit joint recommendations aimed at achieving the objectives of the relevant Union conservation measures and/or multiannual plans and/or specific plans for the obligation to land catches within such an area. This includes making a joint-recommendation on the adoption of measures aimed at achieving the objectives of the MSFD, the Birds and Habitats Directives.

8.6-3. In such instances, the Commission must not adopt any such delegated or implementing acts before the expiry of the deadline for submission of joint recommendations by the Member States. The relevant Member States in turn are compelled to cooperate with one another in formulating joint recommendations and

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175 Recital 55, Preamble, Draft Regulation, Brussels, 11.06.2013.
176 Recital 12, Preamble, Draft Regulation, Brussels, 11.06.2013.
177 On the Hague Resolution see paragraph 8.3-infra.
178 See Chapter 5 infra.
179 Articles 15, 17(1) - (4) and (6), Draft Regulation, Brussels, 11.06.2013.
180 Article 17(1), Draft Regulation, Brussels, 11.06.2013.
must also consult the pertinent AC(s). The Commission must facilitate any such cooperation between Member States, including, where necessary, obtaining assistance from scientific bodies. Again, however, it needs to be noted that the residual enabling mechanism or regulatory powers in bringing these measures into force remain vested in the Commission.\(^\text{181}\) The latter is empowered to adopt measures based upon the joint recommendations, by means of delegated or implementing acts, provided that such recommendations are compatible with the relevant conservation measure and/or multiannual plan.\(^\text{182}\) Member States in turn must ensure that all joint recommendations on conservation measures are based on the best available scientific advice.

8.6-4. Joint-recommendations must be compatible with a number of prescribed criteria, namely: (a) the objectives for the CFP as set out in Article 2 of the Basic Regulation such as the precautionary principle and the ecosystem-based approach to fisheries management; (b) the objectives of the Union conservation measure(s); (c) the quantifiable targets set out in a relevant multiannual plan; and (d) are no less stringent than those existing in Union legislation.\(^\text{183}\) The default position, should this procedure not work as anticipated, is that the Commission has discretion to submit a proposal for of a delegated act in accordance with their powers under Article 190 of the Treaty.\(^\text{184}\)

8.6-5. The case for regionalisation is also supported by the utilisation of the ecosystem-based approach to fisheries management under the CFP. This approach is defined in the Basic Regulation as meaning:

“…an integrated approach to managing fisheries within ecologically meaningful boundaries which seeks to manage the use of natural resources, taking account of fishing and other human activities, while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected, by taking into account the knowledge and uncertainties about biotic, abiotic and human components of ecosystems.”\(^\text{185}\)

8.6-6. The reformed CFP thus aims to minimise the negative impacts of fishing activities on marine ecosystems. Significantly, the Basic Regulation provides for the use of incentives, including economic incentives, to reduce the impact of fishing activities on marine ecosystem, as well as the adoption of technical conservation measures for this purpose.\(^\text{186}\) Moreover, multiannual plans and emergency measures are to be based on the ecosystem based approach to fisheries management.\(^\text{187}\) Within this setting, it should not be forgotten that the ecosystem

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\(^{181}\) See Chapter 5 *infra.*  
\(^{182}\) *Ibid.*  
\(^{183}\) Article 17(5), Draft Regulation, Brussels, 11.06.2013.  
\(^{184}\) See Chapter 5 *infra.*  
\(^{185}\) Article 5(8), Draft Regulation, Brussels, 11.06.2013.  
\(^{186}\) Article 7(1)(d), Draft Regulation, Brussels, 11.06.2013.  
\(^{187}\) Articles 11 and 13a, Draft Regulation, Brussels, 11.06.2013.
approach is based on ecological regions and not on the geographical boundaries established by the Member States. Furthermore, robust structures for stakeholder engagement are central features of ecosystem-based management and thus form an obvious nexus between the Basic Regulation and EU environmental legislation, as will be seen in Chapter 4.

8.6-7. In terms of the SOCIOEC Analytical Framework for governance and stakeholder engagement, the on-going process of regionalisation and decentralisation as codified in the Basic Regulation may align with Options 2, 3 and 4 as shown in Table 1, depending on how these provisions are utilised by the Member States and the Union institutions in practice.

8.7 Sharing enforcement costs

8.7-1. One of the objectives of the revised CFP is the development of a culture of compliance among operators in the fishing industry. The term “operators” is given a broad definition in the Basic Regulation and means:

“...the natural or legal person who operates or holds any enterprise carrying out any of the activities related to any stage of production, processing, marketing, distribution and retail chains of fisheries and aquaculture products”.

8.7-2. This definition extends to a wide number of stakeholders including anyone associated with the catching and marketing of fishery products. Apart from nurturing a greater culture of compliance, the EU system of fisheries control and enforcement is founded on a number of key principles including: a global and integrated approach; the use of modern control technologies for the availability and quality of data on fisheries; a risk-based strategy focused on systematic and automated cross-checks of all available relevant data; and the establishment of effective, proportionate and dissuasive sanctions.

8.7-3. In a fundamental shift away from the traditional paradigm for enforcement, the Basic Regulation provides that Member States may require their operators to contribute proportionally to the costs of implementing the EU’s fisheries control system. Furthermore, in both a carrot and stick approach to fiscal incentives, EU’s financial assistance to the Member States on the cost of enforcement is conditional

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189 Art 46, Proposal for a new Basic Regulation, COM(2011) 425 final, Brussels, 13.7.2011. See the most recent draft of the Basic Regulation, used for this report is appended to the Council of Ministers Interinstitutional File: 2011/0195 (COD), Brussels, 11.06.2013.
upon CFP compliance.\textsuperscript{191} A similar approach is evident with respect to the fishing industry in so far as the EU's financial assistance to operators is also contingent upon their compliance with the rules underpinning the CFP.\textsuperscript{192} We will return to the topic of incentives in Chapter 6, as these are aimed at engendering greater stakeholder engagement with both the policy process and the regulatory framework. Suffice to note here, that the enforcement and compliance model as envisaged under the Basic Regulation appears to accord with Option 2 under the SOCIOEC Analytical Framework, where there is an emphasis on the role and powers of the Member States rather than creating incentive structures facilitating voluntary compliance by the industry.\textsuperscript{193}

8.8 **Summary of the approach adopted under the Basic Regulation**

8.8-1 If one applies the SOCIOEC Analytical Framework to the toolbox of measures in the Basic Regulation, then the position can be summarised in Table 9 below.

Table 9: Summary of the SOCIOEC Analytical Framework as applied to Basic Regulation.

<table>
<thead>
<tr>
<th>Measure</th>
<th>SOCIOEC Analytical Framework</th>
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<tbody>
<tr>
<td>TFCs</td>
<td>Option 3 (co-management by partnership)</td>
</tr>
<tr>
<td>Role and functioning of the ACs</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>Regionalisation and decentralisation</td>
<td>Options 2, 3 and 4</td>
</tr>
<tr>
<td>Sharing enforcement costs</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
</tbody>
</table>

Chapter 4

ENVIRONMENTAL LEGISLATION AND OTHER POLICY MEASURES

9.1 Linking the CFP with environmental legislation

9.1-1. The EU and the Member States have many international commitments to improve the management of fish stocks and to ensure stewardship of the marine environment.¹⁹⁴

9.1-2. The reformed CFP helps discharge many of these commitments and it is thus unsurprising to note that the Basic Regulation has a clear environmental focus with many provisions aimed at prohibiting discards, eliminating overfishing and overcapacity, improving responsibility and compliance by the industry, as well as augmenting the availability of scientific advice and economic data for the purpose of fishery management. In parallel with these provisions, there are several other important EU directives and policy measures that apply to the marine environment and these in turn also have the potential to impinge upon the opportunities for the fishing sector to develop systems of self- and co-management of fisheries under the CFP. They include, inter alia: the MSFD; the Habitats and Birds Directives; the Environmental Impact Directive; the Strategic Environmental Impact Directive; the Directive on Access to Justice in Environmental Matters and a number of related instruments; the draft Directive on Maritime Spatial Planning and Integrated Coastal Zone Management (ICZM); and the over-arching IMP.

9.1-3. Keeping in mind that improved compliance with the environmental dimension of the CFP is one of the objectives of the Basic Regulation, this chapter reviews how the aforementioned instruments relate to maritime governance, fishery management, and stakeholder participation in decision-making concerning the adoption of management measures under the reformed CFP.

9.2 Fisheries management and the MSFD

9.2-1 The MSFD provides a blueprint for marine environmental protection in Union law and is the principal means for the implementation of the ecosystem approach in decisions concerning the management and use of all marine resources including fisheries in sea areas under the sovereignty and jurisdiction of the Member States. As a result, when fully implemented by the Member States, the Directive will have a major bearing on the substance of fisheries management measures at European, regional, and national levels. Indeed, one of the thematic strands running through the MSFD is the need to foster the integration of environmental concerns into the CFP, as well as many other European policies.

9.2-2 The MSFD has the potential to impinge upon the governance structures that apply to the CFP both directly and indirectly. To further illustrate this point it may be appropriate to start by summarising the principal features of the Directive. Namely, the MSFD requires the Member States to achieve good environmental status (GES) of all sea areas under their national sovereignty and jurisdiction by 2020. The quality of the environment is assessed on the basis of eleven qualitative descriptors for determining GES, several of which concern fisheries as can be seen from Table 8 below. The overall scheme of protection is regional in so far as the MSFD requires the establishment of a number of marine regions and sub-regions in the Baltic Sea, the North-east Atlantic Ocean, the Mediterranean Sea and the Black Sea. These areas are coterminous with the geographical boundaries of the existing Regional Seas Conventions. The Directive sets down a firm schedule for the various tasks that need to be undertaken for the attainment of GES. Thus, each Member State had to develop strategies by 2012, which contained a detailed assessment of the state of the environment, a definition of “good environmental status” at the regional level, as well as the establishment of clear environmental targets and monitoring programmes for the on-going assessment and the regular update of the targets. Each Member State must then draw up a programme of cost-effective measures by 2015 in coordination with other Member States in their marine region with a view to achieving or maintaining GES by 2020. Prior to the implementation of

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any new measure there is a requirement to undertake an impact assessment that contains a detailed cost-benefit analysis of the proposed measures. The MSFD provides a legal basis for the adoption of EU measures in instances where Member States cannot achieve their environmental targets. Supplementing the MSFD, Commission Decision 2010/477/EU sets out the detailed criteria and methodology for the attainment of GES in marine waters.\textsuperscript{197}

9.2-3 The MSFD has three features that will have a bearing on the long-term governance structures that are adopted by the Union and the Member States to implement the CFP. Firstly, the Directive does not envisage the adoption of horizontal management measures at the EU level, but entails the adoption of operational and implementation measures through the regional seas agreements, as mentioned previously. Secondly, implementation of the MSFD is intended to bring about a major shift in the emphasis of EU law-making in so far as maritime regulation and decision-making will no longer organised exclusively along the vertical lines of sector policies such as fisheries, but will become more integrated in form and content at a horizontal level across a range of policies.\textsuperscript{198} Thirdly, the MSFD promotes a sea-basin approach where management measures are to be harmonized at a regional or sub-regional level. There will, however, be scope for the adoption of specific management solutions for individual fisheries at a local level such as community-based-management or the use of existing self- and co-management systems (like the clam fishery in the Adriatic and the crangon fishery in the North Sea).\textsuperscript{199}

9.2-4 As a consequence of this general shift in emphasis under Union environmental legislation, it should be noted nonetheless that future regulatory measures will focus on mitigating the impacts of particular activities on the wider marine regions and will not be limited by the maritime boundaries of the Member States. Also, it is clearly stated that achieving GES may entail the adoption of additional fisheries management measures under the CFP with a view to maintaining or restoring fish stocks, as well as to ensure the structure and functioning of ecosystems.\textsuperscript{200} Indeed, one of the qualitative criteria for determining GES under the MSFD is focused on ensuring that the populations of all commercially exploited fish and shellfish are within safe biological limits and exhibit characteristics that are consistent with healthy stocks.\textsuperscript{201} Several of the descriptors of GES (as shown in Table 10 below) concern commercial-sea fisheries and are aimed at ensuring that such activity is only undertaken at levels that are sustainable and in a manner that reduces their impacts on marine ecosystems.\textsuperscript{202}

\textsuperscript{197} Commission Decision of 1 September 2010 on criteria and methodological standards on GES of marine waters, OJ L 232/14, 2.9.2010.
\textsuperscript{199} See Chapter 1 supra.
\textsuperscript{200} Recital 9 of Directive 2008/56/EC.
\textsuperscript{202} Descriptors 1, 3, 4 and 6 of Directive 2008/56/EC.
**Table 10**: Qualitative descriptors for determining good environmental status

<table>
<thead>
<tr>
<th>Number</th>
<th>Descriptor</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Biological diversity is maintained. The quality and occurrence of habitats and the distribution and abundance of species are in line with prevailing physiographic, geographic and climatic conditions.</td>
</tr>
<tr>
<td>3</td>
<td>Populations of all commercially exploited fish and shellfish are within safe biological limits, exhibiting a population age and size distribution that is indicative of a healthy stock.</td>
</tr>
<tr>
<td>4</td>
<td>All elements of the marine food webs, to the extent that they are known, occur at normal abundance and diversity and levels capable of ensuring the long-term abundance of the species and the retention of their full reproductive capacity.</td>
</tr>
<tr>
<td>6</td>
<td>Sea-floor integrity is at a level that ensures that the structure and functions of the ecosystems are safeguarded and benthic ecosystems, in particular, are not adversely affected.</td>
</tr>
<tr>
<td>9</td>
<td>Contaminants in fish and other seafood for human consumption do not exceed levels established by Community legislation or other relevant standards.</td>
</tr>
<tr>
<td>11</td>
<td>Introduction of energy, including underwater noise, is at levels that do not adversely affect the marine environment.</td>
</tr>
</tbody>
</table>

