

Effectuating the Marine Strategy Framework Directive under the Common Fisheries Policy

A comparative outlook on legislative competences

Thesis for the attainment of the Master's Degree

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Table of contents

Table of contents	p. 1
List of abbreviations	p. 5
Introduction	p. 7
Chapter 1: The Marine Strategy Framework Directive	
1.1. The MSFD setting: an introduction	p. 19
1.1.1. Place in the EU legal setting	p. 19
1.1.2. Background	p. 20
1.1.3. Objectives and scope	p. 20
1.1.4. Structure and substance	p. 21
1.1.5. The MSFD and fisheries	p. 22
1.2. Competences and obligations for Member States related to fisheries	p. 24
1.2.1. The initial assessment	p. 25
1.2.1.1 Member State obligations	p. 25
1.2.1.2 Conclusion	p. 26
1.2.2. The determination of ‘good environmental status’	p. 27
1.2.2.1 Member State obligations	p. 27
1.2.2.2 Conclusion	p. 28
1.2.3. Establishing environmental targets	p. 28
1.2.3.1 Member State obligations	p. 29
1.2.3.2 Conclusion	p. 30
1.2.4. Establishing monitoring programmes	p. 30
1.2.4.1 Member State obligations	p. 30
1.2.4.2 Conclusion	p. 31
1.2.5. Establishing programmes of measures	p. 31
1.2.5.1 Member State obligations with regard to environmental principles	p. 31
1.2.5.2 Listed measures in Annex VI	p. 32
1.2.5.3 Inclusion of spatial protection measures	p. 32
1.2.5.4 Other elements in the programmes of measures	p. 34
1.2.5.5 Conclusion	p. 35
1.2.6. Procedures for not taking measures	p. 36
1.2.6.1 Drafting history	p. 36
1.2.6.2 The procedure under Article 14(1)	p. 37

1.2.6.3	<i>The procedure under Article 14(4)</i>	p. 39
1.2.6.4	<i>The procedure under Article 15</i>	p. 41
1.2.6.5	<i>Conclusion</i>	p. 42
1.2.7.	<u>Updating of the marine strategies</u>	p. 43
1.2.8.	<u>Conclusion: Member States in the MSFD setting with regard to fisheries</u>	p. 44
1.3.	Competences and obligations for the EU institutions related to fisheries	p. 45
1.3.1.	<u>Competences and obligations for the Commission</u>	p. 45
1.3.1.1	<i>The Commission's assessment of the preparations phase</i>	p. 45
1.3.1.2	<i>Competences and obligations for when Member States do not take measures</i>	p. 47
1.3.1.3	<i>The Commission's assessment in the programmes of measures phase</i>	p. 50
1.3.1.4	<i>Commission reports and reviewing of the MSFD</i>	p. 52
1.3.1.5	<i>Technical adaptations to the MSFD</i>	p. 54
1.3.2.	<u>Competences and obligations for the Council and the European Parliament</u>	p. 55
1.3.2.1	<i>Receiving proposals and reports</i>	p. 55
1.3.2.2	<i>Indirect importance</i>	p. 55
1.3.3.	<u>Conclusion: the EU institutions in the MSFD setting with regard to fisheries</u>	p. 55
1.4.	Conclusion	p. 56

Chapter 2: The Common Fisheries Policy

2.1.	The CFP setting: an introduction	p. 60
2.1.1.	<u>The CFP setting in the EU legal framework</u>	p. 60
2.1.1.1	<i>CFP framework</i>	p. 60
2.1.1.2	<i>Competence division</i>	p. 61
2.1.1.3	<i>Competence distribution</i>	p. 62
2.1.2.	<u>The Basic Regulation</u>	p. 63
2.1.2.1	<i>Background</i>	p. 63
2.1.2.2	<i>Objectives and scope</i>	p. 63
2.1.2.3	<i>Measures</i>	p. 65
2.1.3.	<u>Conclusion</u>	p. 69
2.2.	Competences and obligations for the EU institutions with regard to the MSFD objectives	p. 69
2.2.1.	<u>Competences and obligations for the Council</u>	p. 69
2.2.1.1	<i>Primary EU law</i>	p. 70
2.2.1.2	<i>Secondary EU law</i>	p. 73
2.2.1.3	<i>Comparison with the MSFD setting</i>	p. 74
2.2.2.	<u>Competences and obligations for the European Parliament</u>	p. 75
2.2.2.1	<i>Primary EU law</i>	p. 75
2.2.2.2	<i>Secondary EU law</i>	p. 76
2.2.2.3	<i>Comparison with the MSFD setting</i>	p. 76

2.2.3.	Competences and obligations for the Commission	p. 77
2.2.3.1	Primary EU law	p. 77
2.2.3.2	Secondary EU law	p. 78
2.2.3.3	Comparison with the MSFD setting	p. 79
2.2.4.	EU institutions: a comparison with the MSFD setting	p. 80
2.3.	Competences and obligations for the Member States with regard to the MSFD objectives	p. 81
2.3.1.	Primary EU law	p. 81
2.3.2.	Secondary EU law	p. 82
2.3.2.1	Secondary legislation under the CFP	p. 82
2.3.2.2	Indirect effect of the CFP competence division: the Habitats Directive	p. 85
2.3.3.	Comparison with the MSFD setting	p. 86
2.3.3.1	Member State measures within the 12 nautical mile zone	p. 86
2.3.3.2	Member State measures applicable solely to fishing vessels flying their flag	p. 87
2.3.3.3	Member State emergency measures	p. 87
2.3.3.4	Conclusion	p. 88
2.4.	Conclusion	p. 88

Chapter 3: The Common Fisheries Policy reform

3.1.	The CFP reform: an introduction	p. 91
3.1.1.	The green paper	p. 91
3.1.1.1	Relation to other maritime policies	p. 92
3.1.1.2	Decision-making issues	p. 92
3.1.1.3	Focusing the policy objectives	p. 93
3.1.2.	Conclusion	p. 93
3.2.	The proposal for a new Basic Regulation	p. 94
3.2.1.	General structure	p. 94
3.2.2.	Environmental objectives	p. 95
3.2.3.	The frameworks for decision-making	p. 96
3.2.3.1	Changes to the frameworks of measures and their adoption	p. 97
3.2.3.2	Pursuing objectives by means of the measures	p. 97
3.2.4.	Conclusion	p. 99
3.3.	Competence distribution	p. 100
3.3.1.	Competences of the EU institutions	p. 100
3.3.1.1	The Council and the European Parliament	p. 100
3.3.1.2	Competences of the Commission	p. 101
3.3.2.	Competences of the Member States	p. 104
3.3.2.1	Competences under multiannual plans and technical measures frameworks	p. 104
3.3.2.2	Other competences and obligations	p. 105
3.4.	Evaluation	p. 106
3.4.1.	Compatibility of competences	p. 107
3.4.1.1	The EU institutions	p. 107

3.4.1.2 <i>The Member States</i>	<i>p. 108</i>
3.4.1.3 <i>Article 12</i>	<i>p. 109</i>
3.4.2. <u>Compatibility of objectives</u>	<u>p. 110</u>
3.5. Conclusion	p. 112

Conclusion	p. 115
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References	p. 118
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Legal sources	p. 123
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List of abbreviations

(This is a list containing all abbreviations found in this research.)

BSAP	Baltic Sea Action Plan
CFP	Common Fisheries Policy
ECJ	Court of Justice of the European Union
EP	European Parliament
EC	European Community
EU	European Union
GES	Good environmental status
HELCOM	Helsinki Commission
IMP	Integrated Maritime Policy
MPA	Marine protected area
MS	Member State of the European Union
MSFD	Marine Strategy Framework Directive
nm	Nautical miles
PAFOR	Principal annual fishing opportunities Regulation
RSC	Regional Sea Convention
SAC	Special area of conservation
SPA	Special protection area
SPM	Spatial protection measure
TAC	Total allowable catch
TEC	Treaty establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the functioning of the European Union
WFD	Water Framework Directive

Introduction

The MSFD and its umbrella position

In 2007 the European Commission (Commission) presented its vision for an integrated maritime policy (IMP). This IMP allows the European Union (EU) to benefit fully from its marine waters in a sustainable way. By integrating and coordinating sectoral policies, inter-use conflicts may be prevented and inconsistencies between sectoral policies can be minimized. By taking a holistic approach, the IMP naturally regards the preservation of the marine environment. This aim was highlighted in the Commission's Thematic Strategy on the Protection and Conservation of the Marine Environment. The outcome of the Thematic Strategy was the Marine Strategy Framework Directive (MSFD),¹ also dubbed 'the environmental pillar of the IMP'. The MSFD prescribes a marine strategy which EU Member States (MSs) must follow in order to attain the objective of 'good environmental status' (GES) in their marine waters. The marine strategy consists of a preparatory phase and a phase where a programme of measures is drafted and subsequently implemented. The scope of the MSFD covers all human activities except those whose sole purpose is national defence or security, thereby reflecting the wide array of policy fields where its implementation may take place. This includes the field of fisheries, which is the subject of this thesis.

The demarcation of the research

The research focuses on the relationship between the MSFD and the EU Common Fisheries Policy (CFP). The CFP, being a sectoral policy, falls under the material scope of the MSFD.

Under both the MSFD – secondary legislation under the environmental policy – and the CFP different actors, such as MSs on the one hand and the EU's institutions on the other, have

¹ Directive 2008/56/EC, *OJ* 2008, L164/19.

different tasks. Because of the material scope of the MSFD there exists a connection between both ‘settings’: through the obligations given to the actors under the MSFD to pursue its objectives under the CFP. No provision, however, is made to ‘legally’ link the MSFD and the CFP; the CFP is merely mentioned in the MSFD preamble and within the CFP no provision is made to effectuate such a link. Therefore, the actors must pursue the MSFD objectives from within the CFP, i.e. in an entirely different setting.