9.2-5 Although the specification of the descriptors in the regulatory framework, as shown in Table 10, establishes a firm bond between the MSFD and the CFP, it is important to stress that fishery management measures can only be taken by the EU institutions following the procedures set down by the TFEU and the Basic Regulation dealing with the adoption of fishery conservation measures.\(^{203}\) In other words, the MSFD does not provide a legal basis for Member States to adopt unilateral conservation or management measures aimed at safeguarding fish stocks or marine ecosystems. On the contrary, the power of Member States in fisheries management is limited by the MSFD to making recommendations to the Commission when action cannot be taken at a national level and where EU measures are needed.\(^{204}\) This should not prove to be an insurmountable obstacle to the enhancement of the governance structures under the CFP or impede the implementation of ecosystem-based fisheries management.\(^{205}\)

9.2-6 There have also been a number of important initiatives to link the MSFD with other environmental protection instruments, and efforts have been made by a

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\(^{204}\) Art 15 of Directive 2008/56/EC.

number of international bodies to support the implementation of the Directive. For instance, the MSFD incorporates biodiversity and conservation commitments made under the Habitats and Wild Birds Directives, as well as the Water Framework Directive. The International Council for the Exploration of the Sea (ICES) has developed advice on the assessment of Descriptor 3 (Commercial fish and shellfish) and the OSPAR Commission has sought to ensure consistency and harmonisation of targets and indicators under Descriptors 1, 4 and 6. On the other hand, it should also be pointed out that the initial implementation of the MSFD has not been all plain sailing despite the fact that all Member States apart from Poland, transposed the Directive into national law within the prescribe deadlines. Significantly, Bulgaria, Ireland, Malta, Poland, and Slovenia did not meet the initial reporting requirements under the Directive.  

9.2-7 From the perspective of this report, one should keep in mind that the MSFD influences the range of options under the revised CFP concerning regionalisation, devolved decision-making, as well as stakeholder consultation regarding the adoption of management measures. Specifically, the Basic Regulation authorises Member States to adopt, in the waters under their sovereignty or jurisdiction, such conservation measures that are necessary to comply with their obligations under the MSFD, where such measures do not affect fisheries interests of other Member States. As seen above in the discussion of the regionalisation of the CFP, there is also scope for the initiating Member State and the other Member States with a direct management interest to submit a joint recommendation regarding the proposed management measures to be adopted on a regional basis pursuant to Article 17 of the Basic Regulation. Where such measures might affect fisheries interests of other Member States, however, the power to adopt such measures are vested in the Commission and by recourse to the regional cooperation procedures among the Member States concerned. This approach is fully consistent with the MSFD, which mandates expressly the EU to work with the regional authorities and other sectors to improve maritime governance. More specifically, Article 19 of the MSFD provides that “all interested parties are given early and effective opportunities to participate in [its] implementation... involving, where possible, existing management bodies or structures, including Regional Sea Conventions, Scientific Advisory Bodies and Regional Advisory Councils”.

9.2-8 Clearly, the fisheries sector comes within the scope of the latter provision and a number of points can be made about how this scheme is intended to operate in practice. Firstly, both the Basic Regulation and the Directive underscores the importance of using existing consultative structures such as the ACs for the purpose of engaging with stakeholders regarding the implementation of the scheme of environmental protection. Secondly, following on from this, it is envisaged that ACs will extend their remit to other areas of marine resource management that affect

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206 Articles 8 through to 12 of Directive 2008/56/EC.
207 Recital 17(a) Preamble, and Article 12, Draft Regulation, Brussels, 11.06.2013.
208 Part 3 of this report, section 8.6 supra.
209 Ibid.
210 Article 19(1) of Directive 2008/56/EC.
fishing activity. The regional scheme for the implementation of the MSFD will facilitate this approach and enhance its effectiveness. Thirdly, it may be contended that the explicit reference to “relevant existing legislation” in Article 19(1) of the Directive appears to preclude the adoption of new legislation for the purpose of enhancing the capacity and role of stakeholders in the policy and regulatory implementation process. In other words, existing policies and legal-mechanisms for stakeholder involvement will be used for this purpose. Fourthly, the Directive is very much predicated on wide stakeholder engagement and places an obligation on Member States to make available to the public for comment summaries of the following: the initial assessment and the determination of GES, the environmental targets, the monitoring programmes, and the programmes of measures that are ultimately adopted. Access to this information is of course crucial for the task of fisheries management under any system of devolved or shared management under the CFP. As will be discussed further on below, public access to environmental information under Directive 2003/4/EC applies to the information acquired pursuant to the MSFD. There are also requirements for the sharing of information and data with both the Commission and the European Environment Agency in accordance with the INSPIRE Directive with a view to facilitating both of these institutions in the performance of their tasks.

9.2-9 From the perspective of governance structures and the enhancement of stakeholder involvement in the management of fisheries, there are a number of areas where the objectives of the MSFD and the CFP converge and overlap to a greater or lesser extent. Thus, for example, fisheries management measures adopted under the Basic Regulation will be one of the predominant mechanisms for achieving GES under the MSFD. The principal interventions will be in the form of technical conservation measures, the elimination of discards, spatial measures such as protected areas under the Habitats and Birds Directives, as well as effort and catch limitations under the CFP. As noted previously, central features in both the MSFD and the CFP are the commitment to ecosystem-based management, the regionalisation of policy delivery, as well as a partnership approach to stakeholder engagement in the policy process. The objective of reaching maximum sustainable yield under the CFP will thus be informed by the objectives and timelines set down in the MSFD. The latter Directive, however, requires engagement with a much broader spectrum of stakeholder interests than that which traditionally came within the purview of the CFP.

9.2-10 Both the MSFD and the Basic Regulation require Member States and stakeholders to take more responsibility for fisheries management measures, as well as for ensuring greater coherence between management measures and other policy initiatives or legislative actions in each sea basin. Under the reformed CFP, Union

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211 Article 19(2) of Directive 2008/56/EC.
214 See Chapter 3 supra.
fisheries legislation will focus on objectives, common standards, as well as deadlines for the attainment of specific targets. Following on from this, Member States and stakeholders could take responsibility for the implementation of conservation and management measures that comply with the spirit and letter of Union law. This arrangement fits with the development and implementation of resource allocation and utilisation models similar to the ones that have been utilised in Denmark.215 Furthermore, as foreseen in the Commission’s reform proposals, this arrangement will allow “effective producers’ organisations to become active players in planning their members’ fishing activities and stabilising the markets, in managing their quotas, fishing effort and fleets optimising their quota uptake and in ending discards by swapping and leasing quotas and handling of unwanted catches.”216

9.2-11 There are a number of matters in both the reformed CFP and the MSFD, which point towards an enhanced role for stakeholders/user groups. Namely, both the Basic Regulation and the MSFD require a combination of compliance by those in the sector and effective enforcement by the various law enforcement bodies in the Member States. This suggests that there is considerable scope for the development of a system of self or co-management under the CFP to improve compliance with fisheries law. Furthermore, the Basic Regulation also introduces the principle of conditionality, according to which the availability of certain financial or other resources for either the Member States or operators in the fishing industry is linked to compliance with the regulatory framework underpinning the CFP.217 This is aimed at incentivising the industry into behaving responsibly. Clearly, it is also envisaged by the MSFD and the Basic Regulation that a new approach to stakeholder involvement on horizontal issues, it must be assumed by the new ACs, will be required to ensure that Member States discharge the many obligations set down by the Directive in a timely and effective manner. This is particularly the case in relation to the programme of measures that Member States must take to achieve GES in their marine waters.218 Indeed, the Directive requires Member States to establish appropriate administrative frameworks to ensure that their policies are pursued in an integrated manner and to ensure that due consideration is given to sustainable development and to the economic and social impacts of the measures adopted under national programmes.

9.2-12 In summary, the CFP has a vital contribution to make to the protection of the marine environment and in particular to the achievement of GES by 2020 under the MSFD. In terms of the SOCIOEC Analytical Framework for governance and stakeholder engagement, the MSFD appears to be clearly orientated towards the model of co-management by consultation (Option 2 in Table 1), where some formal mechanisms for consultation with users and stakeholders are envisaged, but where all decisions are taken by the Member States, regional authorities and the EU. There is scope, however, for the adoption and implementation of existing self- and co-management systems such as the one that exists in the clam fishery in the

215 See Chapter 3 supra.
218 Article 13 of Directive 2008/56/EC.
Adriatic and the crangon fishery in the North Sea, provided that these remain in full conformity with Union law.

9.3 Fisheries management and the Habitats and Birds Directives

9.3-1 A core objective of the SOCIOEC project is to review how EU legal instruments on nature conservation and marine environmental protection impinge upon the establishment of new governance structures for fisheries under the reformed CFP. When addressing this topic, it is evident that there is a considerable body of EU legislation aimed at nature conservation and the protection of the wider marine environment including instruments that provide specifically for habitat and species protection, the establishment of marine protected areas, and the creation of biologically sensitive areas for fisheries management purposes. As is well documented, much of this legislation restricts how Member States can use maritime space and resources coming under their sovereignty and jurisdiction including fisheries resources. Accordingly, the implementation of this legislation by the Member States can have a direct bearing on the adoption of fishery management measures under the CFP.


9.3-3 These are sophisticated and comprehensive instruments and only the briefest of summaries can be undertaken here. Essentially, they set down specific obligations on the Member States as regards the establishment and management of special protection areas (SPAs) and special areas of conservation (SACs). The network of SPAs and SACs established under the Birds and Habitats Directives is referred to as the NATURA 2000 network, which is a pan-European ecological network of protected areas. Within this network, Member States are required to protect biodiversity by taking a number of measures including: the designation of protected areas for the birds, habitats and species listed in the directives; the maintenance or restoration of protected habitats and species at a favourable conservation status; the adoption of appropriate conservation and management measures for the designated sites; undertaking “appropriate assessment” of plans and projects likely to have a significant effect on the integrity of an SAC. There is also a strict scheme of protection for the fauna and flora listed in Annex IV of the Habitats Directive. Member States are required to undertake appropriate

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monitoring and enforcement, as well as to report to the Commission on the implementation of the Directive every six years.

9.3-4 The relationship between fisheries management under the CFP and the Habitats and Birds Directives has been addressed by the European Commission in a number of specialist publications.\(^\text{221}\) Suffice to note here that both Directives apply in the marine environment and 936 marine SPAs and 1848 marine sites of community importance by 2011.\(^\text{222}\) Indeed, in relation to the extent of their spatial application, the Court of Justice of the European Union has held that the Habitats Directive applies where the Member States exercises jurisdiction and sovereignty under public international law, which in effect means as far as the outer limits of the continental shelf.\(^\text{223}\) Similarly, the harvesting of cockles was deemed by the Court of Justice to be a “project” and to come within the scope of the EIA Directive.\(^\text{224}\) This means that fishing activity constitutes a plan or project likely to have a significant effect on the conservation objectives of the site and is therefore subject to appropriate assessment under the Habitats Directive unless there is adequate information to show otherwise.

9.3-5 At both EU and national levels, fishing activity must be regulated in a way that complies fully with both the letter and spirit of the Habitats and Birds Directives. As mentioned previously, the Basic Regulation authorises Member States to adopt, in the waters under their sovereignty or jurisdiction, such conservation measures that are necessary to comply with their obligations under both directives where such measures do not affect fisheries interests of other Member States.\(^\text{225}\) As seen above, there are several criteria, which must be achieved in relation to the adoption of national measures in such instances including the requirement that they are compatible with the conservation, economic, social and environmental objectives of the CFP.\(^\text{226}\)

9.3-6 Where such measures might affect fisheries interests of other Member States, the power to adopt conservation or management measures is vested in the Commission, who may use their powers to adopt delegated legislation or by relying on the regional cooperative procedures and joint recommendations by the Member States concerned.\(^\text{227}\) In such instances, certain timelimits and procedural


\(^{223}\)Case C-6/04, Commission v United Kingdom [2005] ECR 1-9017.

\(^{224}\)Case C-127/02, Landelijke Vereniging tot Behoud van de Waddenzee and Others [2004] EGR 1-7405.

\(^{225}\)Article 12(1), Draft Regulation, Brussels, 11.06.2013.

\(^{226}\)Article 12(2), Draft Regulation, Brussels, 11.06.2013.

\(^{227}\)Article 12(3) and (4), Draft Regulation, Brussels, 11.06.2013
requirements apply. Significantly, under this process, the Commission remains the principal facilitator in relation to the adoption of fisheries management measures and the Member State(s) concerned must request the Commission to adopt the appropriate measures under the CFP. There is also scope for the application of the regionalisation process in relation to any such request as described Chapter 3.  

The initiating Member State must provide the Commission and the other Member States having a direct management interest with relevant information on the measures required, including rationale, scientific evidence and detail on practical implementation and enforcement. Member State and the other Member States with a direct management interest may submit a joint recommendation referred pursuant to Article 17(1) within six months from the provision of sufficient information for this measure. When drafting their proposal for fisheries management measures, however, Member States are encouraged by the Commission to coordinate their approach with fishery and environmental authorities at Member State level, as well as with other relevant stakeholders including scientific bodies such as the Council for the Exploration of the Sea (ICES) and the Scientific, Technical and Economic Committee for Fisheries (STECF). Once the appropriate measures are adopted at an EU level, a Member State must then implement appropriate monitoring and control measures, including an inspection programme.

9.3-7 In the absence of a joint recommendation, the Commission may adopt a fisheries management measure to give effect to the Directives under the relevant Treaty procedure. Should the Commission be obliged to act in this manner, it will then initiate its own consultation with stakeholders including the relevant ACs. In general, this consultation covers the following: “the scientific basis of the request, the extent of proposed areas, the need to ban certain gear, assessment of potential impacts of the closures on fleet and fisheries, enforceability of measures proposed and potential effects of displacement of fishing effort.” There is also a requirement for regional cooperation among the Member States concerned when the proposed measures have a trans-boundary element. Fore obvious reasons, the Commission is of course compelled to adopt a regional approach when protecting habitats and species that straddle or migrate across the maritime boundaries of tow or more Member States.

9.3-8 Again the central role of the European institutions in relation to governance and the adoption of fisheries management measures is noted in the Basic Regulation. The latter clearly envisages that where such measures might affect fisheries interests of other Member States, the power to adopt such measure will be by means of delegated act by the Commission on the basis of a joint-recommendation by the Member States concerned, or else by the Commission.

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228 As set out in Article 17(1) - (4) and (6), mutatis mutandis, Draft Regulation, Brussels, 11.06.2013.


231 FISHERIES MEASURES FOR MARINE NATURA 2000 SITES: A consistent approach to requests for fisheries management measures under the Common Fisheries Policy, p. 6.
under what is best described as a default procedure.\textsuperscript{232} In other words, the principal actors remain the European institutions with no additional powers vested in stakeholders or the creation of new governance structures, apart from reliance on the regionalisation process.

9.3-9 The governance structures that apply to protected areas is mainly top-down hierarchical management by the Member State in conjunction with the EU, where mechanisms for dialogue with users and stakeholders exist in an informal setting regarding the site selection and designation process. This appears to be aligned with Option 2 under the SOCIOEC Analytical Framework, as shown in Table 1 above. The over-riding consideration however is scientific merit and ecological criteria in the case of the Habitats Directive and on the basis of the ornithological criteria under the Birds Directive. Although there are national procedures in place to ensure that an exchange of information is undertaken with stakeholders concerning site selection, designation and the adoption of management measures, it needs to be emphasized that national bodies and the Commission retain absolute discretion regarding the outcomes of the decision-making processes. In some Member States such as the United Kingdom, the consultation process has a solid statutory footing and government bodies have considerable discretion to make management plans provided that these do not impinge upon fisheries that fall within the law-making processes pertaining to the CFP. Furthermore, it needs to be pointed out that there is only very limited scope for stakeholders to play an enhanced part in any governance arrangements concerning site selection, designation and management process under the Birds Directive. Mainly because the Court of Justice has held firmly that it is only ornithological criteria that are relevant to designation of an SPA and not economic criteria.\textsuperscript{233} Similarly, the Court has rejected arguments pertaining to delays associated with public consultation, State ownership of land, as well as the effects of EU policies, as reasons for not designating an SPA.\textsuperscript{234} As mentioned above, there is very limited scope for a greater role under the Habitats Directive, which allows account to be taken of “economic, social and cultural requirements and regional and local characteristics” in the designation of SACs.\textsuperscript{235} Member States must take compensatory measures. Furthermore, the Court has adopted a strict approach to protection once sites are deemed to be candidate sites under the Directive.\textsuperscript{236} Indeed, it should be noted that the designation of SPAs and SACs may well effect the economic interests of the fishing industry but EU law does not require the protection of property rights or indeed property uses by decision-makers at national or EU levels when implementing the Habitats and Birds Directives. Overall, the general thrust of the case law is that site selection and designation, as well as the adoption of management measures are questions of scientific opinion and unlikely to be usurped to improve or enhance fishery governance structures.

\textsuperscript{232} See Chapter 5 \textit{infra}.
\textsuperscript{233} Case C-44/95 \textit{R v. Secretary of State for the Environment ex parte RSPB}, [1996] ECR 1-3805.
\textsuperscript{235} Article 6(4) of Council Directive 92/43.
9.3-10 One final point, it should be noted that unlike the EIA Directive (discussed below) there is no formal requirement for mandatory public consultation under the procedural requirements set down by the Habitats and Birds Directives.\(^2^{37}\) Indeed, it is important to emphasize that the outcome of “appropriate assessment” under the Habitats Directive determines whether national bodies can grant consent for the proposed project or plan in question and this may be contrasted with the EIA/SEA Directives as the latter set down procedures for public notification and consultation without indicating what should happen as an outcome of the decision-making process. This may be contrasted with the substantive obligations that flow from the Habitats Directive, which prohibits, \textit{prima facie}, the competent national authorities from authorising a plan or project if they have ascertained that it will adversely affect the integrity of the site concerned. Indeed the national authority is only required to obtain the opinion of the general public “if appropriate” (emphasis added). Assessments carried out under the Habitats Directive, although not a replacement or substitute for EIA\(^2^{38}\) are often implemented in practice as an integral part of EIA in the Member States.

### 9.4 Fish stock recovery area

9.4-1 In addition to the aforementioned measures for the spatial protection of the environment, the Basic Regulation provides for the establishment of biologically sensitive protected areas for fisheries management purposes.\(^2^{39}\) This is to apply to areas “where there is clear evidence of heavy concentration of fish below minimum conservation size and spawning grounds, in which fishing activities may be restricted or prohibited in order to contribute to the conservation of living aquatic resources and marine eco-systems.”\(^2^{40}\) In the words of the Basic Regulation, “for this purpose, Member States must identify, where possible, suitable areas which may form part of a coherent network and prepare, where appropriate, joint recommendations, in accordance with the provisions of Article 17(7), with a view to the Commission submitting a proposal under the relevant Treaty Procedure.”\(^2^{41}\) The Commission is empowered to establish such biologically sensitive protected area in a multi-annual plan under the procedures set out in Article 17 (1)-(6) of the Basic Regulation. The Commission must report regularly to the European Parliament and the Council on protected areas. Again here we see only a limited consultative role for stakeholders in the process of site selection and management. Option 2 under the SOCIOEC Analytical Framework, as shown in Table 1.

\(^{237}\) See para 9.5 \textit{infra}.

\(^{238}\) Case C-418/04 \textit{Commission v. Ireland} [2007] ECR. I-10947.

\(^{239}\) Article 7(a), Draft Regulation, Brussels, 11.06.2013.

\(^{240}\) \textit{Ibid.}

\(^{241}\) \textit{Id.}
9.5 Fisheries management and the EIA Directive

9.5-1 Environmental impact assessment (EIA) and strategic environmental assessment (SEA) are procedural tools that have unrealised potential to enhance governance structures and stakeholder involvement in fishery management under the CFP. If applied correctly, they will facilitate informed and transparent decision-making about the protection of the environment and the management of natural resources including fishery resources. They are not always a panacea in every instance and their utility should not be overstated. Indeed, experience in other areas of offshore law such as hydrocarbon development, demonstrates that they may also result in a number of paradoxes and a battlefield with the industrial/commercial sectors on one side and the environmental NGOs on the other, with national authorities juxtaposed endeavouring to balance the national interest in relation to growth and jobs against environmental protection considerations.

9.5-2 That said, the EIA Directive and the SEA Directive are well established in Union law and set down the regulatory requirements for assessing environmental impacts. Briefly stated, the former requires that certain classes of projects be subject to assessment before they are approved due to their nature, size, location, or their potential to have significant effects on the environment. Projects listed in Annex 1 of the EIA Directive are subject to mandatory assessment and projects listed in Annex II are subject to assessment where there are likely effects on the environment. In contrast, the SEA Directive (examined separately below) takes a much broader approach and provides for the strategic assessment of certain plans and programmes on the environment. Significantly, both the EIA and SEA Directives require national bodies in the Member States to take the views of the public and other stakeholders into consideration ex-ante and before a particular development, project, plan or programme is approved or authorised by the licensing or regulatory authority. In general, both directives have improved the quality, accountability and legitimacy of environmental and planning decisions in relation to development of the terrestrial environment.

9.5-3 Project based assessment is best understood as an iterative process used for “evaluating the likely environmental impacts of a proposed project or development taking into account inter-related socio-economic, cultural and human health impacts that are both beneficial and adverse”. This procedural and administrative law approach to environmental and natural resource management is aimed at allowing

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the effects on the environment to be taken into account at the earliest possible stage in the planning process and before a development or a given activity takes place. EIA can thus influence the approval or rejection of a proposed project or activity by national authorities, or it can result on consent for the project being subject to conditions that are aimed at mitigating adverse effects on the environment. The EIA process embodies and reflects a number of important environmental principles set down in the TFEU, namely: the precautionary principle, the principle of preventative action, the obligation to rectify pollution at source, and the principle that the polluter should pay.\footnote{Article 191 of the TFEU.}

9.5-4 The relationship between EIA and the regulation of fisheries is not fully developed in Union law. In light of the reform process and in the context of our discussion of stakeholder involvement in fishery management under the CFP, it is important to keep in mind that a central and fundamental concept of EIA is the requirement of extensive public consultation and stakeholder participation in decision-making prior to the authorisation of a particular activity or development. With this in mind, there are two aspects of EIA that need consideration: first, the legislative requirement to undertake assessment of the impacts of fishing activity under EU and international law; and secondly, the contingent obligation to give individuals including those from the fishing industry the right to participate in the EIA process.

9.5-5 At the outset, it should be noted that the EIA Directive does not have a specific focus on the marine environment and as a consequence there appears to be several gaps in EIA legislation as it applies to activities that take place at sea, or indeed in areas beyond national jurisdiction. Thus, for example, Annex I of the EIA Directive addresses aquaculture projects but doesn’t mention commercial sea fisheries specifically as a project or programme that require assessment. Similarly, Annex II projects are judged on a case-by-case basis and this leaves considerable discretion to national authorities in deciding whether there is a necessity to undertake an assessment before authorising a particular activity.\footnote{Ludwig Kramer, \textit{EU Environmental Law, 7th edition} (London: Sweet and Maxwell, 2011), 155-162.} As mentioned above, in view of the fact that different types of fishing gear can damage the geomorphology, flora and fauna of the seabed and water column, the Court of Justice held that mechanical cockle fishing, in an area of the Wadden Sea that had been designated under the Birds Directive for which a licence was granted annually, required an assessment of its impacts under the EIA Directive.\footnote{Case C-127/02, \textit{Landelijke Vereniging tot Behoud van de Waddenzee and Others} [2004] EGR 1-7405}

9.5-6 In practice, however, the EIA procedures that apply to activities that take place in the marine environment vary considerably. In general much of the focus of EIA is on physical development such as reclamation of land from the sea, the extraction of minerals from the seabed by dredging, the building of renewable energy installations, as well as on the works undertaken in relation to the

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\footnote{Case C-127/02, \textit{Landelijke Vereniging tot Behoud van de Waddenzee and Others} [2004] EGR 1-7405}
development and maintenance of seaports. In both the United Kingdom and Ireland, for example, there is no general legal requirement to undertake EIA in relation to commercial sea fisheries activity. As seen previously, however, there is such a requirement to undertake impact assessment in relation to sites that are protected under the Habitats and Birds Directives.\(^{248}\)

9.5-7 Instructively, the Basic Regulation requires information to be collected on the potential environmental impact of fishing activities on the marine ecosystems.\(^{249}\) Furthermore, the European Parliament has pushed for the inclusion of impact assessments as one of the principles of good governance under the CFP.\(^{250}\) Similarly, the Council and Parliament have both agreed that multiannual plans ought to include measures that reduce the negative impact of fishing on the ecosystem.\(^{251}\) Although the precise requirements have not been finalised at the time of writing, it needs to be kept in mind that under the reformed CFP, fisheries are to be managed by multi-annual plans and governed by principles such as the precautionary principle and the ecosystem approach. If these principles and approaches are to be fully implemented, then it may only be a question of time that EIA becomes an intrinsic part of fisheries management in the EU. This trend, as will be seen below, is already arising under international instruments and in relation to fishing activity in areas beyond national jurisdiction.\(^{252}\)

9.5-8 One important feature of the EIA process in the EU is that it requires Member States to observe strict temporal limitations for public consultation in order to facilitate interested parties in participating in the decision-making process regarding the authorisation of a particular project or programme. Furthermore, Member States must notify and seek the view of the public, and other Member States in some instances where there are transboundary environmental effects, on a number of matters, including: the approval or rejection of the project and any conditions associated with it; the principal arguments upon which the decision was based after examination of the results of the public consultation, including information on the process of public participation; any measures to reduce the adverse effects of the project.\(^{253}\) The precise details of such consultation are prescribed usually in national legislation, which matters such as the public bodies that are subject to mandatory and discretionary consultation. Such consultation has a number of inherent advantages in so far as it allows the licensing authority to hear the views of all interested parties on the environmental effects and to address key issues at a stage in the decision-making process before a determination is made on the merits of the proposed project or activity.