Because of the lack of a legal hierarchy or link between the MSFD and the CFP, it is important to know what the tasks of the different actors are under both settings. If an actor has similar tasks, it may be expected that there are few problems from a competence perspective to attain the objectives of the MSFD. Action obligated under the MSFD can be effectuated through competences under the CFP. If the tasks differ, however, achievement of the MSFD objectives might be hindered because of, for instance, a lack of a legislative competence. It could also be that although there is a difference in tasks under the MSFD and the CFP, there is a system in place to remedy such a difference. Altogether, a comparative analysis of the tasks given to the main actors under both settings will contribute to a better understanding of how the CFP relates to the MSFD from a competence perspective. This is important because the compatibility of tasks influences the process of and degree to which the objectives of the MSFD can be fulfilled.

Such an analysis can also be of practical relevance as the CFP is to undergo a reform in 2012, the process of which has already started. The scope of the reform includes legislative competences. It will be interesting to see whether the results of the analysis between the MSFD and the CFP in this research, are in line with reform suggestions.

Research question

To give direction to the above mentioned research subject, two questions have been formulated:

“What are the tasks for the Member States and the EU institutions in relation to fisheries under the MSFD and to what extent is the current distribution of competences between the Member States and the EU under the existing CFP adequate to meet the requirements under the MSFD?”

“What changes are to be made in the CFP during the upcoming reform in terms of the distribution of competence between Member States and the EU in relation to the MSFD?”

The hypothesis, under which the research is conducted, is the following:

“The competence distribution under the CFP shows an incompatibility with the distribution under the MSFD, to the degree that achievement of the MSFD’s requirements is hindered.”

The research questions contain several elements that must be explained before a further step can be made to come to answering the question.

Tasks

Tasks are understood in this thesis as competences and obligations of an actor in a certain setting. This research shall only focus on competences and obligations as seen from an EU legal perspective.

A competence is a power one has and an obligation is something one must do. Often the difference is indicated by words as ‘shall’ and ‘may’: the former indicates an obligation and the latter a competence. There are however, also provisions where such indicators are lacking. An obligation must be understood to be aimed at some positive goal. Secondly, the obligation has a “coercive” flavor.² This means that the goal goes further than that “one *ought* to bring [it] about.”³ A competence is the power of an actor to change legal positions.⁴ Behind such a competence may lay an obligation to do so, but the focus in the provision will be on the power that can be exerted by the actor.

Although Brandt notes that the word ‘duty’ is better used in “pure organization-role relations”, as opposed to obligation which “functions in agreement-relations and retributive-relations”,⁵ the latter shall be used in this research because it is used in a same sense in the EU legislative texts.

It is important to remind that the research takes as its starting point the MSFD, whose objectives must be brought about by regulatory (legislative) and enforcement measures. The focus of this thesis is primarily on legislative aspects. To research the compatibility between the tasks of

² Brandt 1964, p. 391.

³ Ibid., p. 391.

⁴ Spaak 2005.

⁵ Brandt 1964, p. 392.

actors under both the MSFD and the CFP settings, requires the understanding of competences and obligations as those being connected to legislative purposes. Furthermore, the focus in the research is on obligations under the MSFD setting and competences under the CFP setting.

The EU legal order

To describe the history of the EU legal order goes far outside the scope of this research. Next to the assumption that this is familiar terrain for most European legal scholars, information can be readily found in any EU law handbook.⁶ A short introduction on significant elements and principles that are relevant to this research, however, is presented hereafter.

To start with, the research only mentions the EU. Although most EU legislation still refers to ‘the Community’, which means the European Community, the EU is the legal successor since the adoption of the Treaty of Lisbon.

The EU legal order is a legal order of its own, next to for instance the national legal order. It was created by the Member States (MSs) as they limited their sovereignty in certain areas in favor of the EU.⁷ The basis for these actions is currently laid down in the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).⁸ The entire EU legal order is therefore based upon these treaties, which are categorized as ‘primary’ EU law. ‘Secondary’ EU law, in contrast, is based on the primary EU law. Following the intention of the transferal of sovereignty by the MSs to the EU, the Court of Justice of the EU (ECJ) concluded that EU law has direct effect in the national legal order and precedence over national law.⁹ For the functioning of and the intricate relation between EU law and national law, four legal principles are of central importance to EU law: the principle of attribution, the principle of subsidiarity, the principle of proportionality and the principle of sincere cooperation.¹⁰

⁶ This research has made use of: Lenaerts & Van Nuffel 2005, and Amtenbrink & Vedder 2010.

⁷ Amtenbrink & Vedder 2010, p. 156.

⁸ Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *OJ* 2008, C115/01.

⁹ See ECJ, Case 26/62, section B; and ECJ, Case 6/64, section ‘On the submission that the court was obliged to apply the national law’.

¹⁰ These are found in Articles 4 and 5 TEU.

The principle of attribution is laid down in Article 4(1), 5(1) and (2) TEU. This principle prescribes that the EU may only legislate if a basis for such a legislative competence exists in the TEU or TFEU.¹¹ Regarding this competence, the concept of shared competence can be contrasted against the concept of exclusive competence. When shared competence is the case, a Member State (MS) may exercise competence “...to the extent that the Union has not exercised its competence.”¹² In the case of exclusive competence, “...only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”¹³

In case of shared competence, the ‘subsidiarity principle’ must be respected. This principle demands that the EU only acts if, and in so far as, the objectives of the proposed action cannot be sufficiently achieved by the MSs, but can be better achieved – e.g. by reason of scale – at the EU level.¹⁴

Regarding the content and form of all EU action, the proportionality principle must be respected. This principle demands that action shall not exceed that which is necessary to achieve the objectives of the Treaties.¹⁵ The conferral of legislative competences in specific areas, and the abovementioned principles have contributed to a legal structure that is sectoral in character.

Finally, the principle of sincere cooperation can be found in Article 4(3) TEU. It demands that “...the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.” From the wording of the provision it can be derived that both sides (EU and MS) have an obligation following from the principle.¹⁶

There are three main kinds of secondary legislation which can be adopted by the EU: Regulations, Directives and Decisions. Regulations have general application; they are binding in their entirety and are directly applicable in all MSs. Decisions are also binding in their entirety, but they can be specified to certain addressees. In those cases they are only binding on those addressees. A Directive is a legislative act, binding as to the *result to be achieved*.¹⁷ It is

¹¹ Amttenbrink & Vedder 2010, p. 163.

¹² Article 2(2) TFEU.

¹³ Article 2(1) TFEU.

¹⁴ Article 5(3) TEU.

¹⁵ Article 5(4) TEU.

¹⁶ Proelss et al. 2011, p. 42.

¹⁷ Article 288 TFEU.

addressed to the MSs and leaves it to the national authorities of the MSs to choose the form and method of implementation. Implementation into national legislation is required because Directives are generally not directly applicable, as opposed to Regulations and Decisions.¹⁸

So far, the general structure and principles governing EU law, as well as the types of secondary legislation have been introduced. In the introduction of Chapters 1 and 2, the respective settings – the environmental policy and the common fisheries policy – are specifically addressed.

Actor

For the meaning of the research the common meaning of actor suffices: i.e., “a participant in an action or process”.¹⁹ The action or process is given shape by the competences and obligations the actors have in the respective settings. It can be added here that ‘participant’ does not require the actor to undertake any action.

For the current research, not all actors in the EU legal order need to be taken up. A selection of actors has been made, since they are believed to be the most important. Their importance follows from the allocation of the majority of competences and obligations to these actors.

The Member States

The treaties, on which the EU and its antecessors were founded, were concluded by representatives of every MS. Each MS thus decided on the transfer of legislative sovereignty to the EU on the basis of those Treaties.²⁰ Amendments to those treaties do not come into effect until each MS has ratified them. Depending on whether the EU has exclusive competence or shared competence, MSs may not legislate, may legislate where the EU institutions have not done so, or may legislate if they have expressly been authorized to do so by the EU. Apart from their own legislative competences as individual actors, all MSs are represented in the Council, thereby giving them also a voice as part of an EU institution.

¹⁸ Exceptions may apply when a MS does not fulfil its obligation to correctly or timely implement a Directive.

¹⁹ Oxford Dictionary 2011, ‘actor’.

²⁰ Lenaerts & Van Nuffel 2005, p. 521.

EU institutions

There are 7 official institutions in the EU. These are listed in Article 13 TEU: the European Parliament (EP), the European Council, the Council, the Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. Again, not all of these are of importance to this research.²¹ Only those that have been allocated most competences and obligations under both settings shall be introduced.

The Council

The Council is the intergovernmental institution of the EU. It represents the MSs of the EU at the EU level. The Council consists of representatives of each MS's government. These representatives vary according to the subject of the meeting; in the environmental council ministers of environment shall be present. Each representative will advance its country's interests. The Council has 4 general tasks: that of a constitutional organ, a legislative organ, a policy making organ (this follows from the legislative task), and an administrative organ.²² Of importance to the research is the legislative competence.

Without the Council's approval, no secondary EU legislation can be adopted. The other legislative institution – the EP – is only under the common legislative procedure equally important.²³ The Council can request the Commission to research the possibility of a proposal for legislation. The bases for its legislative competences are found throughout the TFEU in (sector-) specific provisions. Decision-making is done by means of a simple majority, qualified majority or unanimity vote amongst the representatives.

The European Parliament

The EP is the only EU institution with a direct democratic legitimacy, which means that its members are directly chosen by the MSs' citizens. The EP has three general tasks in the EU: to

²¹ It should be mentioned that the ECJ has an important role in the interpretation of EU legislation. Questions regarding the scope of specific competences and obligations – which will be posed throughout this research – may be ultimately answered by an ECJ decision.