\(^{248}\) See paras XXX infra.
\(^{249}\) Recital 34, Preamble, and Article 37, Draft Regulation, Brussels, 11.06.2013.
\(^{250}\) Article 4 of the Draft Regulation. See 3-column document on basic regulation comparing the Commission’s, Parliament’s and the Council’s positions, 5.3.2013
\(^{251}\) Article 11, Draft Regulation, Brussels, 11.06.2013.
\(^{252}\) See paras 9.5-10 to 9.5-12.
9.5-9 The introduction of mandatory EIA should not be seen as a barrier or be resisted by industry representatives as it provides a number of inherent benefits as evidenced by projects concerning development in the terrestrial environment. These have demonstrated that the EIA procedural requirements provide potential developers with an opportunity to articulate the rationale behind the project, as well as providing an obvious framework for the mitigation of any detrimental environmental effects of the project.\footnote{Stuart Bell, Donald McGillvray and Ole W. Pedersen, \textit{Environmental Law, 8th edition} (Oxford: OUP, 2013), 487.} As noted by the House of Lords in the UK (now the Supreme Court), it is intended to give those affected by the project a meaningful way to get involved in the decision-making processes.\footnote{\textit{Berkeley v. Secretary of State for the Environment, Transport and the Regions} [2001] \textit{Env LR} 16.}

9.5-10 Perhaps it is appropriate to conclude this section by pointing out that recent trends in EU law on fisheries impact assessment must be viewed in light of development at an international level concerning the assessment of fishing activity with a view to reducing its environmental footprint. More specifically, EIA of fishing activity is required under several international instruments including the Fish Stocks Agreement that requires coastal and flag States to “assess the impacts of fishing, other human activities and environmental factors on target stocks and species belonging to the same ecosystem or associated with or dependent upon the target stocks.”\footnote{Article 5(d) of the Straddling Fish Stocks Agreement.} There is also an obligation on States and the EU to assess the impact of fishing on non-target and associated or dependent species and their environment, and adopt plans, which are necessary to ensure the conservation of such species and to protect habitats of special concern. Similarly, a prior assessment of the impact of fishing activities on the Antarctic Environment or on dependent or associated ecosystems must be undertaken under the 1998 Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol).\footnote{Article 8 of the Madrid Protocol} All States with vessels engaged in bottom longline fishing must submit EIAs to the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR) for review and approval. Three important RFMOs in the Atlantic (NEAFC, NAFO and SEAFO) require impact assessments in relation to bottom trawling in new fishing areas or when new scientific information becomes available.

9.5-11 Other relevant instruments are the United Nations General Assembly resolutions 61/105, 64/72 and 66/68, which call for the assessment of the impacts of bottom fishing on vulnerable marine ecosystems on the basis of the best available scientific information. Specifically, UNGA resolution 61/105 requires the adoption of measures that:

“assess, on the basis of the best available scientific information, whether individual bottom fishing activities would have significant adverse impacts on vulnerable marine ecosystems, and to ensure that if it is assessed that these...
activities would have significant adverse impacts, they are managed to prevent such impacts, or not authorised to proceed." 258

9.5-12 Further to the latter resolution, Regulation (EC) No 734/2008 prohibits the use of bottom gears in the High Seas without prior impact assessment for fishing activity in international waters not regulated by Regional Fisheries Management Organisations. 259 This requires the carrying out of prior scientific assessment and the publication of the results of the assessment. There are also rigorous regulatory requirements concerning: special fishing permits, VMS, observers, reporting to the Commission on catches and fishing plans, and the invocation of serious infringement procedures in relation to fishing in areas that are assessed. 260 Although no new deep-water areas are allowed to be fished without an environmental impact assessment, there are no prescribed requirements or standards set down by Regulation (EC) No 734/2008 regarding stakeholder consultation and participation in the assessment process. This mirrors developments outside of the EU where the approach to such matters appears to be arbitrary and fragmented. This is evident from a report from the Secretary-General of the United Nations on the implementation of UNGA resolution 61/105, which notes as follows:

"Some policies and legislation have provided for stakeholder participation in the identification and implementation of measures to protect marine ecosystems. Under the Canadian Oceans Act, various stakeholders cooperate in the planning and management of ocean activities, and in identifying ecologically and biologically significant areas and applying appropriate management measures to ensure the long-term health of ecosystems. In New Zealand, the Joint Marine Protected Area Policy and Implementation Plan will bring scientists, marine users, indigenous people and the broader community together to plan for the protection of marine habitats and ecosystems. In Australia, community support for the new zoning plan of the Great Barrier Reef Marine Park is being increased by building closer relationships between the Great Barrier Reef Marine Park Authority and community members through the Community Partnerships Programme." 261

9.5-13 The FAO Deep-sea Fishery Guidelines offer specific guidance regarding assessing the significant adverse impacts in vulnerable marine ecosystems. 262 These Guidelines require that the assessment: specify details of the activities; the ecological features of place to be fished; the risk assessment of relative to VMEs, including cumulative risks; the specification of mitigation and counter measures.

258 General Assembly Resolution 61/105 page 20.
261 Report of the Secretary-General on the Impacts of Fishing on Vulnerable Marine Ecosystems: Actions taken by States and regional fisheries management organizations and arrangements to give effect to paragraphs 66 to 69 of General Assembly resolution 59/25 on sustainable fisheries, regarding the impacts of fishing on vulnerable marine ecosystems. Available at: http://dataaccess-dds-ny.un.org/doc/UNDOC/GEN/N06/432/00/PDF/N0643200.pdf?OpenElement
Again, however, the Guidelines offer little in the way of guidance on the role of stakeholders in the assessment process, apart from the requirement that States and RFMOs should make publicly available the impact assessments, existing and proposed conservation and management measures; as well as the advice and recommendations provided by the appropriate RFMO/A scientific or technical committee, or other relevant body.263

9.5-14 Applying the SOCIOEC Analytical Framework, the scope for stakeholder engagement under the EIA Directive in relation to fisheries management appears to accord with Option 1 as shown in Table 1 above. Under some instruments that apply in areas beyond national jurisdiction, however, it is more akin to Option 2.

9.6 Fisheries management and the SEA Directive

9.6-1 The SEA Directive provides a legal basis for an assessment of the effects of certain plans and programmes which are likely to have significant effects on the environment.264 The strategic assessment of plans and programmes is aimed at ensuring that holistic consideration of the impacts, including cumulative ones, are taken into consideration before the plans and programmes are finalised and adopted by national bodies. The SEA Directive applies to all plans and programmes that are required by legislative, regulatory and administrative decision and which set the framework for future development consent in respect of projects under the EIA Directive (emphasis added), as well as those that require assessment under the Habitats Directive. SEA is also required in relation to plans and programmes on a case-by-case basis, which are determined by "screening" as likely to have significant environmental effects but are not subject to EIA. National bodies are required to prepare a report on the likely significant environmental effects of such plans and programmes, the alternatives, and propose mitigation measures where necessary.

9.6-2 Fishery management plan or programme established by legislative, regulatory or administrative provision could in certain circumstances come within the scope of the Sea Directive. This includes national strategic plans and operational programmes for the management of fishing vessels, as well as any fisheries-related plans or programmes impacting upon SACs or SPAs. Again in this instance, there is a clear nexus between the SEA Directive, the EIA Directive, and the Habitats and Birds Directives. Furthermore, on a case-by-case basis, the SEA Directive can apply to any plan or programme on the licensing or management of fishing vessels/ activity, including the renewal of licences, if the Member State determines that the plan or programme are likely to have significant effects on the environment.

9.6-3 The SEA Directive is largely permissive and procedural in nature and defines “environmental assessment” to mean “the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental

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263 Para 57 of the FAO Guidelines.
264 Article 3(2) of Directive 2001/42/EC.
report and the results of the consultations in decision-making, and the provision of information on the decision in accordance with Articles 4 to 9 of the Directive.”

One of the objectives of the SEA Directive is to make the decision-making process more transparent to ensure that the information supplied for the assessment is comprehensive and reliable. Accordingly, there are express requirements under the SEA Directive for national authorities to consult environmental authorities and the public during the course of the assessment process. Public consultation and participation must be made early in the preparatory phase and before the national authorities adopt the plan or programme.

9.6-4 In the case of the assessment of fisheries plans and programmes, the public include relevant non-government organisations such as those promoting environmental protection (eNGOs). Another important consideration in the context of fisheries management is that the SEA Directive has specific provisions on inter-Member State consultation when the plan or programme prepared in one Member State is likely to have a significant effect on the environment of other Member States. The Directive also requires that those consulted must be engaged with regard to the scope and detail to be included in the SEA report. As noted in a Communication from the Commission on the practical implementation of the SEA Directive in the Member States, there are a wide range of methods used for public consultation including:

“...public announcements, publication in official journals or the press, public meetings, internet surveys and questionnaires. In terms of the duration of the public consultation, only a few MS have set fixed time frames. Most MS allow for consultation periods of at least one month, while others decide on a case-by-case basis. General experience shows that public consultation, especially when organised at an early stage of planning and when understood as a process, contributes to a higher acceptance of the plan and programme, and therefore to the early identification and resolution of conflicts.”

9.6-5 The SEA process should in principle provide for stakeholder engagement in the preparation and of fishery plans and programmes. Moreover, its importance as process within the fishery management framework will be elevated as soon as the draft Directive on Maritime Spatial Planning and Coastal Management is adopted by the European institutions and implemented by the Member States. There are however significant impediments to be overcome. One study, for instance, has pointed to difficulties in applying SEA to fisheries plans or programmes due to the extensive nature of EU competence. The study goes on to suggest that a planning and SEA system could be established at the AC level with a view to securing

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265 Article 2 of Directive 2001/42/EC.
266 Recital 15, Preamble of Directive 2001/42/EC.
267 Article 5 of Directive 2001/42/EC.
269 See para. 9.8 of this report infra.
stakeholder buy-in and potentially make SEA an international consensus-building tool.\textsuperscript{271} In such instances, the study acknowledges that there would be requirement of a relatively rigorous system of oversight to ensure that the fishing industry doesn’t dominate or impede the decision-making processes.\textsuperscript{272}

9.6-7 There is no general requirement under Union law to undertake SEA in relation to all EU fisheries policy and legislation. The SEA Protocol to the Espoo Convention on EIA in a Transboundary Context, however, has been signed by the EU and the Member States and is in force and is now being applied to certain sectors. Moreover, the SEA Directive is applied to the operational programmes financed by the European Fisheries Fund. In this respect, the Commission report that the quality of the SEA varied considerably between Member States.\textsuperscript{273} The Commission noted that despite the large number of participants “there were insufficient opportunities for public involvement due to inadequate methods of consultation”.\textsuperscript{274}

9.6-8 Applying the SOCIOEC Analytical Framework, stakeholder engagement under the SEA Directive aligns most closely with Option 2, as shown in Table 1.

9.7 Fisheries management and the Aarhus Convention

9.7-1 There is little doubt but that the European institutions and the Member States have sought to enhance the role of stakeholder and their participation in fisheries policy development and management decisions. The provision of access to information and access to justice in environmental matters are an integral part of this process under the provisions in EU law giving effect to the Aarhus Convention. The objectives of this important international agreement are threefold, namely: (1) to guarantee rights of public participation in decision-making in environmental matters (2) to ensure public participation in decisions on the specific activities that are listed in Annex I of the Convention, as well as other non-listed activities that may have a significant effect on the environment; (3) to improve access to procedures for challenging the substantive or procedural legality of decisions, acts or omissions that come within the scope of Article 6 of the Convention. The EU has adopted a range of legislative measures to implement the Aarhus Convention as shown in Table 11 below.\textsuperscript{275} Crucially, the Grand Chamber of the Court of Justice has held that the Aarhus Convention is part of EU law and that national courts ought to interpret their national law in a way, which, to the fullest extent possible, is consistent with the objectives of the Convention with a view to ensuring “effective judicial protection in the fields covered by EU environmental law.”\textsuperscript{276}

\textsuperscript{271} Ibid at viii.
\textsuperscript{272} Ibid at ix.
\textsuperscript{274} Ibid., at 11.
\textsuperscript{275} Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJL 124, 17.5.2005, 1–3.
\textsuperscript{276} Case C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court (Grand Chamber) of 8 March 2011.
Table 11: EU legislation implementing the Aarhus Convention

<table>
<thead>
<tr>
<th>Implementing the Aarhus Convention</th>
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<tr>
<td>• Directive 2003/4/EC on public access to environmental information; (277)</td>
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<tr>
<td>• Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment; (278)</td>
</tr>
<tr>
<td>• Regulation (EC) N° 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. (280)</td>
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9.7-2 Participation is defined in EU law to include participation by a wide range of constituents including associations, organisations and groups, as well as eNGOs. \(281\) Effective public participation is justified on the grounds that it “enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.” \(282\)

9.7-3 The success of the Aarhus Convention in achieving these objectives is the subject of some debate in the specialist literature, as well as in the reports of the Aarhus Convention Compliance Committee. \(283\) On the one hand, some academic commentators have argued that the implementation of the Aarhus Convention through the medium of EU and national law in the Member States has improved the quality of public participation in environmental decision-making through the use of procedural mechanisms such as EIA. \(284\) Another authority has noted, on the other hand, there is little improvement in the range of possibilities open to individuals to improve the application or enforcement of EU environmental law at EU or Member State levels. \(285\)

9.7-4 Notably, at the time of writing, there are no provisions in the Basic Regulation similar to Article 19(3) of the MSFD concerning public access to

(281) Article 3 of Directive 2003/35/EC.  
(282) Recital 3, Preamble of Directive 2003/35/EC.  
information. What is significant for the purpose of this report, however, is that the substantive and procedural provisions set down by the Aarhus Convention continue to inform and influence EU sector policies including the CFP. Moreover, the European institutions have sought to strengthen this influence by improving access to environmental data including fisheries data held by public bodies. In particular, the Parliament has sought to ensure that the actions taken by the Union and by Member States under the CFP comply fully with the Aarhus Convention and that there are transparent data-handling and decision-making structures in place that provide for access to information, public participation in decision-making and access to justice in environmental matters.\textsuperscript{286} Furthermore, the Parliament has sought the amendment of the Basic Regulation to ensure that Directive 2003/4/EC and Regulations (EC) No 1049/2001 and (EC) No 1367/2006 apply under the CFP with a view to improving access to environmental information.\textsuperscript{287} These amendments were not adopted by the Council at their meeting of June 2013, and may be raised again by the Parliament at the second reading in October 2013.