²² Amténbrink & Vedder 2010, p. 59.

²³ Ibid., p. 59. See below the section 'Ordinary legislative procedure' for more information.

take part in EU legislative processes, to function as a democratic supervisor of other EU institutions, and to (co-)adopt the EU budget.²⁴ Its role in legislative processes depends on the legal basis (TFEU provision) on which the legislation is to be adopted. For the acts adopted by means of the ordinary legislative procedure (Article 294 TFEU), full cooperation and agreement of the EP is required.²⁵ For acts adopted by means of special procedures, which are found in the respective Articles, cooperation in the form of advice or consent is required from the EP.²⁶

The Commission

The Commission is expected to operate in the sole interest of the EU.²⁷ Although each of its members (commissioners) comes from a MS – at the time of writing 27 – they do not represent their MS. It can therefore be said that the Commission furthers different interests than the MSs. The Commission's general tasks can be derived from Article 17(1) TEU: to propose legislation to the EP and Council, to manage and implement EU policies and the budget, to enforce EU law (together with the Court), and to represent the EU on the international stage. For the research, its first three general tasks are of importance.

The task of managing and implementing EU policies may entail the exercise of delegated legislative competences. An example of such a case is when the EU legislator sets out a framework Directive, which leaves it to the Commission to specify more detailed norms in a subsequent Regulation. The rules for such delegations and the hierarchy between them and other secondary legislative acts are set out in Articles 190 and 191 TFEU. Before the adoption of the Lisbon Treaty, the 'comitology procedure' played a central role in the exercise of delegated legislative competences.²⁸ This was the case under both the MSFD and the CFP setting. In short, comitology may refer to four types of procedures through which the Commission may draft acts (Decisions). The procedures provide a form of control for the MSs because their representatives form a committee that consults the Commission over its Decisions. Depending on the procedure at hand, a Commission decision may also be referred to the Council, to the EP or to both.²⁹

²⁴ Amttenbrink & Vedder 2010, p. 40.

²⁵ Ibid., p. 124.

²⁶ Ibid., p. 127-129.

²⁷ Ibid., p. 73.

²⁸ Council Decision 1999/468/EC, *OJ* 1999, L184/23, as amended.

²⁹ Blom-Hansen 2011, p. 346.

The procedural rules for implementing legislation by the Commission are all, except for the regulatory procedure with scrutiny, regulated by a new Regulation which has repealed the former comitology Decision.³⁰

The task of enforcing the application of EU law is effectuated with respect to primary and secondary legislation. The Commission may bring both MSs and other EU institutions before the ECJ if it finds that EU law has been violated.³¹ In the case of non-compliance of a MS regarding EU law, the Commission instigates a non-compliance procedure on the basis of Article 258 TFEU. The first step is a pre-litigation phase in which the Commission first requests information of a MS regarding an identified problem. After such information is given, the Commission may send a reasoned opinion requesting the MS to comply within a certain time. If the MS fails to do so, the second phase of the procedure commences as the Commission brings the matter before the ECJ.³²

The ordinary legislative procedure

The ordinary legislative procedure (previously: co-decision procedure) is the common procedure for the adoption of most secondary legislation in the EU; the MSFD was accordingly adopted under this procedure. Since reference will be made to steps in the drafting history of the MSFD, the basics of the ordinary legislative procedure – which are laid down in Article 294 TFEU – will be shortly dealt with here.

Under the ordinary legislative procedure, the Commission comes with a proposal for legislation. This proposal is sent to the EP for a first reading. The EP then prepares its position. It can make amendments to the proposal. The first reading position is sent to the Council. The Council can approve the position after which the act is adopted. If the Council does not approve, it makes amendments and sends its position back to the EP. The Council also informs the EP of the reasons for its position. Next to this, the Commission informs the EP of its position. The EP, in its second reading may accept the Council's position, it may reject its position, or it may

³⁰ Regulation 182/2011/EU, *OJ* 2011, L55/13, Articles 12 and 13.

³¹ Amtenbrink & Vedder 2010, p. 87.

³² Tallberg 2002, p. 617. Article 258 TFEU is applicable for actions against MSs and Articles 263 and 265 TFEU are applicable for action against EU institutions.

propose amendments to the Council's position. In the first case, the act is adopted; in the second case it is not; in the third case, the second reading is sent back to the Council and the Commission. The Council may accept the amendments, or not. If the amendments are accepted, the act is adopted. If they are not accepted, a conciliation procedure may be initiated to come to an adoption.

For the adoption of an act under the ordinary legislative procedure, both the Council and the EP's approval are needed. Their input, however, goes further than mere approval as they may both suggest amendments.

Research outline

Throughout the following three Chapters an answer shall be given to both research questions.

Chapter 1 shall address the tasks under the MSFD setting, with a focus on those aspects that are related to fisheries. Full understanding of these tasks requires an introduction of the MSFD as an instrument under the environmental policy area, its place in the EU legal order, and its structure and substance. By doing so, this Chapter aims to answer the first part of the first research question: *“What are the tasks for the Member States and the EU institutions in relation to fisheries under the MSFD?”*

Chapter 2 shall approach the CFP in a similar fashion as Chapter 1 did for the MSFD. The focus on tasks will be, however, more specific by looking at competences of the actors. Only those legislative competences that can be used to pursue the MSFD objectives are the point of focus. Accordingly, Chapter 2 aims to answer the second part of the first research question: *“To what extent is the current distribution of competences between the Member States and the EU under the existing CFP adequate to meet the requirements under the MSFD?”*

To answer the second research question, Chapter 3 shall move the point of focus to the fourth reform of the CFP: *“What changes, are to be made in the CFP during the upcoming reform in terms of the distribution of competence between Member States and the EU in relation to the MSFD?”* This Chapter approaches the question by looking at the recent Commission proposal

for a new Basic Regulation under the CFP and by evaluating that proposal on the basis of the conclusions from Chapter 2.³³ It should be noted that the Commission proposal was released just before the closure of this research. Due to time restrictions, only Chapter 3 could be changed accordingly.

³³ Commission, COM(2011) 425 final.

Chapter 1:

The Marine Strategy Framework Directive

1.1. The MSFD setting: an introduction

This Chapter addresses the MSFD setting and the tasks thereunder. Paragraph 1.1 deals with the MSFD setting itself and paragraphs 1.2 and 1.3 deal with the tasks under the MSFD.

1.1.1. Place in the EU legal setting

The competence for the EU to adopt legislation in the environmental policy field is Article 4(2)(e) TFEU: “Shared competence between the Union and the Member States applies in the following principle areas: (e) environment...” The MSFD was adopted on the basis of the former Article 175(1) of the Treaty establishing the European Community (TEC),³⁴ nowadays Article 192(1) of the TFEU.³⁵ This provision is the general legal basis for the adoption of secondary EU legislation in the environmental policy field. Article 192 TFEU appoints the ordinary legislative procedure (the former co-decision procedure) from Article 294 TFEU as the required legislative procedure.

The general environmental policy objectives are defined in Article 191 TFEU: “preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources and promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.”³⁶ In addition, regional diversity within the EU is to be taken into account when taking

³⁴ Consolidated version of the Treaty establishing the European Community, *OJ* 2006, C325/33.

³⁵ Commission, COM(2005) 505 final, p. 6.

³⁶ TFEU, Article 191(1).

action, which must be based on the precautionary principle, the polluter-pays principle and on the principle that environmental damage must be rectified at the source.³⁷

1.1.2. Background

In 2002 the Commission issued a communication named ‘Towards a strategy to protect and conserve the marine environment.’³⁸ The Council welcomed the approach and requested a Strategy by 2005. In that year the Commission presented its ‘Thematic Strategy on the Protection and Conservation of the Marine Environment’.³⁹ The legislative instrument chosen to address its challenges and to attain the objective of the Strategy was the MSFD: “... ambitious in its scope, but not overly prescriptive in its tools.”⁴⁰ The MSs accordingly enjoy freedom in their implementation of the Directive, which is only limited by procedural obligations. These require the MSs to use prescribed methodologies to define their own objectives and follow prescribed strategies to attain these objectives.

1.1.3. Objectives and scope

The central objective of the MSFD is for MSs to achieve or maintain GES in the marine environment by 2020 latest. Under ‘marine environment’ must be understood the marine waters of every MS. These, in turn, are the waters, seabed and subsoil seaward of the baselines used to measure the territorial seas up to the legal limits of the EEZ and the continental shelf.⁴¹ GES is defined in Article 3(5) MSFD⁴² as:

“[T]he environmental status of marine waters where these provide ecologically diverse and dynamic oceans and seas which are clean, healthy and productive within their intrinsic conditions, and the use of the marine environment is at a level that is sustainable, thus safeguarding the potential for uses and activities by current and future generations...”

³⁷ Ibid., Article 191(2).

³⁸ Commission, COM(2002) 539 final.

³⁹ Commission, COM(2005) 504 final.

⁴⁰ Ibid., p. 6.

⁴¹ MSFD, Articles 2(1) and 3(1)(a) and (b).

⁴² From here onwards in Chapter 1, references to Articles, Recitals, or Annexes will be understood to be from the MSFD, unless stated otherwise.

Although the objective clearly aims at environmental values, sustainable use – connected to economic and social values – is also promoted. The provision further contains several key elements that give direction to the material scope of the definition of GES. A more detailed list of qualitative descriptors is taken up in Annex I to the MSFD, which in its turn, is further specified in a Decision from the Commission (GES Decision).⁴³ The attainment of GES shall primarily be brought about by regulating human activities that have an impact, or put pressure, on the marine environment. The functional scope of the MSFD extends to all activities, except for those whose sole purpose is defense or national security (Article 2(2)).

1.1.4. Structure and substance

The MSFD has five Chapters. Chapter I contains the general provisions such as the subject matter, scope and definitions. Chapters II and III deal with the marine strategies which the MSs must adopt to attain GES in their marine waters. Chapter IV deals with updating and reporting obligations for MSs (Articles 17-19) and for the Commission (Articles 20, 21 and 23). Article 22 establishes a financial obligation on the support of implementation of the MSFD for the EU. Chapter V contains provisions on procedural aspects, such as technical adaptations (Article 24), a Regulatory Committee (Article 25), a transposition deadline (Article 26) and the entry into force date (Article 27).

In Chapter I, Article 5 provides general guidance, including the deadlines, for the marine strategies. It also allows for so-called ‘pilot projects’, in case the status of the sea is so critical as to necessitate urgent action (Article 5(3)). Most significantly however, it establishes an obligation for MSs to cooperate within their marine region to ensure that the elements from the marine strategies are coherent and coordinated across the marine region (Article 5(2)).

There are two phases in the strategies. The first phase is for the taking of preparatory actions and the second is for the adoption and implementation of programmes of measures. In the preparation phase the MS must make an assessment of the current environmental status of their marine waters (Article 8), determine characteristics to define GES in their marine waters (Article 9), establish environmental targets to progress towards achieving GES in their marine waters

⁴³ Commission Decision 2010/477/EU, OJ 2010, L232/14.

(Article 10), and set up monitoring programmes to assure the ongoing assessment of the environmental status of their marine waters (Article 11). Results from several steps must be reported to the Commission (Article 12).

Chapter III contains provisions on the programmes of measures phase. In this phase the MS must identify the measures which need to be taken to achieve or maintain GES (Article 13(1)), integrate these measures into a programme of measures (Article 13(2)), and operationalize these programmes within one year of their establishment (Article 13(10)). Annex VI provides a list with types of measures which MS must take into account when making their programme of measures. Chapter III also contains provisions on instances where a MS cannot take measures. These are Article 14 ('exceptions') and 15 ('recommendations for Community action'). Again, several elements of this phase must be reported to the Commission (Article 16).

1.1.5. The MSFD and fisheries

As was mentioned earlier, the scope of the MSFD extends to all human activities, except for those whose sole purpose is defense or national security. Fishing as an activity therefore falls under the functional scope of the MSFD. Also of relevance is the impact of fisheries on GES, thereby bringing it under the material scope. The impact an activity has on GES influences the measures MSs must undertake to pursue GES. Either way, the marine strategies undertaken by the MSs need to apply an ecosystem-based approach. The ecosystem approach, pursues three elements: it should be ensured that the collective pressure of all human activities is kept within levels compatible with the achievement of GES, the capacity of marine ecosystems to respond to human-induced changes should not be compromised, and it should at the same time enable the sustainable use of marine goods and services by present and future generations (Article 1(3)). This means that, to be able to measure the collective pressure of all human activities, the impact of fisheries must be taken into account.

Of the eleven descriptors that specify the elements on the basis of which GES must be defined, four are directly related to fishing activities (see Table 1). This further clarifies the relevance of fisheries (the 'economic fishing activity') to the MSFD because of its direct impact on GES descriptors.

Descriptor number:	Descriptor substance
1	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.
3	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.
4	All elements of the marine food web, 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.
6	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.

Table 1: ‘MSFD Annex I – qualitative descriptors related to fisheries’.

Next to the matter of the scope and the aforementioned descriptors on which fishing activities have a direct influence, there are also explicit references in the preamble to the general relevance of the MSFD for the CFP. The preamble contains non-legally binding provisions that can help to interpret its provisions by explaining the MSFD’s philosophy, purpose and principles. Three recitals deal with the CFP in particular. Recital 9 explicitly calls the CFP within the scope of the MSFD, as far as that the latter should contribute to coherence between different policies – amongst which the CFP – and foster the integration of environmental concerns into the CFP. Article 1(4) contains similar wording, without explicitly naming the CFP.

“(9) In order to achieve those objectives, a transparent and coherent legislative framework is required. This framework should contribute to coherence between different policies and foster the integration of environmental concerns into other policies, such as the Common Fisheries Policy, the Common Agricultural Policy and other relevant Community policies. The legislative framework should provide an overall framework for action and enable the action taken to be coordinated, consistent and properly integrated with action under other Community legislation and international agreements.”

Recitals 39 and 40 address the regulation of fisheries management under the CFP and the relation to the MSFD more specifically.

“(39) Measures regulating fisheries management can be taken in the context of the Common Fisheries Policy, as set out in Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (2), based on scientific advice with a view to supporting the achievement of the objectives addressed by this Directive, including the full closure to fisheries of certain areas, to enable the integrity, structure and functioning of ecosystems to be maintained or restored and, where appropriate, in order to safeguard, inter alia, spawning, nursery and feeding grounds. Articles 30 and 31 of the Euratom Treaty regulate discharges and emissions

resulting from the use of radioactive material and this Directive should therefore not address them.”

“(40) The Common Fisheries Policy, including in the future reform, should take into account the environmental impacts of fishing and the objectives of this Directive.”

Both recitals have been subject to extensive changes throughout the formation of the MSFD. Originally, recital 39 contained an explicit exclusion of the MSFD’s scope over fisheries measures: “Measures regulating fisheries management can only be taken in the context of the [CFP] ... and are therefore not addressed by this Directive.”⁴⁴ This was amended by the EP to “Measures regulating fisheries management can be taken, inter alia, in the context of the Common Fisheries Policy ... and are therefore also addressed by this Directive.”⁴⁵ This amendment was said to contradict primary EU law as regards fisheries management.⁴⁶ The final version seems to be a – at the least – textual compromise between the EP’s amendment and the Common Position of the Council.

The conclusion which may be drawn from the preamble is that the scope of the MSFD includes fishing activities, which are primarily regulated under the CFP. Provisions from the MSFD, however, cannot directly regulate fisheries management. Instead, from within the CFP account should be taken of the objectives of the MSFD.⁴⁷

1.2. Competences and obligations for the Member States in relation to fisheries

This paragraph contains provisions from Chapters II and III of the MSFD. These provisions are primarily directed at the MSs by means of obligations to take preparatory actions in the preparation phase and implementation measures in the programmes of measures phase of their marine strategies.

⁴⁴ Commission, COM(2005) 505 final, recital 28.

⁴⁵ European Parliament, A6-0373/2006, Amendment 21.

⁴⁶ Commission, COM(2007) 456 final, p. 8. If the Commission was referring to the exclusive EU competence of conservation of biological resources under the CFP v. the shared competence of environmental legislation, reservations may be had about this comment. See also paragraph 2.1.1.2.

⁴⁷ See also Wakefield 2010, p. 329-330.

1.2.1. The initial assessment

Article 8(1) prescribes MSs to make an initial assessment (IA) of their marine waters. This IA is to consist of three parts: a) the essential features, characteristics and current environmental status, b) predominant pressures and impacts and c) an economic and social analysis of the use of the waters and the cost of degradation of the marine environment. The relevance to fisheries becomes evident when looking at the indicative elements in the Annex to the MSFD.

1.2.1.1 Member State obligations

Important when making the IA is that account is taken of other relevant EU legislation and of other relevant assessments undertaken in the context of Regional Sea Conventions (RSCs).⁴⁸ Coastal, transitional and territorial waters covered by the Water Framework Directive (WFD)⁴⁹ are also to be taken into account (Article 8(2)).

Part (a) must be assessed while taking account of Annex III Table 1. This Table consists of 4 categories of characteristics: ‘Physical and chemical features’, ‘Habitat types’, ‘Biological features’ and ‘other features’. It follows from the characteristics that the biological components in this part of the IA are of paramount importance; both the seabed and the water column need to be assessed as regards their habitat functions. Furthermore, an extensive description of the biological communities associated with the habitats needs to be produced. This includes fish populations, their abundance, distribution, and size/age structure.

Part (b) must be based on Annex III Table 2. This table contains a list of 8 categories of pressures and impacts, ‘Physical damage’ and ‘Biological disturbance’ are the categories that are explicitly linked to fishing activities. Under physical damage, abrasion and selective extraction are mentioned. Abrasion may be caused by bottom trawling. Selective extraction likely refers here to living resources that are attached to the seafloor, such as mussels. Under biological disturbance, selective extraction of species, including incidental non-target catches are mentioned. This clearly relates to recreational and commercial fisheries activities and the by-catches of the latter’s activities.

⁴⁸ The Netherlands in this line, has declared that it shall primarily use OSPAR results and assessments where possible, see Rijkswaterstaat 2009, p. 129.

⁴⁹ Directive 2000/60/EC, *OJ* 2000, L327/1.

There is no indicative list for part (c) of the initial assessment. Furthermore, in preparing the assessment, MSs must make every effort to ensure that their assessment methodologies are consistent across the marine region or subregion, and that transboundary impacts and transboundary features are taken into account (Article 8(3)(a) and (b)).

Throughout the drafting history, obligations concerning regional cooperation were amended in each step of the process. In its first reading, the EP introduced terminology which resulted in increased cooperative demands for MSs.⁵⁰ In the Common Position many of these Amendments were changed and the wording was explained so that "...regional marine strategies are again understood as a compilation of national strategies, not implying collective responsibility."⁵¹ The current provision refers to Articles 5 and 6 with regard to regional cooperation during the preparation of the assessment. Apart from the cooperation obligation under Article 5(2), Article 6 expressly notes the importance of international forums, such as RSCs for matters of cooperation in a marine region or subregion. The initial assessment is to be reviewed and, if applicable, updated every 6 years, according to Article 17(2)(a).