9.7-5 Several instruments have been adopted within the framework of the CFP, including the Control Regulation 1224/2009, which have extensive provisions on the collection and dissemination of fishery management information. When considering the utility of the Aarhus framework in improving transparency and accountability in relation to such information, however, attention needs to be drawn to the classes of exemptions, which provide a legal basis for public bodies to refuse to disclose information on the grounds of commercial confidentiality or to protect economic interests. This type of exemption is particularly relevant to fishery management data such as fishing effort and VMS data. Furthermore, questions have been raised by a number of eNGOs about the transparency of some aspects of the CFP, including access to documents held by the Commission on the evaluations of fisheries access agreements with third countries.\textsuperscript{288}

9.7-6 Applying the SOCIOEC Analytical Framework, the relationship between fisheries management provisions under the CFP and the obligations that arise under the Aarhus Convention aligns most closely with Option 2, as shown in Table 1.

9.8 Fisheries management and the Draft Directive on MSP and ICM

9.8-1 Fisheries is no longer a stand-alone policy and the essence of the EU approach to the wider issues of maritime governance and enhanced stakeholder participation can be seen in recent legislative proposals and policy initiatives from

\textsuperscript{286} See 3-column document on basic regulation comparing the Commission’s, Parliament’s and the Council’s positions, 5.3.2013. Available at: http://cfp-reformwatch.eu/wp-content/uploads/2013/03/CFP_Basic_reg_3-column_document_revised_5-March.pdf

\textsuperscript{287} Ibid.

the European institutions on the subject of maritime spatial planning and integrated coastal management. Specifically, as a part of the strategy to develop Europe’s Blue Economy and to facilitate coherence between the various EU policies and legislation governing maritime activities, the Commission brought forward in March 2013 a legislative proposal for the adoption of a Directive establishing a framework for maritime spatial planning and integrated coastal management. According to the IA of the proposal, the purpose of this Directive is to provide a framework for taking decisions concerning the use of maritime space in the marine environment and to address what the Commission describes as land-sea interactions of coastal activities. The draft Directive underpins the application of the ecosystem-approach under the MSFD and aims to reduce conflicts between the attainment of the economic objectives of EU policies and the protection of the marine environment. In the words of the draft Directive, MSP and ICM will “result in better coordination of maritime and coastal activities, which can lead to significant economic benefits by providing transparency, predictability and stability for investors as well as lowering coordination and transaction costs”.

9.8-2 Maritime spatial planning is viewed by the Commission as an obvious mechanism that again has considerable potential to contribute to the conservation and sustainable exploitation of fisheries resources under the CFP. Nevertheless, the precise relationship between the draft Directive and the CFP is not easy to discern at this point in time and certainly not before the proposed instrument has been through the rigorous law-making procedures that take place in the Council and Parliament. Nonetheless, the Commission has expressed the view in the impact assessment that the draft Directive is not sector specific and will thus not disturb the acquis under the TFEU. On the other hand, the intention is to apply the acquis in areas such as fisheries in an integrated manner with other EU policies that are applicable to the marine environment in accordance with the scheme set down in the Directive. This approach can be seen in many key provisions in the draft Directive. For instance, “sector activities” are defined to mean those activities falling under the scope of Union policies referred to in Part Three of the TFEU, which have an impact on marine waters and coastal zones, and thus extend to fisheries and the CFP. Indeed, two of the objectives of MSP and ICM are aimed at “fostering the sustainable development and growth of the fisheries and aquaculture sector, including employment in fisheries and connected sectors;” and “ensuring the preservation, protection and improvement of the environment as well as the prudent and rational use of natural resources, notably in order to achieve good environmental status, halt the loss of biodiversity and degradation of ecosystem services and reduce marine pollution risks.” Furthermore, Member States must map and identify the actual and potential spatial and temporal distribution of all relevant maritime activities including fishing. Similarly, Member States are

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290 Ibid., at p.9.
291 Recital 16, Preamble, Draft Directive.
293 Article 5(d), Draft Directive on MSP and ICM.
294 Article 7, Draft Directive.
obliged to take into account fishing activities in establishing integrated coastal management strategies.\textsuperscript{295}

9.8-3 Accordingly, the implementation of the Directive by the Member States will have a major bearing on the planning and use of maritime space for different offshore activities including fishing activities. In particular, it will facilitate trans-boundary cooperation, planning and management in marine region and sub-regions and related coastal zone for activities that straddle marine ecosystems, such as fishing grounds, marine protected areas and so forth. Moreover, it enhances the role of the principal actors in this process, which are the Member States. They retain exclusive competence to decide on the content and implementation of such plans and strategies, as well as the designation of maritime space to the different sector activities in sea areas under their sovereignty and jurisdiction.\textsuperscript{296} In this context they should build upon the principles and elements set out in previous European instruments on coastal zone management and this includes the Protocol on Integrated Coastal Zone Management in the Mediterranean to the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean.\textsuperscript{297}

9.8-4 The role of the public, stakeholders, and sector interests such as the fishing industry, is articulated in a number of provisions of the Draft Directive. The nature and importance of this participation is noted in the Preamble, which provides as follows:

“…the management of maritime and coastal areas is complex and involves different levels of authorities, economic operators and other stakeholders. In order to guarantee sustainable development in an effective manner, it is essential that stakeholders, authorities and the public are consulted at an appropriate stage in the preparation of maritime spatial plans and integrated coastal management strategies under this Directive, in accordance with relevant EU legislation. A good example for public consultation provisions can be found in article 2(2) of Directive 2003/35.”\textsuperscript{298}

9.8-5 The above provision refers to the instrument that transposes the requirements of the Aarhus Convention into Union law.\textsuperscript{299} The “public” is defined to mean involving one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.” \textsuperscript{300} This thus extends the ambit of the Directive to fishing industry representative groups. Further detail is provided in Article 9, which provides a clear role for stakeholder participation in the development of the plans and strategies. In particular, it requires that the relevant stakeholders and authorities and the public concerned are

\textsuperscript{295} Article 8, Draft Directive.
\textsuperscript{296} Recital 12, Draft Directive
\textsuperscript{298} Recital 16, Preamble, Draft Directive.
\textsuperscript{299} Discussed above at paras XXXX.
\textsuperscript{300} Article 3(5), Draft Directive.
consulted on the draft plans and strategies and have access to the results once available. Moreover, when establishing the means of public consultation, the Member States are obliged to act in accordance with relevant provisions in other Union legislation. In this regard, the Commission is empowered under the Draft Directive to adopt by means of implementing acts the operational steps for the establishment and reporting on public consultation in relation to MSP and CZM.\footnote{301 See Chapter 5 \textit{infra}.}

9.8-6 In summary, the principal objective of the Draft Directive is to implement a procedural mechanism with which to identify and manage spatial uses and conflicts in maritime areas, including, it must be assumed, conflicts that arise between users of maritime space with the fishing industry. As seen above, there is a defined role for stakeholders in the design and establishment of plans and strategies under the scheme advanced by the Draft Directive. Indeed, one of the \textit{raison d’être} for this instrument is to “establish an integrated planning process for maritime activities and an integrated management process for coastal zones, by bringing together national authorities and stakeholders of the relevant sector policies”.\footnote{302 See Chapter 5 \textit{infra}.} That said, however, there appears to be little that is innovative in the proposal in relation to stakeholder participation, which largely reflects the traditional top-down hierarchical approach to maritime governance favoured by the EU and Member States. The latter remain firmly in the driving seats regarding the design and implementation of the proposed schemes of plans and strategies. Notably, the Draft Directive does not envisage the establishment of any new public-private nexus or the creation of a managerial role for private actors in environmental or natural resource management. Accordingly, the proposed scheme does little to usurp the traditional hierarchy and authoritative role of the Member State in maritime spatial planning and integrated coastal management. As such, the Draft Directive when fully implemented is unlikely to reduce the scope of the public powers available to regulators and administrators in the management of fisheries under the CFP. At best, it will widen the scope for private actors to have their views taken into consideration in decision-making processes concerning other activities that take place in the marine environment, particularly activities that impinge upon the sustainable use of marine and coastal resources including fisheries.

9.8-7 Applying the SOCIOEC Analytical Framework, the Draft Directive on MSP and ICM aligns most closely with Option 2, as shown in Table 1.

9.9 Integrated Maritime Policy

9.9-1 The fisheries sector is only one part of the wider maritime economy and considerable efforts were made during the reform process by the EU institutions to dovetail the CFP with the EU’s Integrated Maritime Policy (IMP). The objective of the IMP is to support the sustainable development of seas and oceans and to develop coordinated, coherent and transparent decision-making in relation to the Union’s

\footnote{301 See Chapter 5 \textit{infra}.}
\footnote{302 COM(2013) 133 final. Brussels, 12.3.2013, at p.23.}
sector policies affecting the oceans, seas, islands, coastal and outermost regions and maritime sectors, including through sea-basin strategies or macro-regional strategies. Much of the emphasis in the IMP is on creating synergy between various EU policies and regulatory regimes to ensure greater economic efficiency and to promote the EU’s agenda for growth, jobs and improving competitiveness. The IMP, for example, identifies maritime spatial planning and integrated coastal management (discussed above) as suitable tools for use by public authorities and stakeholders in the application of an integrated approach to marine resource management. Likewise, the application of an ecosystem-based approach under both the CFP and the IMP are perceived as a means to promote the sustainable growth of the maritime and coastal economies and the sustainable use of marine and coastal resources.

9.9-2 In this process, one of the objectives of the IMP is to ensure the closer involvement of stakeholders in integrated maritime governance schemes. Most notably, considerable efforts have been made by the Commission to align the CFP with the IMP by means of the European Fisheries Fund. This Fund is aimed at bringing Union policies that have a maritime dimension such as fisheries, the trans-European transport network tourism, environment and climate change, the framework programme for research and development and energy policy, into the one common strategic framework from a fiscal management perspective. This in turn is expected to improve coordination and the harmonisation of the implementation of EU policies including the CFP. Moreover, Member States can make use of the fund to “support efforts to improve data collection and strengthen control, and ensure that synergies are also sought in support of the priorities of the IMP, such as marine knowledge, maritime spatial planning, integrated coastal zone management, integrated maritime surveillance, the protection of the marine environment and of biodiversity, and the adaptation to the adverse effects of climate change on coastal areas.”

9.9-3 The IMP does not prescribe the adoption of any definitive structures regarding the management of fisheries or any other maritime sector. As far back as 2008, however, the Commission reported that “the main problems found slowing down the implementation of an integrated approach to the IMP, apart from financial constraints, are generally lack of collaboration and of coordination structures between the players concerned and the long time it takes for administrations and

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304 See Chapter 3 supra.
stakeholders to internalise fully integrated thinking.”  

Furthermore, the Commission advocated “economic operators should adopt an integrated approach by forming “maritime clusters” which, in turn, can cooperate with other stakeholders by setting up civil society fora and networks of maritime stakeholders.” They called upon Member States to develop their own national integrated maritime policies and recommended strongly that they “promote and facilitate appropriate stakeholder structures, allowing broad participation by stakeholders in governance of maritime affairs, taking measures to increase the capacity of the social partners and ensuring a transparent decision-making process.”

9.9-4 Essentially, EU measures under the IMP are focused on promoting best practices and greater dialogue between the various sectors that have a maritime interest. Apart from generating greater public awareness of the core maritime issues, these initiatives are capable of bringing specialist stakeholders concerned with the management of the CFP together with experts from national, regional and local bodies, as well with private undertakings and other interested parties. The principal players in this dialogue again appear to be the public bodies in the Member States.

9.9-5 Applying the SOCIOEC Analytical Framework, the IMP aligns most closely with Options 1 and 2, as shown in Table 1.

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310 Ibid.
9.10 Summary of the approach adopted by Union environmental directives

9.10-1 If one applies the SOCIOEC Analytical Framework to the approach to stakeholder engagement in fisheries management decisions under Union environmental legislation and the IMP, then the position can be summarised in Table 11 below.

Table 12: Summary of EU environmental legislation and SOCIOEC Analytical Framework.

<table>
<thead>
<tr>
<th>Institutions and the public</th>
<th>SOCIOEC Analytical Framework</th>
</tr>
</thead>
<tbody>
<tr>
<td>MSFD</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>Habitats and Birds Directives</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>Fish stock recovery area</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>EIA Directive</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>SEA Directive</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>Aarhus Convention</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>IMP</td>
<td>Options 1 and 2</td>
</tr>
</tbody>
</table>
Chapter 5

LIMITATIONS IMPOSED BY UNION LAW

10.1 Union Treaties and fisheries law-making

10.1-1 This chapter reviews the way the EU makes its decisions on fisheries management under the CFP and the legislative process within the Union. In particular, it focuses on the obligations that arise under Union treaties, as well as the legal constraints on decentralisation and the enhancement of governance structures as a result of the exclusive nature of Union competence in relation to fisheries. Mention is made of the attribution of powers in relation to fisheries, the principle of conferral, the exclusive and shared nature of Union competence, the residual powers of the Member States, the delegation of powers to the Commission by the Council and Parliament, fisheries implementation acts, as well as the application of the principles of proportionality and subsidiarity to EU law-making under the CFP. This discussion also touches upon the relationship between the Union institutions, national parliaments in the Member States, as well as the structures and procedures that are already in place for stakeholder engagement. The obligations that arise under the settled case law of the Court of Justice of the European Union are mentioned at appropriate points in the text.