1.2.1.2 Conclusion

Article 8 sets out the framework for the first step MSs must take in their marine strategies, by obliging an IA. The significance of fisheries with regard to this IA follows from the indicative lists of characteristics, pressures and impacts on which the IA must be based. Biological and habitat components make up for a large part the characteristics description, and it is unlikely that pressures and impacts attributable to fishing activities on those components can be left out of that part of the IA. Since, next to the general obligation of cooperation pursuant Articles 5 and 6, MSs are also obligated to make every effort to ensure that methodologies are consistent across a marine region or subregion, they are steered to that level for cooperation with regard to this element. Article 8 is not the last provision in the MSFD to contain such wording.

⁵⁰ European Parliament, A6 0373/2006, Amendment 47-52.

⁵¹ Commission, COM(2007) 456final, p. 5-6.

1.2.2. The determination of ‘good environmental status’

Article 9 deals with the determination of GES, the central objective of the MSFD.⁵² Relevant features of the concept are: ecosystems should function fully and maintain their resilience to human-induced environmental change, marine species and habitats are protected, human-induced decline of marine biodiversity is prevented, and diverse biological components function in balance (Article 3(5)(a)). The definition of GES is not quantified, and therefore necessitates further specification. This approach allows taking into account the specific needs and priorities of the different marine regions and subregions.⁵³ Article 9 forms the procedural framework for the determination of GES.

1.2.2.1 Member State obligations

It was shown in paragraph 1.2.1 that the IA, through the Tables from Annex III, requires the inclusion of several elements directly related to fisheries. Because the definition of GES must be made with reference to the IA and the corresponding Tables from Annex III, it is unlikely that the description of GES will not include statements on the impact and pressures from fishing activities. This is further secured by the qualitative descriptors set out in Annex I on which the characteristics of GES must be based. As was mentioned in paragraph 1.1.3., the GES Decision further specifies the descriptors.⁵⁴ By laying down these more detailed criteria, it is possible to better compare GES descriptions within a marine region or subregion, or even on the EU level. The GES Decision has clarified most of the descriptors from Annex I, but some only to a limited extent. Certain criteria remain unclear (those regarding energy and sound), others are clear but very general (regarding biodiversity), and others are specific but complex and likely to be difficult to implement (e.g. fish stocks).⁵⁵

Next to the general cooperation obligations under Articles 5 and 6, the GES Decision (superfluously) reaffirms that obligation: “Member States are subject to the obligation of regional cooperation ... and in particular to the requirement to ensure that the different elements of the marine strategies are coherent and coordinated across the marine region or sub-region

⁵² See paragraphs 1.1.3. and 1.1.5.

⁵³ Wakefield 2010, p. 330.

⁵⁴ Commission Decision 2010/477/EU.

⁵⁵ Markus et al. 2011, p. 79.

concerned.”⁵⁶ Within the boundaries of this obligation, it is possible for a MS to motivate why it shall not use criteria for the determination of GES within its marine waters.⁵⁷ This motivation accompanies the MS’s notification pursuant to Article 9(2), in which the MS informs the Commission on its IA pursuant to Article 8(1) and its determination of GES pursuant to Article 9(1). The determination of GES is to be reviewed and, if applicable, updated every 6 years according to Article 17(2)(a). If such an update has been made, its details must again be sent to the Commission, but also to the RSCs and to any other MSs concerned within three months of their publication (article 17(3)).

1.2.2.2 Conclusions

Under Article 9, MSs must give the concept of GES hands and feet for their marine waters. Because of the links to the IA, the tables in Annex III and the prescribed basis for the description of GES on the descriptors from Annex I, which were subsequently developed in the GES Decision – all of which contained elements with direct relevance to fishing activities – the definition of GES is likely to contain references to the impact of fishing activities. It has been pointed out, however, that there is considerable space for MS discretion, which allows for political value judgments when devising those criteria.⁵⁸ Similar to the IA, MSs are obligated to cooperate within a marine region or subregion when working on the determination of GES.

1.2.3. Establishing environmental targets

After having conducted the IA, and after having determined the characteristics of GES, MSs must establish environmental targets to guide progress towards achieving GES in their marine waters.

⁵⁶ Commission, Decision 2010/477/EU, Part A, no. 8.

⁵⁷ See both Annex I and Commission Decision 2010/477/EU, Part A, no. 8.

⁵⁸ Markus et al. 2011, p. 79.

1.2.3.1 Member State obligations

MSs must establish their environmental targets on the basis of the IA and they must take into account the indicative list of pressures and impacts from Table 2 of Annex III, and the characteristics set out in Annex IV on ‘characteristics to be taken into account for setting environmental targets’. Characteristics from Annex IV include: ‘specification of the environmental status to be achieved or maintained ... in terms of measurable properties of the elements characterizing the marine waters’, and ‘formulation of targets with a timescale for their achievement and the absence of conflicts between targets’.⁵⁹ The inclusion of biological elements such as fish stocks, and fishing activities as a pressure on, *inter alia*, these stocks, has been unavoidable under the previous elements in the preparations phase. Therefore, it could be argued that the setting of environmental targets, *inter alia*, implies the limiting of fishing activities. It could be that fishing activities do not need to be limited; for instance when it is concluded that the current state of the marine waters in terms of biological features is similar to the corresponding characteristics of GES in those waters, or when the impact of fishing activities on GES is said to be marginal compared to other human activities.

Article 10 experienced similar changes to Article 8, regarding cooperative obligations throughout its drafting history.⁶⁰ As opposed to Articles 8 and 9, however, obligations for MSs to cooperate were not retained. This does not negate the general cooperation obligations under Articles 5 (see paragraph 5(2)(a)(iii)) and 6. Next to the cooperation obligations, MSs must also take into account relevant transboundary impacts and transboundary features when establishing environmental targets. Pursuant to Article 10(2), MSs must notify the Commission of the environmental targets within three months of their establishment. This requirement of establishment is not found in Articles 8 and 9. It could obligate a formal establishment in national legislation.

The established environmental targets are to be reviewed and, if applicable, updated every 6 years according to Article 17(2)(b). If such an update has been made, its details must be sent to the Commission, but also to the RSCs and to any other MSs concerned within three months of their publication (Article 17(3)).

⁵⁹ Annex IV, no. 3,4 and 6.

⁶⁰ Compare European Parliament, A6 0373/2006, amendment 55 and Commission, COM(2007) 456 final, p. 7.

1.2.3.2 Conclusion

It is unlikely that the establishment of environmental targets can be accomplished without setting measurable proportions of biological characteristics that need to be achieved. If not explicitly, these targets will implicitly be limiting fishing activities. The setting of environmental targets is a step which MSs cannot take without cooperation with other MSs, although the removal in the provision of references to this end probably had this aim. Facilitating the cooperation obligations is the requirement that transboundary impacts and features must be taken into account.

1.2.4. Establishing monitoring programmes

After having made the IA, MSs must continue monitoring the environmental status of their marine waters. Monitoring programmes will provide information on the effectiveness of the strategies.

1.2.4.1 Member State obligations

The monitoring programmes must be based on the indicative list of elements from Annex III and the list set out in Annex V, and by reference to the environmental targets established pursuant to Article 10 (Article 11(1)). The list from Annex V requires the inclusion of activities, to identify the “cause of the change [in the environmental status of the waters] and hence the possible corrective measures that would need to be taken to restore [GES]”. This is an important aspect in the light of fisheries as it is another implication for MSs to adopt measures regarding fishing activities in case these adversely affect the environmental status.

Furthermore the monitoring programmes must also be compatible, and build upon, relevant provisions for assessment and monitoring laid down by EU legislation, including the Habitats and Birds Directives, or under international agreements (Article 11(1)).

Monitoring programmes must not only be compatible within marine regions or subregions, but MSs sharing a marine region or subregion must also “endeavor to ensure” that monitoring methods are consistent to facilitate comparability of the results and that relevant transboundary impacts and transboundary features are taken into account (Article 11(2)(a) and (b)). The

monitoring programmes are to be reviewed and, if applicable, updated every 6 years according to Article 17(2)(c).

1.2.4.2 Conclusion

The monitoring programmes are the final element of the preparations phase to be established. The provisions which require cooperation between MSs are rather extended, though their terminology seems to suggest a lighter obligation by the use of ‘endeavor’ instead of ‘shall’. There is an explicit obligation to build upon relevant assessment and monitoring provisions under EU legislation. It will be interesting to see whether those assessments and monitoring schemes are compatible with the requirements of the Annexes and the IA.

The next paragraph addresses the second phase of the marine strategies: the programmes of measures phase.

1.2.5. Establishing programmes of measures

Article 13 constitutes the basis for the programmes of measures which the MSs have to develop and effectuate in the second phase of their marine strategies (Article 13(2)). The programmes of measures build upon the elements from the preparations phase. The abovementioned expectations around the prominence of the impact of fishing activities for the description of GES, and the environmental targets based thereupon, have their effect on the programmes of measures phase.

1.2.5.1 Member State obligations with regard to environmental principles

Provision 13(3) deals with giving due consideration of sustainable development (specifically to the social and economic impacts of the measures envisaged), assisting the national competent authority or authorities to pursue their objectives and enacting administrative frameworks (Article 13(3)). MSs must carry out cost-effective and technically feasible measures and must also carry out impact assessments, including cost-benefit analyses, prior to the introduction of any new measure (Article 13(3)). Both recital 27 and recital 44 – which demand the

precautionary principle, the prevention principle, the polluter pays principle and the principle that environmental damage should as a priority be rectified at source – suggest similar requirements for the programmes of measures.⁶¹

1.2.5.2 Listed measures in Annex VI

Annex VI contains examples of types of measures that MSs may adopt in their programmes of measures. The Annex is to be *taken into consideration* when a MS devises the measures. This formulation means that MSs have a greater freedom not to use Annex VI as compared to the Annexes they must *take into account*. Examples of measures which are applicable to fishing activities are: (1) Input controls – management measures that influence the amount of a human activity that is permitted, (2) Output controls – management measures that influence the degree of perturbation of an ecosystem component that is permitted, (3) Spatial and temporal distribution controls – management measures that influence where and when an activity is allowed to occur, and (6) Economic incentives – management measures which make it in the economic interest of those using the marine ecosystems to act in ways which help to achieve the good environmental status objective. Although these examples only need to be taken into consideration, they do give an overview of the types of measures that MSs may adopt. Whether MSs indeed have the competence to adopt such measures under the CFP setting is discussed in Chapter 2.

1.2.5.3 Inclusion of spatial protection measures

A significant obligation in the programme of measures is to include spatial protection measures (SPMs). Articles 13(4)-(6) cover SPMs; examples of which are the special area of conservation (SAC), the special protection area (SPA), and the marine protected area (MPA). SPMs have in common that they are defined by a spatial scope and are restricting human influence to some degree. Because of the direct connection between an SPM and an ecosystem (component) it is designed to protect, SPMs will certainly affect fishing activities within their spatial scope. One

⁶¹ Markus et al. 2011, p. 81.

can for instance think of a prohibition of bottom trawling in an area subject to an SPM with the aim of protecting endangered sea-bed dwelling flora and fauna. The specifics of the restrictions depend on the legal framework surrounding the type of SPM. Since almost a third of the paragraphs in Article 13 deals with SPMs, it is important to understand how and to what extent such a prominent measure is to be included in the MSs' programmes of measures.

In Article 13(4) it is stated that programmes of measures *shall* include SPMs contributing to coherent and representative networks of MPAs.⁶² The use of *shall* in legal terms implies an unambiguous obligation. This is reaffirmed by the drafting history. The first reading by the EP, which introduced the provision, read "Member States' programmes of measures shall include spatial protection measures."⁶³ In the Common Position, this amendment was partially revoked: "[Amendment] 62 ... [was] not incorporated in the Common Position to the full extent ... the wording of the Common Position does not introduce an obligation to establish MPAs."⁶⁴ The Common Position's wording read: "Programmes of measures ... should include measures such as the use of special areas of conservation ... the use of special protection areas ..., and marine protected areas..."⁶⁵ The EP's second reading reintroduced the former wording as regards 'shall'⁶⁶ which persists in the final version, thereby reinstating the obligation to establish MPAs.

The Birds and the Habitats Directives⁶⁷ are specifically mentioned in Article 13(4) as they provide the legal framework for the establishment of SPAs and SACs respectively.⁶⁸ Another reason for their explicit inclusion seems to be the perceived failing to date of the application of these Directives to marine waters.⁶⁹ Naming these Directives in Article 13 could advance their application to marine waters. It is unclear how exactly the obligation for an inclusion of SPMs in the programmes of measures should be regarded. It likely does not obligate MSs to adopt SPMs *in addition* to those already obligated on the basis of the Bird and the Habitats Directives, and other international or regional agreements. The obligation could be read in such a way, that *in the*

⁶² Compare Directive 2008/56/EC, Articles 13(1) last paragraph, and Article 13(4).

⁶³ European Parliament, A6-0373/2006, Amendment 62.

⁶⁴ Commission, COM(2007) 456 final, p. 7.

⁶⁵ Council, Common Position 12/2007/EC, Article 13(4).

⁶⁶ European Parliament, A6-0389/2007, Amendment 46.

⁶⁷ Council Directive 79/409/, *OJ* 1979, L103/1, repealed by Directive 2009/147/EC, *OJ* 2009, L20/7; Council Directive 92/43/EEC, *OJ* 1992, L206/7, as amended.

⁶⁸ For an analysis of the connection of the MSFD to the Birds and Habitats Directives (with regard to MPAs), see Dotinga & Trouwborst 2011, p. 27-37.

⁶⁹ Westaway, 2008, p. 221; and Dotinga & Trouwborst 2011, p. 35.

absence of any adopted SPM under one of the Directives or other agreements by a specific MS, the MSFD obligation does necessitate the establishment of SPMs. In such a way it can be regarded as a ‘safety net’ provision for the establishment of SPMs in a MS’s marine waters.

Article 13(5) addresses the situation where “...the management of a human activity at Community or international level is likely to have a significant impact on the marine environment...” particularly in the areas where SPMs have been taken. If such an impact occurs, the competent authority must be addressed with a view to the consideration and possible adoption of measures that may be necessary to achieve the objectives of the MSFD, “so as to enable the integrity, structure and functioning of ecosystems to be maintained or, where appropriate, restored.” Article 13(5) pursues the aim that the ecosystem approach is not contained within the MSFD framework, but also pursued in other relevant legal frameworks. The provision is especially interesting when read in the light of MSs’ competences under the CFP with regard to adopting SPMs specifically and to limiting fishing activity in general.⁷⁰ The provision has similarities to Article 15, which shall be discussed in paragraph 1.2.6.4.

1.2.5.4 Other elements in the programmes of measures

Paragraphs 6-10 of Article 13 are procedural provisions arranging notification, publication and operationalization of the programmes of measures and their elements, including their effects on waters beyond the MSs’ marine waters and their contribution to achieving the environmental targets. Similarly to the elements in the preparations phase, the general cooperation obligations in Articles 5 and 6 apply to the development of the programmes of measures. The programmes of measures are to be reviewed and, if applicable, updated every 6 years according to Article 17(2)(d).

On the basis of Article 5(3), MSs having borders in the same marine region or subregion, should where the status of the sea is so critical as to necessitate urgent action, devise a plan of action which includes an earlier entry into operation of programmes of measures as well as possible stricter protective measures. MSs concerned must inform the Commission, which may provide supportive action by declaring the region in question a pilot project. Currently it is not

⁷⁰ See paragraph 2.3.2.2.

clear what these pilot projects entail. The Helsinki Commission's (HELCOM) Baltic Sea Action Plan (BSAP) was signaled as a pilot project in 2007.⁷¹ It distinguishes between measures that cannot be implemented at the regional or national level and measures that require implementation at EU or international levels. For the last type of measures it commits the contracting States to proactively reach regional consensus and provide joint – HELCOM – inputs in relevant legislative processes – such as the CFP at the EU level.⁷² The development of the HELCOM BSAP took from 2003 to 2007,⁷³ and the absence of a confirmation by the Commission of it being a pilot project since then,⁷⁴ emphasize the long development time needed before such a plan might come into operation. One could wonder whether this matches the necessity portrayed in the provision's description (“the status of the sea is so critical as to necessitate urgent action”).

1.2.5.5 Conclusion

Article 13 is the core of the final phase of the marine strategies. Because it is not ‘overly prescriptive’, it has the advantage that every MS can adopt programmes of measures in such a way that they attain maximum effectiveness within that MS's national legal system. The suggested measures in Annex VI are the likely measures that will be introduced in many of the MSs' programmes of measures. Several of these types of measures are in use under the CFP.⁷⁵

The obligatory adoption of SPMs is a stand-out element in the Article. Connected hereto is the obligation to promote ecosystem maintenance and restoration – which is likely identical to the ecosystem approach with respect to the management of human activities. If this obligation is indeed met by the MSs, it will accelerate the ecosystem approach in relevant human activities and their respective legislative frameworks thereby advancing the MSFD's goals – albeit in an indirect fashion as these hypothetical steps to be taken lay beyond the scope of a MS's programme of measures. The adoption of SPMs is highly relevant to fishing activities as these

⁷¹ HELCOM website 2011.

⁷² Backer et al. 2010, p. 644.

⁷³ Ibid., p. 642.

⁷⁴ See to this respect paragraph 1.3.1.3.

⁷⁵ See paragraph 2.1.2.3.

are per definition aimed at ecosystems (and their elements). The possibilities for their adoption by MSs under the CFP must be specifically addressed.

The ‘pilot projects’ are an important addition to the programmes of measures. Crucial to their success will be a development time that corresponds to the critical state of the respective marine waters.

Article 13 mostly contains obligations of what must be included in the programmes of measures. Equally significant factors in the final adoption of the programmes of measures are the actual situation in MSs’ marine waters and the legal frameworks in which the measures must be adopted. These will determine to a large extent whether MSs can take necessary measures. Both are the subject of the provisions dealing with procedures for not taking action, which are dealt with in the following paragraph.

1.2.6. Procedures for not taking measures

Articles 14 and 15 contain procedures for handling situations where MSs are unable to resolve matters related to attaining GES through their programme of measures.⁷⁶ As such, they have an intricate history with provisions moving from one Article to another.

1.2.6.1 Drafting history

In the Commission proposal, Articles 14 and 15 were named ‘special areas’ and ‘information’ respectively. Article 14 on ‘special areas’ was meant to provide MSs with a procedure for dealing with exceptional instances in which the environmental targets could not be achieved through the programmes of measures. The possible instances were restrictively listed and an obligation to take ad-hoc measures was included.⁷⁷

Article 15 named ‘information’, dealt with issues having an impact on the environmental status of waters, which could not be tackled by measures adopted at national level (i.e., measures

⁷⁶ MSFD, Article 14(4) however, also applies to the preparatory phase.

⁷⁷ Commission, COM(2005) 505 final, Article 13.

in a programme of measures).⁷⁸ Under both provisions, the MS had to inform the Commission and provide the evidence necessary to substantiate its view.

The difference in scope of these original provisions may be stipulated by the use of the word ‘area’ in Article 14 and ‘issue’ in Article 15. It seems that Article 14 was meant to deal with actual conditions,⁷⁹ whereas Article 15 pointed towards a (thematic) subject and was aimed at tackling a competence inadequacy. Throughout the drafting history no amendments or statements have been made to suspect otherwise, making it likely that the difference is persistent in the final version of the MSFD. Recital 30 and 31 in the preamble support this interpretation by stating that the provisions are indeed covering ‘two special cases’. In the following sections, the Articles will be analyzed from this perspective.