10.2 Legal personality and the attribution of vires

10.2-1 The Union has legal personality and competence to adopt legislation and to make decisions in certain policy areas, which legally bind the Member States and the European institutions.\(^{311}\) In the unique lexicon of the EU, competence is the term used to define and to describe the attribution of the powers (vires) for decision-making in a particular policy realm such as fisheries. Accordingly, one of the most important constraints on the establishment of governance structures and stakeholder involvement in fisheries management under the CFP relates to the distribution of legislative competence between the Union and the Member States under the European Treaties. The allocation of competence defines the limits of what can be achieved in establishing a fisheries management paradigm that provides for a fully-fledged system of self- and co-management at a devolved level in the Member States.

10.2-2 One of the welcome changes that the Lisbon Treaty brings about to the treaty architecture of the Union is that it describes and codifies the attribution of various categories of competence between the EU and the Member States in a number of specific areas that are set down in the TFEU.\(^{312}\) In particular, the Treaty identifies three categories: exclusive, shared, and competence to support,

\(^{311}\) Art 47 of the TEU.
\(^{312}\) Arts 2-6 of the TFEU.
coordinate, or supplement Member State action. The principle provisions on fisheries are set out in Title 1 of the TFEU, which deals with the categories and areas of EU competencies. As will be seen below, they fall into the two broad categories of exclusive and shared competence. In addition, the EU can only exercise competence whether exclusive or shared on a particular subject matter such as fisheries in accordance with the principle of conferral, which is an obvious starting point for the discussion of this topic.

10.3 Treaty constraint: the principle of conferral

10.3-1 The Treaty on European Union (TEU) provides that the “Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.”\(^\text{313}\) Moreover, the TEU goes on to clearly state that competences not conferred upon the Union in the Treaties remain with the Member States.\(^\text{314}\) The principle of conferral was included in the TEU by the Lisbon Treaty to stop the phenomenon of competence drift in favour of the EU in a number of policy areas over recent decades. The principle is not unique to Union law as it is a common feature in the constitutional architecture of international organisations or federal states and is aimed at putting clear boundaries between the areas where the EU can exercise its powers and areas where the Member States exercise their sovereignty. The corollary of the principle is that the EU has a solid legal basis for EU action in areas where it has been conferred with appropriate competence pursuant to the Treaties. The principle of conferral has always been implicit in Union law. In understanding its application in practice, however, it is important to keep in mind that the EU is vested with competence by the Member States and that any such competence can also be taken away by the Member States.\(^\text{315}\) In other words, the EU does not determine its own legislative remit and exercises its mandate within the parameters set down by the Treaties as agreed by the Member States. All legislative measures emanating from the Union including those on fisheries conservation must have a specific legal basis in the Treaties. Thus, we can trace the origin of any particular legislative provision back to the Treaty and to where the Union has been vested with such powers by the Member States.

10.4 Exclusive legislative competence in relation to marine biological resources

10.4-1 The TFEU provides that the Union shall have exclusive competence in the conservation of marine biological resources under the CFP.\(^\text{316}\) There is nothing radically new in this provision as it merely reflects the codification of long-established case law of the Court of Justice of the European Union that may be

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\(^\text{313}\) Art 5(2) of the TEU.
\(^\text{314}\) Ibid.
\(^\text{315}\) The procedures for the amendment of the Treaties are set down in Art 48 of the TEU.
\(^\text{316}\) Article 3 (1d) of Title 1, ,
traced back to the 1970s. As such, the TFEU does not change the previously held powers of the EU to adopt measures for the conservation of the biological resources of the sea including the fixing of catch quotas and their allocation between Member States on the basis of relative stability of fishing activities for each fish stock or fishery.

10.4-2 This provision is unequivocal in so far as when the Treaties confers on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts. This is subject to the caveat that Member States can do so if they are empowered by the Union or with a view to implementing a Union measure. The consequences of exclusive EU competence have been described as “severe” in that Member States have no autonomous legislative powers and can thus neither legislate nor adopt any legally binding non-legislative act in the field where the EU exercises exclusive competence (emphasis added). This means, that it is not permissible for a Member State to adopt binding measures that provide for self and co-management management of fisheries unless they are empowered to do so by the Union, or to implement Union acts. Moreover, under the TFEU, the Union has exclusive competence to enter into international agreements including international fisheries agreements once certain conditions are satisfied. In line with the general scheme of Union law, the principle of proportionality applies to Union measures in areas where it exercises its exclusive competence, but not the principle of subsidiarity.

10.4-3 There are a number of other terms and definitions that have a bearing on the exercise of Union competence in relation to fisheries. The Treaties, for example, do not define the term or expression “marine biological resources.” This term, however, is given a very broad definition in the draft Basic Regulation, which provides that it means “available and accessible living marine aquatic species, including anadromous and catadromous species during their marine life.” In the domain of the conservation of marine biological resources, there are many ways of course whereby the EU can exercise its exclusive competence including the adoption of regulations, the harmonisation of national legislation and by means of fiscal or policy measures. The Basic Regulation provides much of the detail on how this is to be achieved in practice for the purpose of achieving the conservation and exploitation objectives of the CFP. Thus, for example, the Union must adopt conservation measures that include: multiannual plans; targets for the conservation and sustainable exploitation of stocks and related measures to minimise the impact of fishing on the marine environment; measures to adapt the fishing capacity of fishing vessels to available fishing opportunities; economic incentives; measures on

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318 Art 2(1) of the TFEU.
319 Ibid.
321 Art 3(2) of the TFEU.
322 See further infra.
10.5 Shared legislative competence

10.5-1 The TFEU sets down a number of policy areas where competence is shared between the EU and the Member States. Although the list of shared competences set down in the TFEU is not exhaustive, the TFEU does provide that the Union has shared competence, inter alia: for agriculture and fisheries, apart from the aforementioned area concerning the conservation of marine biological resources (emphasis added). Accordingly, policy areas such as aquaculture come within the scope of shared competence.

10.5-2 In areas of shared competence, both the Union and the Member States may legislate and adopt legally binding acts. Member States, however, can only exercise their competence “to the extent that the Union has not exercised its competence.” In other words, the Member States lose their competence as soon as the EU exercises its competence in a particular area. Further detail and clarity are provided by Protocol No. 25 appended to the TFEU which states that “when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area.” Furthermore, since the entry into force of the Lisbon Treaty, the TFEU now provides a legal basis for the so-called “repatriation” of shared competence where the Union has decided to cease exercising its competence. In accordance with the Declaration on the delimitation of competences, the latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular to ensure greater adherence and respect for the principles of subsidiarity and proportionality. This can be undertaken on the basis of a simple majority of the Council. Alternatively, the Council may seek to amend the Treaties with a view to either increasing or reducing EU competences. This applies equally to competences exercised in the domain of fisheries.

10.5-3 In line with the general scheme of EU law, the Union must exercise its legislative competence in areas of shared competence in accordance with the principles of proportionality and subsidiarity. In practice, ascertaining the precise division of shared competence in any particular area pertaining to the CFP requires a rigorous appraisal of the acquis (the settled law) as it applies to fisheries, the fixing and allocation of fishing opportunities; spatial management measures; and technical conservation measures.

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324 Article 7, Draft Regulation, Brussels, 11.06.2013.
325 Art 4 of the TFEU.
326 Arts 48 (2) and (5) of the TFEU.
327 Art 2(2) of the TFEU.
328 Ibid.
329 Protocol No. 25 to the TFEU on the exercise of shared competence.
330 Art 2(2) of the TFEU (last sentence). Declaration 18
331 Declaration No 18 to the TFEU in relation to the delimitation of competences.
332 Art 241 of the TFEU. Declaration No 18 to the TFEU in relation to the delimitation of competences.
333 Article 48(2) to (5)
protection and preservation of the marine environment, and in many related areas. Furthermore, the exercise of EU competence in areas of shared competence tends to be ambulatory in nature. EU measures prevail over national measures in areas where the Union exercises its competence. Significantly, the treaties do not impose any area of marine environmental protection exclusively to the Union or exclusively to the Member States. However, we have seen many areas in Chapter 4 where the union has exercised its competence such as under the MSFD, the Habitats and Birds Directives. In such areas, national measures must conform to both the tenor and letter of Union law.

Table 13: Division of competence between EU and Member States

<table>
<thead>
<tr>
<th>Union Competence</th>
<th>Areas</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Union exclusive competence</strong></td>
<td>The conservation of marine biological resources under the common fisheries policy (Art 3(d))</td>
</tr>
<tr>
<td><strong>Shared competence between the Union and Member States</strong></td>
<td>Agriculture and fisheries, excluding conservation of marine biological resources (Art 4(2)(d))</td>
</tr>
<tr>
<td></td>
<td>Environment (unless the Union has exercised its competence on a particular subject matter such as the protection of the marine environment under the MSFD)</td>
</tr>
</tbody>
</table>

10.6  Powers of the Member States under the Basic Regulation

10.6-1 There are a number of brief points that can be made about the Union’s exclusive and shared competence in relation to fisheries under the reformed policy. At the outset, it is noted that the Union’s competence does not extend to cover all fisheries management measures to the detriment of the Member States, which have powers in a number of significant policy areas. Indeed, as seen above, the Basic Regulation provides a legal basis for Member States to cooperate with one another for the purpose of adopting measures necessary to ensure compliance with obligations under Union environmental legislation. Similarly, the Member States must coordinate with one another before adopting national measures within 12-mile zone of the coast where these measures affect fishing vessels of other Member

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334 Case C-459/03, Commission v. Ireland [2006] ECR I-4635. 204
335 Article 7(1), Draft Regulation, Brussels, 11.06.2013.
As previously pointed out, such measures must only be adopted after consulting the Commission, the relevant Member States and relevant ACs. In specific cases, the Basic Regulation empowers Member States to adopt legally binding acts including conservation measures. The Mediterranean region is mentioned specifically by the Basic Regulation as a region suitable for the adoption of such measures.

On a similar vein, the regional cooperation procedures established under Article 17 of the Basic Regulation foresees Member States acting jointly in relation to making recommendations on conservation measures including multiannual plans, measures in accordance with Article 12, and specific plans for the obligation to land catches. The Commission in turn is empowered to adopt these measures by means of delegated or implementing acts, and ensuring that such recommendations are compatible with the relevant conservation measure and/or multiannual plan.

According to this analysis, Member States may adopt management measures in line with the scheme set out in the Basic Regulation. This may include measures that facilitate self- and co-management by the industry provided these measures are based on the best available scientific advice and are compatible with four criteria, namely: (i) the objectives set out in Article 2 of the Basic Regulation such as the precautionary approach and the ecosystem principle; (ii) the scope and objectives of the Union conservation measure; (iii) the relevant multiannual plan; and (iv) are no less stringent than those existing in Union legislation. These are essentially the legal parameters that frame the scope for Member State action in the field of fisheries management under the CFP.

Lastly, the Basic Regulation foresees the delegation of the management function back to the Member States and through their good offices to others concerned with the management of fisheries such as POs. As seen in Chapter 1, the POs play a fundamental role in the decentralisation of the CFP at an operational level under various systems of self-regulation and co-management such as the one that operates in the North Sea shrimp fishery. The powers delegated to the POs extend to the adoption of fisheries conservation and management measures and can be aimed at vesting industry with greater responsibility in the management of quotas and fishing effort, as well as in the adoption of appropriate technical conservation measures. The latter could include an incentive-based system in selected fisheries with the prospect of additional benefits for those that get involved in specific management and compliance schemes on a voluntary basis.

336 Article 7(2), Draft Regulation, Brussels, 11.06.2013.
337 See Chapter 3 supra.
338 Article 7(3), Draft Regulation, Brussels, 11.06.2013.
339 Ibid.
340 Article 17(3), Draft Regulation, Brussels, 11.06.2013
341 See Chapter 1 supra.
Furthermore, there are inherent advantages in this approach as noted by the Federal Ministry of Food, Agriculture and Consumer Protection in Germany in their submission in response to the Commission’s Green Paper, which reads as follows:

“If competencies were to be delegated to the producer organisations, the monitoring of quota and effort management would result in an easing of the burden on the authorities because the number of checks could be substantially curbed on balance. What is more, the ...Control Regulation allows a quicker matching of data and checks that are more strongly focused on risks. For specific measures, such as programmes to avoid discards and the by-catch of protected species, either video surveillance on board or scientific monitoring programmes should be envisaged.”

10.6-5 In relation to the powers of the Member States under the Basic Regulation, it is evident that they are free to allocate fishing opportunities allocated to them by the Council among the regions or operators as they see fit including the empowerment of POs for this purpose. In essence, this gives Member States and the POs considerable scope to establish the most appropriate self and co-management model of their choice to exploit their allocated fishing opportunities.