In the final version of the MSFD, another exception clause was added to Article 14(4). This provision, which originally came from another Article, functions independently from Article 14(1).

1.2.6.2 The procedure under Article 14(1)

Article 14(1) allows the MS to “...identify instances within its marine waters where the environmental targets or good environmental status cannot be achieved in every aspect through measures taken by that [MS], or for ... they cannot be achieved within the time schedule concerned.” A MS must identify these instances clearly in their programme of measures and must substantiate its view to the Commission, while considering the consequences for other MS in the marine region or subregion concerned.⁸⁰ The instances described are: (a) action or inaction for which the MS concerned is not responsible, (b) natural causes, (c) force majeure, (d) modifications or alterations to the physical characteristics of marine waters brought about by actions taken for reasons of overriding public interest which outweigh the negative impact on the environment, including any transboundary impact, (e) natural conditions which do not allow timely improvement in the status of the marine water concerned. Only instance (a) has the possibility to be related to fisheries. It does not have a clear-cut meaning and, as such, it can be

⁷⁸ Ibid., Article 14.

⁷⁹ ‘Area’ was understood to define the spatial and temporal nature of the subject; see Westaway 2008, p. 221.

⁸⁰ MSFD, Article 14(1) 2nd paragraph.

understood to have a relation to the procedure under Article 15. It shall be presumed that (a) describes the situation where another actor is causing the instance to occur. This opinion is based on an analysis of the provision throughout its drafting history. The original Commission proposal read:

“(a) action or inaction on the part of another Member State or a third country...”⁸¹

In the first reading by the EP the entire Article was renamed and received many changes. The specific provision was amended to:

“(ca) action or inaction on the part of another Member State, a third country, the European Community or any other international organization...”⁸²

In the Common Position the *EP Amendment* was not taken aboard in its entirety.⁸³ The text of the provision was changed without further explanation. Other Amendments were accompanied by an explanation if the substance of a provision was amended and required such to be explicated.⁸⁴ Consequently, also nothing was said about the original version from the Commission proposal text.

“(a) action or inaction for which the Member State concerned is not responsible...”⁸⁵

In the second reading by the EP the provision was changed back to the version from the first reading, with the addition of the clause from the Common Position:

“(a) action or inaction on the part of a third country, the European Community or any other international organization for which the Member State concerned is not responsible...”⁸⁶

The final provision is the same as the version as that of the Common Position. Since the substance of the Commission proposal was never rebutted, and as the textual change in the Common Position did not seem to be a reinterpretation, the substance of the provision cannot be expected to have changed drastically since the version in the Commission proposal.

An instance that might be covered by this exception – and which is related to fisheries – is the case where a neighboring MS does not enforce regulations on fishing activities in its waters. If this omission has a negative impact on transboundary stocks that also reside in the principal

⁸¹ Commission, COM(2005) 505 final, Article 13(1)(a).

⁸² European Parliament, A6-0373/2006, Amendment 66, Article 13(1)(ca).

⁸³ Commission, COM (2007) 456 final, p. 7.

⁸⁴ *Ibid.*, p. 5 on Amendments 33, 37, 47; and p. 6 on Amendment 56.

⁸⁵ Council, Common Position 12/2007/EC, Article 14(1)(a).

⁸⁶ European Parliament, A6-0389/2007, Amendment 49, Article 14(1)(a)

MS's marine waters, the latter might not be able to fully achieve GES with regard to the safe biological limits of all commercially exploited fish. In this instance, however, the MS is not responsible for the inaction on the part of the other MS and a successful appeal on the basis of Article 14(1) could be made.⁸⁷

Identifying an instance under Article 14(1), however, does not release that MS from its obligations under Article 13. The MS must take appropriate ad-hoc measures to keep pursuing the environmental targets and mitigate the adverse impact at the level of the marine region or subregion concerned or in the marine waters of other MSs. These ad-hoc measures are to be integrated as far as practicable into the programmes of measures (Article 14(3)).

Article 14 can be labeled an 'attribution' argument: the MS argues that, because one of the listed instances – which cannot be attributed to that MS – occurs, the MS should not be required to fulfill its obligations.

1.2.6.3 The procedure under Article 14(4)

Another exception under Article 14, applicable to any element in the marine strategies except with respect to the IA under Article 8, is that MSs may choose not to take specific steps where there is no significant risk to the marine environment, or where the costs would be disproportionate – taking account of the risks to the marine environment, and provided that there is no further deterioration (Article 14(4)). Both of these exceptions have been identified as potentially undermining the effectiveness of the MSFD.

Regarding the exception for 'no significant risk', it has been noted that it is not clear what the scope of this term is, leaving MSs to interpret it at will.⁸⁸ It shall be seen in paragraph 2.2.3.1 that the catch limits for fish stocks known to be under pressure are often set at higher levels than what is advised from a conservation point of view. Since the MSFD is not linked to the CFP in a legal sense, and its objectives must be pursued from within the CFP, the possibility exists that

⁸⁷ Under the CFP the MS is obliged on the basis of Council Regulation 2371/2002/EC, *OJ* 2002, L358/59, Article 23 and Council Regulation 1224/2009/EC, *OJ* 2009, L343/1, Article 5, to ensure effective control of the rules of the CFP in waters under its jurisdiction – regardless of the vessels' nationality. See Churchill & Owen 2010, p. 214.

⁸⁸ Markus et al. 2011, p. 84.

‘no significant risk’ will be defined in the CFP on other grounds than it would be under the environmental policy setting.⁸⁹

An interpretation of the “cost-disproportionality” exception is that it allows for a choice for the least expensive measure if several measures are available. Since this exception has also not been further defined its scope is not clear. An option would be to build upon the guidelines used for the WFD⁹⁰ regarding the same topic.⁹¹ Furthermore, in the situation where environmental risks are undervalued or poorly understood, the “cost-disproportionality” exception was seen as problematic if expensive protection measures were to be adopted.⁹² In such cases, the obligation of having to take account of the risks to the marine environment would not tip the balance in favor of nevertheless taking specific steps: certainty of high costs would prevail, resulting in the measures not being taken. Measures that in itself do not bear high costs, but have a significant economic impact also fall under this scope. A possibility could be severe restriction of fishing activities, whereby fishermen lose their source of income.

For both exceptions the Commission must be provided with necessary justification to substantiate the decision, while avoiding that the achievement of GES is permanently compromised.⁹³ There seems to be incongruence between this final obligation and the earlier where it was demanded “that there is no further deterioration”.⁹⁴ They both lay down demands regarding the status of the environment. The final provision demands that there is no permanent compromise of GES, which implies that a temporary compromise is admissible. The earlier provision demands that there is no further deterioration. Reading this together could hint that the exception can lead at the most to a postponement of potential measures.⁹⁵ This would, to some extent, limit the potential the provision has of undermining the effectiveness of the MSFD.

⁸⁹ Regarding the incompatibility of principles between different settings, see paragraph 3.4.2.

⁹⁰ Directive 2000/60/EC.

⁹¹ Bruens et al. 2009, p. 33.

⁹² Westaway 2008, p. 221.

⁹³ MSFD, Article 14(4), 2nd paragraph.

⁹⁴ Markus et al. 2011, p. 84.

⁹⁵ Markus et al. 2011, p. 84.

1.2.6.4 The procedure under Article 15

The above shows the framework for MSs to identify situations where they cannot, or do not need to take measures to achieve GES. Article 15 provides a procedure for the case where a MS identifies “...an issue which has an impact on the environmental status of its marine waters and which cannot be tackled by measures adopted at national level or which is linked to another Community policy or international agreement”.

If such is the case, the MS must inform the Commission and provide a justification to substantiate its view. The reporting to the Commission is similar to Article 14(1) 2nd paragraph. Contrary to Article 14(1), no obligation to identify the issues in the programme of measures exists, let alone an obligation to take ad-hoc measures. The reason for not including said obligations is possibly due to the difference between Article 14(1) and Article 15(1): the former provision is based on an ‘attribution’ argument and the latter a ‘competence’ argument.⁹⁶ Consequently, in the case of the application of Article 15(1), the MS in question will likely not have the competence to take any measures.

Leaving the issue unidentified, however, does not seem a good choice. In the current situation there will be a ‘blank’ spot insofar that a certain impact on the environmental status, addressed by environmental targets, is not covered by the programmes of measures – which follows from the above. The blank spot also occurs insofar that the MS does not specify by which (procedural) means it aims to tackle the impact. This means that the procedure of Article 15 and the issue at stake are not formally connected anymore to the programmes of measures.

Under Article 15(2) a MS is obliged to, in the case action by Community institutions is needed, “...make appropriate recommendations to the Commission and the Council for measures regarding those issues”. This is where the procedure ends as far as the MS is concerned; it depends on the Commission whether there will be a next step.⁹⁷ Article 15 is especially relevant to this research as it addresses those circumstances where an incompatibility in competences between legal settings arises, which is expected to be the case according to the hypothesis.

⁹⁶ Strictly speaking this is incorrect, as Article 15(1) also covers issues “...linked to another Community policy” which does not necessarily preclude a MS competence. Overall though, it gives a practical approach to the difference between both Articles.

⁹⁷ See paragraph 1.3.1.2.

Article 13(5) was mentioned as having similarities to Article 15. Both provisions require the MSs to recommend the taking of measures with regard to an issue, and also function as procedures for advancing the MSFD's objectives outside of its legal framework. The difference between the recommendations however, is that the one under Article 13(5) is particularly aimed at pursuing the effectiveness of SPMs for ecosystem protection purposes, as opposed to those under Article 15 which may be directed at a wide array of issues. The addressee under both provisions is also different, as Article 15 is specifically directed at the Commission. This underlines the difference in function of both provisions as Article 13(5) is likely meant as a 'catalyst' for the introduction of ecosystem protection in other legal frameworks,⁹⁸ whereas Article 15 is meant to fix problems in the regulatory framework.