10.7 Delegation of powers to the Commission

10.7-1 The Lisbon Treaty increased the powers of the European institutions in relation to the CFP by extending the co-decision procedure to fisheries, other than the setting of the TAC and quotas, which remains within the sole prerogative of the Council. The co-decision procedure in itself can improve governance by increasing transparency and accountability in the law-making process by allowing third parties to raise concerns more easily in the European Parliament and by facilitating scrutiny by national parliaments of European proposals to reform the policy. There is a downside, however, as this process is attenuated and has the potential to delay the timely management of fisheries for up to two years. This delay became clearly apparent in relation to the extended and protracted debate on the reform of the CFP and the adoption of the Basic Regulation by the Council and Parliament.

10.7-2 Thus it is unsurprising to note that there are significant provisions in the TFEU to overcome the centralisation of the law-making functions in the Council

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343 ibid.
344 House of Commons, TREATY OF LISBON: AN IMPACT ASSESSMENT, p.272, paras 10.36 and 12.175.
and the Parliament.\textsuperscript{345} Moreover, one such way is the delegation of powers to the Commission under the Basic Regulation.\textsuperscript{346} In addition, this eases the amount of work undertaken by the Council and the Parliament in relation to individual management decisions and can thus be viewed as an enhancement of the law-making role and powers of the Commission. This should in turn remove the responsibility of micro-management from the Council and enhance the role of the Commission acting in cooperation with the Member States.\textsuperscript{347} As noted previously, the power to adopt delegated acts is conferred on the Commissions in relation to the following:

- The development and implementation of conservation measures and measures affecting fishing activity in areas protected under environmental law;
- The implementation of the discard prohibition and the obligation to land all catches for the purpose of complying with the Union’s international obligations;
- The extension of the landing obligation towards other species having used the regionalisation process, as well as adopting a discard plan using the regionalisation process;
- The adopting \textit{de minimis} exemptions to the landing obligation if no other implementation measure for the landing obligation has been adopted: and
- The details of the functioning of the ACs.\textsuperscript{348}

10.7-3 In general, the exercise of delegated powers is trammelled by the residual powers of the Council and Parliament. Thus, for example, there is considerable oversight and the European Parliament or the Council may revoke the delegation of power to the Commission at any time. A decision to revoke puts an end to the delegation of the powers specified in that decision. Moreover, as soon as it adopts a delegated act, the Commission must notify it simultaneously to the European Parliament and to the Council. Significantly, a delegated act enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council. Significantly, in the context of this paper, it is pertinent to note that scrutiny of delegated acts is undertaken by advisory committees of national experts and by committees of the Parliament.

10.7-4 The procedures on the delegation of certain functions and powers to the Commission are clear, precise and comprehensive. They will expedite the adoption of legislative measures by the Commission but in no way do they advance the role of stakeholders in governance or fisheries management. Furthermore, the

\textsuperscript{345} Article 290, TFEU.
\textsuperscript{346} Article 55, Draft Regulation, Brussels, 11.06.2013.
\textsuperscript{347} See Chapter 2, para 7.2 \textit{supra}.
\textsuperscript{348} See Chapter 3 \textit{supra}.
Council, the Parliament and the Commission have adopted a common understanding on how to implement delegated powers under the Treaty. What is most significant about this Understanding is that it requires the Commission to carry out an extensive preparatory phase including consulting experts from the Member States who are required to implement the delegated act. Again, here, there is no stated role for the wider stakeholder interests or indeed participation by stakeholders over and beyond the role of the ACs. The Commission is in effect playing a quasi-legislative role in the law-making process by utilising its delegated powers and the task of fisheries management is thus seen as a task of public administration to be discharged in the main by national and Union experts. An example of this approach to law-making is Commission Delegated Regulation (EU) No 32/2012 of 14 November 2011 supplementing Regulation (EU) No 1236/2010 of the European Parliament and of the Council laying down a scheme of control and enforcement applicable in the area covered by the Convention on future multilateral cooperation in the North-East Atlantic fisheries. This particular regulation sets down the list of fishery resources to be reported by Member States by vessels flying their flag in the NEAFC area. Plainly, such a measure is best adopted by means of delegated legislation and this in no way usurps the law-making powers of the Council and the Parliament.

10.7-5 The use of delegated powers by the Commission in relation to fisheries management decisions thus conforms to Option 1 under the SOCIOEC Analytical Framework, as shown in Table 1 above.

### 10.8 Implementing acts

10.8-1 Similar to other Union policies, there is scope under the TFEU for the Commission (and the Council in special circumstances) to adopt implementing acts with a view to ensuring uniform conditions for the implementation of legally binding Union acts. For this purpose under the CFP, the Committee for Fisheries and Aquaculture assists the Commission. This is a committee within the meaning of Regulation (EU) No 182/2011 and is made-up of representatives of the Member States and chaired by the Commission, who submit the initial draft of the measure. Again, reliance of this procedure ought to remove the responsibility of micro-management from the Council and enhance the role of the Commission in the law-making process concerning the CFP. Implementing acts may be adopted in cases of a serious threat to marine biological resources, or where emergency measures need to be adopted in certain circumstances, or to manage entries and exits from

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349 Council 8753/11, Common Understanding as approved on 3 March 2011 by the Conference of the Presidents of the European Parliament, Brussels, 10 April 2011.

350 L13/1, 17.01.2012.

351 Article 291, TFEU.

352 See Chapter 2, para 7.2 supra.

353 Article 13, Draft Regulation, Brussels, 11.06.2013.

354 Article 13a, Draft Regulation, Brussels, 11.06.2013.
the fishing fleets of the Member States,\textsuperscript{355} and to record the information on
ownership, vessel and gear characteristics and on the activity of vessels on the
fishing fleet registry.\textsuperscript{356} The Committee exercises implementing powers in
accordance with one of only two procedures, namely the advisory procedure or the
examination procedure. The latter is applied in relation to acts concerning the CFP
and the environment, among many other policy sectors.\textsuperscript{357} Where the committee
delivers no opinion on a draft implementing, the Commission must not adopt the
draft-implementing act.

10.8-2 The essence of these provisions is to ensure that there is uniformity in
the way Union measures are implemented in and by the Member States. Here
again, however, it is the Member States that retain control over the examination
procedure as it applies to the CFP under Regulation (EU) No 182/2011 and there is
reliance on qualified majority voting, identical to the system used in Council.
Implementing measures are passed once the committee delivers a positive opinion.
There is also provision for an appeal committee made-up of senior representatives
of the Member States and in this instance there is scope for the use of majority
voting. What is important to note in this regard is that the interests of the Member
States are protected by use of the procedures involving the Committee for Fisheries
and Aquaculture under Article 56 of the Basic Regulation and Regulation (EU) No
182/2011. In this process, there is little or no enhanced role for stakeholders and
little opportunity for the European Parliament to exercise control over Committee
decisions or the use of implementing powers by the Commission. The Parliament,
however, can indicate by a non-binding resolution that the Commission has
exceeded the powers conferred on it by the Basic Regulation. The procedure is
designed to ensure that the Council controls the decisions of Committee members
and thus remains in the driving seat in relation to the adoption of implementing acts.

10.8-3 These procedures are complex and it must be remembered that
implementing and delegated acts remain mutually exclusive. The former is an
executive power whereas the latter is a quasi-legislative function, where the
Commission’s powers of intervention are compulsory. An important point of
distinction between the two powers is that in the case of delegated acts the power
to control or oversight rests with the European institutions and this may be
contrasted with implementing acts where the control is exercised by the Member
States by means of their presence and voting on the Committee for Fisheries and
Aquaculture. This system should of course ensure that decisions with considerable
technical detail do not go to Council and are addressed by implementing acts
including it must be assumed any future enhancement of the role of stakeholders in
the ACs.

10.8-4 The role of wider stakeholders under the advisory procedure or the
examination procedure is minimal. Provision is made, however, for public access to

\textsuperscript{355} Article 34a, Draft Regulation, Brussels, 11.06.2013.
\textsuperscript{356} Article 36, Draft Regulation, Brussels, 11.06.2013.
\textsuperscript{357} Article 2(2)(b)(ii) of Regulation (EU) No 182/2011.
information on committee proceedings in accordance with Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.\textsuperscript{358} Control of the decisions taken by the Committee rests with the Member States and the Parliament has no formal role in the process, nor does the Council (even though the Committee representatives come from the Member States and are frequently the same people that sit in the Council working groups). An example of implementing legislation is Commission Implementing Regulation (EU) No 672/2013 of 15 July 2013 amending Regulation (EU) No 468/2010 establishing the EU list of vessels engaged in illegal, unreported and unregulated fishing.\textsuperscript{359} The latter updates the Union list of fishing vessels presumed or confirmed to be involved in the IUU fishing. As such, it is binding in its entirety and directly applicable in all Member States and will thus ensure uniform implementation in all Member States.

10.8-5 The use of implementing powers by the Commission in relation to fisheries management decisions thus conforms with both Options 1 and 2 under the SOCIOEC Analytical Framework, as shown in Table 1 above.

10.9 Principle of proportionality

10.9-1 The legal basis of the Commission’s proposals on draft fisheries legislation such as the Basic Regulation is Article 43(2) of the TFEU. As a general principle of Union law, the principle of proportionality requires that the content and form of Union action such as in the field of fisheries under the Basic Regulation shall not exceed what is necessary to achieve the objectives of the Treaties.\textsuperscript{360} All draft legislation is subject to the principle of proportionality, which is used to check the suitability of the proposed measure and to ensure that the means chosen are suitable for their purpose. As part of this exercise, there is an examination of alternative methods of undertaking the same task and whether this imposes less of a burden in the legislative sense. As seen above in chapter 3, the Commission undertook this exercise when it presented its proposal for a new Basic Regulation to the Council and Parliament.\textsuperscript{361}

10.9-2 One important aspect of proportionality is that allows the Commission to balance conflicting interests when bringing forward its legislative proposals. The Court of Justice applies the principle when reviewing the legality of EU measures and national measures. The principle applies to all Union measures irrespective of whether they are adopted under exclusive, shared or supporting competence. The Commission must also demonstrate the financial impact of the proposed measure and this impact must be minimised.\textsuperscript{362} One particular aspect of

\textsuperscript{358} OJ L 145, 31.5.2001, p. 43.

\textsuperscript{359} OJ L 193/6, 16.7.2013.

\textsuperscript{360} Article 5, Treaty on European Union.


the application of the principle of proportionality to the proposed measures as set out in the Basic Regulation is that the Union is making a political, economic and social choice regarding the most appropriate governance structures for the CFP. In this sense, the proposed measures are unlikely to fall foul of the principle unless they are manifestly inappropriate having regard to the objectives that the European institutions are seeking to pursue. In other words, the European institutions have considerable discretion in bringing forward legislative proposals on fisheries governance structures for the CFP provided that these accord with the letter and tenor of the Treaties. By this yardstick, the provisions on governance in the Basic Regulation do not go beyond what is necessary to achieve its objectives. Moreover, in relation to their proposal for a draft regulation, it is significant that the Commission highlighted the following:

“It is necessary and appropriate for the achievement of the basic objective of ensuring fishing and aquaculture industries that provide long-term sustainable economic, environmental and social conditions and contribute to the availability of food supplies, to lay down rules on the conservation and exploitation of marine biological resources. This Regulation does not go beyond what is necessary to achieve that objective.

Through the proposed regionalised approach Member States will be empowered to adopt the conservation and technical measures necessary to achieve the objectives and targets set out in Regulations adopted by the Union legislator, based on the available toolbox of measures under the conservation policy of the CFP. This will create regional flexibility in the application of Union legislation.

Member States furthermore remain free to allocate fishing opportunities allocated by the Council among regions or operators as they see fit, so Member States have ample room for manoeuvre on decisions related to the social/economic model of their choice to exploit their allocated fishing opportunities."

In other words, regional flexibility, the regionalisation process, and the freedom of the Member States to allocate fishing opportunities among regions or operators as they see fit, all accord with the principle of proportionality in so far as they provide a flexible social/economic model regarding the management or governance of fisheries. Protocol No. 2 on the Application of the Principles of Subsidiarity and Proportionality sets out detailed conditions for the application of the principle.

363 Case C-491/01 British American Tobacco [2010] ECR I-4999, para 68.
364 Recital 60, Draft Regulation, Brussels, 11.06.2013.
10.10 Principle of subsidiarity

10.10-1 In line with the Treaty, as seen above, the adoption of regulatory measures on the conservation of marine biological resources are within the exclusive competence of the Union and thus outside of the scope of the principle of subsidiarity. The latter principle has a legal basis in the TEU and is applied once certain conditions are satisfied. Namely and conversely to proportionality, this principle only applies to subject areas where the EU exercises shares competence with the Member State such as in the area of aquaculture and in the common organisation of the market. In other words, it is inapplicable in relation to the predominant subject matter of the Basic Regulation, which is concerned primarily with establishing a regulatory framework for the management and conservation of fisheries. Indeed, the fact that the principle of subsidiarity is inapplicable means that the normative justification for decentralisation and the taking of decisions at the lowest practical regional or local levels is missing in relation to the establishment of devolved governance system for the CFP. If the principle were applicable to the conservation and management of marine resources under the CFP, then the Union institutions would be compelled to ensure that decisions were taken as closely as possible to interests of the parties concerned with the decision. Moreover, in such areas where interested parties are competent to decide or to take management or conservation decisions for themselves, their initiatives should not be impeded by the Union. There is no scope, however, for the application of the principle of subsidiarity in areas within the exclusive competence of the Union or for allowing national parliaments a greater say in the monitoring of its application under the CFP.

10.10-2 The inapplicability of the principle of subsidiarity to fisheries management decisions under the Basic Regulation is indicative that the governance model is consistent with Options 1 and 2 under the SOCIOEC Analytical Framework, as shown in Table 1 above.

366 See para. 10-4 infra.
367 Article 5(3), TEU.
10.11 Summary of the limitations imposed by Union law-making procedures

10.11-1 If one applies the SOCIOEC Analytical Framework to the limitations imposed by Union law-making procedures under the Treaties and the Basic Regulation, summarised in Table 14 below, then the overall position appears to conform in a marked manner with Option 2, where mechanisms for consultation with stakeholders and users exist, but the decision-making bodies are the Union institutions and national bodies in the Member States.

Table 14: Summary of EU law-making powers, competence and principles in light of SOCIOEC Analytical Framework.

<table>
<thead>
<tr>
<th>Competence / Procedure</th>
<th>SOCIOEC Analytical Framework</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exclusive EU competence</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>Shared legislative competence</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>Delegated acts [Art 290 TFEU]</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>Implementing acts [Art 291 TFEU]</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>Application of proportionality</td>
<td>Option 2 (consultation with stakeholders)</td>
</tr>
<tr>
<td>Application of subsidiarity</td>
<td>Options 1 and 2</td>
</tr>
<tr>
<td>(Inapplicable in relation to areas where Union exercises exclusive competence)</td>
<td></td>
</tr>
</tbody>
</table>
Chapter 6

Tentative conclusions going forward

11-1. This report opened by pointing out that there is considerable uncertainty about the precise legal meaning of many of the terms applicable to fisheries governance structures, including the terms “management,” “self management,” and “co-management” under Union fisheries law. Indeed, there appears to be no hard and fast legal rules on how self and co-management regimes ought best operate in practice within the EU. As such, they may operate in an informal, non-binding, voluntary manner, or more often they may involve rules of full legal force that are enforceable in the Courts. This difficulty is compounded by the broad nature of the term “stakeholder,” which is not a term-of-art in EU fisheries law with specific legal meaning. Accordingly, it can have several meanings in different management and regulatory contexts under the CFP.

11-2. Stakeholder “involvement” in the CFP is again very open-textured and does not appear to tally exactly with the various schemes foreseen under the rubric of Union environmental law. For instance, under the CFP, it consists predominantly of the various processes that are in place for keeping the industry and other stakeholders informed of policy decisions, as well as the content and shape of draft legislation at EU and national levels. In accordance with the SOCIOEC Analytical Framework, the principal actors in this process are the EU institutions and national governments. In some Member States, however, there is a degree of “pluralistic and deliberative participation” by the fishing industry when they are vested with a direct role in quota allocation and utilisation by means of a system of a property right or user entitlements. This may be contrasted with public participation in environmental decision-making under the Aarhus Convention, which seldom extends to rule setting or resource allocation and utilisation.

11-3. The rationale for greater stakeholder involvement in the CFP is unequivocal and acknowledged by all concerned as a pre-requisite for the future success of the policy. As seen above, the principal stakeholder consultative bodies are the ACs, with a more localised role played in management by some industry led bodies involved in production including the POs. The report describes in detail the background to the reform undertaken in 2011-2013, the approach taken by the Commission and the public to the establishment of new structures for fisheries governance, as well as the debate and negotiations in the European Parliament and the Council of Ministers on a new governance model. The Council supported the codification of stakeholder involvement in the policy process as one of the principles of good governance for the CFP. They did not codify the concepts of self and co-management of fisheries in line with the initial views on property rights expressed by the Commission in the Green Paper, or in the subsequent Parliamentary report and resolutions. Nonetheless, after the intense period of negotiations conducted in

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368 Ibid., Article 4(d), Draft Basic Regulation.
369 See section 7.2 supra.
2012-2013, the Council accepted decentralisation and devolution as core management concepts in the Draft Basic Regulation. In this regard, however, the preferred model is predominantly co-management by consultation: where extensive formal mechanisms for consultation (and feedback on use of recommendations) with users and stakeholders exist, but this falls well short of full stakeholder empowerment in the management paradigm (Option 2 under the SOCIOEC Analytical Framework).

11-4. The aim of the revised CFP is to establish a framework for the management of fisheries that provides for environmental, economic, and social sustainability. The reformed policy does not introduce a fully-fledged system of shared and co-management for the CFP. There were inherent difficulties, legal and otherwise, stemming from the Treaties in designating such a system and putting it into operation in practice. As pointed in Chapter 3, the development of private property or user rights at a pan-European level is curtailed by the principles of relative stability and the Hague Resolution. As a result, one of the most obvious outcomes of the reform is that the principal players in law-making and policy processes remain the European institutions and the Member States. In particular, the overarching role of the Council and the Parliament in standard setting is undiminished and these two institutions thus remain the chief players in EU decision-making processes as it applies to the management of fisheries. This comes as no surprise and is somewhat inevitable as a result of the allocation of Union competence in relation to fisheries under the Treaties, as seen in Chapter 5. Then again, it should also be pointed out that as the policy moves forward into the implementation phase, the role of Council and Parliament is firmly focused on objective setting and is no longer orientated towards searching for the best technical solution to particular issues in fishery management under the CFP. This accords with Option 2 under the SOCIOEC Analytical Framework.

11-5. Despite the constraints imposed by the Treaties, there are several other important and potentially game-changing outcomes of the reform process that have the potential to enhance the governance structures that will apply to fisheries into the future. Some of these have real potential to improve the scope for stakeholder involvement in fisheries management and to expedite the move towards decentralisation or devolution of the CFP away from the Council and Parliament. In particular, evidence of this trend includes the extensive range of conservation and management measures that can now be adopted by the Commission by means of implementing act or by means of delegated legislation. As pointed out in chapter 5, this clearly suggests that many key decisions on fisheries conservation and management measures will be taken in the future by the Member States, at the behest of the Commission, without recourse to the Council and Parliament, by reliance on the Committee for Fisheries and Aquaculture. In this context, the Member States appear to be firmly in the driving seats by exercising their voting rights in this particular committee.

See para 8.3-2 supra.
11-6 There is other evidence of the efforts that have been made to vest Member States with additional responsibilities under the Basic Regulation in accordance with the general scheme of what is permissible under the Treaties. Notable features of these new obligations include the duty placed on Member States to cooperate with one another in the implementation of EU environmental legislation such as the MSFD and the Habitats and Birds Directives, particularly at a regional or local level.\textsuperscript{371} This should ensure a streamlining of the measures that are taken to integrate the requirements of environmental legislation into the CFP. Similarly, Member States must coordinate their actions when adopting national fisheries conservation measures that apply in the coastal zone when such measures affect the fisheries interests of other Member States.\textsuperscript{372} As previously pointed out, such measures must only be adopted after consulting the Commission, other Member States (where relevant) and the applicable ACs.\textsuperscript{373} Again here, the preferred model is co-management by consultation: where extensive formal mechanisms for consultation (and feedback on use of recommendations) with users and stakeholders exist, but this falls well short of full stakeholder empowerment. In other words, it aligns most closely with Option 2 under the SOCIOEC Analytical Framework.

11-7. In specific cases, the Basic Regulation empowers Member States to adopt legally binding acts including conservation measures once they are based on the best available scientific advice, conform with the principles and objectives of the CFP and the relevant multiannual plan, and are no less stringent than those existing in Union legislation. There is also considerable potential to be derived from the introduction of TFCs with each Member State having full discretion in establishing or maintaining such a system on a voluntary basis. Although TFCs are perceived by the Council as a tool for the reduction of excessive fishing capacity in the fleet, they can undoubtedly be used as a means to enhance the role of industry in the management of fisheries as evidenced by long-standing practice in some Member States such as Denmark. In this regard, it is significant that the Council agreed that the criteria that must be used by Member States in the allocation of fishing opportunities including environmental, social, and economic factors. Furthermore, within the fishing opportunities assigned to them, Member States may also provide incentives to fishing vessels deploying selective fishing gear or using fishing techniques that aim to reduce their environmental impact.\textsuperscript{374} The utility of TFCs, and their utility in strengthening governance and enhancing the role of stakeholders in management, will undoubtedly become increasingly evident as the new policy is progressively implemented by the Member States. Likewise, there remains scope for the adoption of comprehensive schemes of self-regulation and co-management such as the one mentioned in the North Sea shrimp fishery, as highlighted in chapter 1. This arrangement is closer to the models of co-management by delegation and industry self-management (Options 4 and 5) under the SOCIOEC Analytical Framework.

\textsuperscript{371} Article 7(1), Draft Regulation, Brussels, 11.06.2013.
\textsuperscript{372} Article 7(2), Draft Regulation, Brussels, 11.06.2013.
\textsuperscript{373} See para xxx infra.
\textsuperscript{374} See Chapter 1 supra.
11-8. Perhaps an area, which promised so much in the reform process, and that is unlikely to realise its full potential under the reformed CFP is the role of the ACs in fishery management decisions. At first sight, they appear to be cast in an ancillary and supporting role under the new governance structures, where they remain on the periphery of the decision-making bodies with no real executive functions under Annex III of the Basic Regulation. In particular, the Basic Regulation does not vest them with any innovative powers, apart from accentuating their consultative role in the formulation of new measures for the sustainable exploitation of marine biological resources.\(^{375}\) However, as pointed out above, their role should not be understated as they have a legal mandate and a designated role in the formulation of multiannual plans for fisheries. In this context, the Basic Regulation provides that these plans should be adopted in consultation with the ACs, operators in the fishing industry, scientists, and other stakeholders having an interest in fisheries management.\(^{376}\) They may also play an important part in the design and adoption of measures to give effect to Union environmental legislation. As such, however, this accords with the SOCIOEC Analytical Framework.

11-9 The reformed CFP is focused on results based management, where the overarching framework is agreed by the Council and Parliament, and the Member States working in conjunction with industry to find the best technical solutions to particular fishery management decisions, such as quota allocation and utilisation, and the prohibition on discards. Apart from fostering greater cooperation between industry and scientists, however, there is little evidence in the Basic Regulation of efforts to widen industry access to scientific and technical expertise required for making fully informed fisheries management decisions. Neither does industry appear to be given responsibility for achieving specific management objectives or developing the experience and technical expertise to take on further management responsibilities. This does not accord with the positive role that industry has played in the management of specific fisheries such as the clam fishery in the Adriatic Sea.

11-10 One fundamental question may be posed concerning the new policy framework: Will it facilitate industry taking on additional responsibility for self and co-management of fisheries? At the current state of play with the Basic Regulation in June 2013, there appear to be few if any provisions in the regulatory scheme that are specifically focused in turning industry bodies, such as POs, into fully fledged management bodies with extensive executive powers in relation to fishery resource allocation and utilisation. As currently constituted, the mandate and structure of industry bodies in the majority of the Member States is too narrow to allow them to play an effective role in the management of fisheries at the individual stock level, particularly in relation to multi-species fisheries, or at the marine region level, such as the sea-basin regions established under the MSFD. Moreover, the mechanisms by which POs operate in different Member States varies considerably. Nevertheless, the Basic Regulation foresees the delegation of the management function back to

\(^{375}\) Article 7(2), Draft Regulation, Brussels, 11.06.2013.

\(^{376}\) Recital 17, Draft Regulation, Brussels, 11.06.2013.
the Member States and through their good offices to others concerned with the management of fisheries such as POs. Their future role should not therefore be underestimated.

11-11 Although the reform process (2011-2013) has been attenuated and is yet to conclude, it is important to close this paper by highlighting a number of green-shoots in the regulatory framework as codified in the Basic Regulation that reflect a different architecture for the CFP over the coming decade. Much responsibility rests with stakeholders and industry participants if this architecture is to realise its full potential. If POs are to work together and with other stakeholders in implementing a system of self and co-management of fisheries, appropriate rules can be developed using the procedure for joint-recommendations or the regionalisation process as set out in Article 17 of the Basic Regulation. Indeed, as noted above, regionalisation and decentralisation are the twin-pillars on which the reformed policy is founded. In this context, there is a clear link between regionalisation and decentralisation, and the future role of industry in meeting the obligations on catch-landings, discard plans,\(^{378}\) as well as the targets set down in the relevant multiannual plan for specific fisheries. Looking forward, one other fundamental issue that needs to be resolved by national legislation, joint-recommendation, or by the regionalisation process is reform of the rules governing representation and participation in the activities of POs, particularly in relation to local and industrial fisheries, where interests differ significantly. Furthermore, national legislation or regional measure will have to address matters, such as the requirements for industry to design and implement detailed management plans, as well as appropriate schemes to monitor the achievement of specific management targets, such as the utilisation of quotas for fishing efforts, particularly where TFCs are used for this purpose. As seen above, this again will be essential if the ecosystem-approach is to be used for fishery management. Significantly, the Basic Regulation provides a framework for granting multiannual Union financial assistance “tailored to the specific features of the fishing industry in individual Member States” that will be crucial to the further empowerment of POs. Finally, it should be noted that the Basic Regulation has a mechanism for linking the financial cost of enforcement with compliance.

11-12 All in all, there are a number of features in the Basic Regulation and the reformed policy that all point towards greater scope for industry and stakeholder involvement in the management of fisheries over the coming decades. Decision-making must be based upon best available scientific advice, the policy must apply the precautionary approach and the ecosystem approach, and most importantly of all, Member States and the fishing industry must embrace their conservation and management responsibilities.

\(^{377}\) See Chapter 1 supra.
\(^{378}\) Recital 55, Preamble, Draft Regulation, Brussels, 11.06.2013.
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