1.2.6.5 Conclusion

The previous subparagraphs have analyzed the procedures MSs must follow if they are unable to resolve matters related to attaining GES through their programme of measures. There is a difference in substance between both provisions. Under Article 14(1), a sort of 'causality' argument forms the basis for an exception. The MS argues that because one of the listed instances – which cannot be attributed to that MS – occurs, the MS shall therefore also not be required to fulfill its obligations. In Article 15, a 'competence' argument forms the basis for not taking action. The MS argues that it a) does not have the competence to tackle an issue at the national level, or b) should not act for the issue is linked to an EU policy or international agreement. The situation under b) is not necessarily a competence argument; it can be that such an EU policy is based on shared competence under which a MS does have the competence to take measures. The reason to allow the MS to refrain from taking measures is that it matches the idea of a framework Directive, which allows flexibility to have MSs address those measures in the respective policy area or under the international agreement. The use of the procedure under Article 15 brings the issue at stake outside of the programmes of measures, thus outside the marine strategy.

⁹⁸ Other elements in the MSFD add to this effect; see Dotinga & Trouwborst 2011, p. 37.

Finally, the ‘no significant risk or cost disproportionality’ exception under Article 14(4) is a general exception clause. Because of the lack of guidance on its substance, and the perceived inconsistencies, it is unclear to what extent it will be used and what its use will mean for the effectiveness of the programmes of measures.

All of the exceptions are as relevant to the research as the programmes of measures: it is just as important what measures MSs will not take, as what measures they will take with regard to fisheries. Of the two provisions, Article 15 contains the principal procedure which MSs will use in case the hypothesis posed in the Introduction turns out to be correct.

1.2.7. Updating of the marine strategies

Article 17 obligates the updating of the elements of the marine strategies by MSs. Not only must MSs periodically review and, if necessary, update their marine strategies, but they must also send details of these updates to the Commission, RSCs and any other MSs concerned. Articles 12 and 16 apply *mutatis mutandis*, whereby the Commission can give feedback to the updates with regard to their consistency with the MSFD.

This Article plays an important role when scientific data or insights evolve to the extent that elements in the preparations phase or in the programmes of measures phase need to be adapted. An example is the exception under Article 14(4) which necessitates ‘no significant risk’. It is not unimaginable that due to changes in scientific insights, this label stops being applicable to some activity in a certain area. A MS can accordingly, when updating its strategy, no longer make use of the provision to be excused from taking action.

Another important point of Article 17 lies with the upcoming reform of the CFP. Whatever its outcome may be, it is possible that MSs are delegated more – or other – competences than they hold now. This could take away a necessary condition under one of the provisions dealing with procedures when MSs cannot take measures to pursue the attainment of GES to some degree, thereby obliging the MS to change its programmes of measures accordingly and take the measures it previously did not need to, or could not, take.

1.2.8. Conclusion: Member States in the MSFD setting with regard to fisheries

The tasks for the MSs in the MSFD setting are the most prominent, which is not surprising considering the MSFD is directed at the MSs. Throughout the preparations phase of the marine strategy, MSs are to conduct research, define GES, set environmental targets and set up monitoring programmes. Throughout the programmes of measures phase they develop and implement the measures that must lead to GES. These steps consistently require cooperation at the marine region or subregion level. This follows not only from a general obligation of cooperation, but also from specific provisions addressing each element.

The obligation to periodically review and report on, or update their marine strategies, assures that MSs keep the MSFD on their national and EU environmental agendas. Coupling of this administrative obligation to that of monitoring the actual environmental status ensures that the attainment of the MSFD objectives will be a constant effort. This in turn, makes MSs ‘drivers’ of the MSFD’s objectives. The practical relevance of the obligation is that if developments necessitate changes to marine strategies, these could ultimately lead to the MSs being required to take action which they previously did not need to take.

In both phases, Annexes give substance to the respective elements. It is in these Annexes that the explicit relevance of the MSFD to fisheries is made. The Annexes used in the preparations phase point to biological elements which are known to be affected by fishing activity, and to pressures and impacts caused by fishing activity. Annex VI, used in the programmes of measures phase, includes 8 types of measures of which half is in use under the CFP as an (in)direct means of fisheries management measures.

Overall, MSs have a large discretion: they develop their marine strategies as they see fit. MSs are at most steered by the MSFD in *how* they choose and *when* they choose. This ‘steering’ is effectuated by the Commission. As has been shown, it is not likely that the impact of fishing activities can be left out of those strategies.

The next paragraph addresses the tasks the EU institutions have under the MSFD.

1.3. Competences and obligations for the EU institutions related to fisheries

This paragraph addresses the tasks of the EU institutions under the MSFD setting. Each subparagraph addresses an institution.

1.3.1. Competences and obligations for the Commission

1.3.1.1 The Commission's assessment of the preparations phase

On the basis of Article 12, the Commission assesses the elements of the preparations phase, the IA, the determination of GES, the establishment of environmental targets and the monitoring programmes. Notifications on these elements must be submitted throughout the preparations phase (pursuant to Articles 9(2), 10(2) and 11(3)). The provision is in form comparable to Article 16, which focuses on assessment of the programmes of measures phase. As the relevance of Articles 8-10 to fishing activities was established through the Annexes that are referred to, the Commission's assessment is expected to take account of that relevance on the determination of GES and the consequences this has for the environmental targets.

Commission's competences and obligations

Initially, Article 12 was named 'approval', which hints at the degree of influence the Commission could exert over the MSs' notifications for the preparations phase.⁹⁹ The Commission could ask a MS for additional information necessary for its decision, and it could eventually reject the framework constituting the notifications, or any aspect thereof, on the basis that it did not comply with the MSFD. The Article was first amended by the Council in its Common Position, which sought to bring down the extent of influence exerted by the Commission over the marine strategies.¹⁰⁰ To that extent, the Article was renamed 'Notifications and Commission's advice' and the Commission was only to 'advise' the MSs in response to their notifications.¹⁰¹

⁹⁹ Commission, COM(2005) 505 final, Article 11.

¹⁰⁰ Although Article 12 MSFD only relates to the preparations phase, Article 16 MSFD did administer the programmes of measures phase and was amended similarly.

¹⁰¹ European Council, Common Position 12/2007/EC, Article 12.

The final version is a compromise between the Common Position and that of the draft for a second reading of the EP, which re-introduced elements from the Commission's proposal.¹⁰² Article 12 has the Commission performing an assessment; not just aimed at the framework per MS, but it considers them *together* as frameworks within different marine regions or sub-regions and even across the EU. This clearly reflects the cooperation obligations MSs have under the preparations phase. Instead of being able to reject a framework, the Commission is only able to 'provide guidance on any modifications it considers necessary'. If necessary, it is by this competence that the Commission has the power to steer MSs in their valuation of the importance of (biological) elements in their marine waters, and the impact of fishing activities thereupon. There is even the possibility to steer the environmental targets which the MSs set for themselves.

Noteworthy is that the Commission gives its advice on the elements together, after having received all notifications from every MS. There is a 2-year timespan between the first and the last deadline of the elements (and notifications) in the preparations phase, and only a 1-year timespan between that last notification and the deadline for the establishment of the programmes of measures. It would be easier for MSs to apply changes to, for instance, the determination of GES shortly after having sent a notification rather than shortly before the deadline to send the programmes of measures.

Following Articles 17(4), Article 12 applies *mutatis mutandis* when MSs update any of the elements from the preparations phase of their marine strategies. This is relevant when new scientific data or insights become available that might point toward new outcomes in any of the elements under the preparations phase.

Conclusion

The Commission exerts some control over the preparations phase by means of an assessment. It can not only assess the submitted notifications on a national level, but also on a regional level. This makes sense as MSs are instructed throughout the preparations phase to cooperate at the regional level or to take transboundary features or impacts into account. Their efforts to this

¹⁰² European Parliament, A6-0389/2007, Amendment 42. Interestingly, rather than being able to reject any element from the whole framework as constituted by Articles 9-11, which was possible under the Commission Proposal and the EP's first reading, the draft EP's second reading only contained such a competence with regard to the monitoring programme.

extent should be assessed accordingly. The degree of this control shall be mentioned in the conclusion to Article 16, as that Article is practically identical to Article 12.

1.3.1.2 Competences and obligations for when Member States do not take measures

Articles 14 and 15 contain procedures for handling situations where MSs are unable to resolve matters related to attaining GES through their programmes of measures. The provisions do not give a *carte blanche* to the MSs: the Commission inspects their use with regard to the programmes of measures.

Commission's competences and obligations under Article 14

Under Article 14 ('Exceptions'), the Commission will receive a notification from a MS in two situations: when instance (a)-(e) under Article 14(1) occurs, and when a MS opts for one of the arguments under the general exception clause of Article 14(4).¹⁰³ MSs are under the obligation to identify the instances under Articles 14(1)(a)-(e) in their programmes of measures and substantiate their view – regarding the invocation of such an exception – to the Commission. No obligation exists to include the reasons for not taking any steps under Article 14(4) in the programmes of measures. These reasons must, however, also be justified and substantiated to the Commission. Recital 32 comments that the flexibility offered in Article 14 "...should be subject to control at Community level." In this light it is likely that the Commission has the implied competence to respond and comment on the submissions under both Articles 14(1) and 14(4).

Because the instances under provision 14(1) need to be identified in, and the following ad-hoc measures integrated into the programmes of measures, the Commission is also able to follow up on them pursuant Article 16. Because of the absence of an obligation to identify an exception under Article 14(4) in the programmes of measures, the Commission will not easily be able to comment on such an exception through Article 16, unless the use of the Article 14(4) exception amounts to a situation where it deprives the programmes of measures of their effect in a way that they become inconsistent with the Directive.¹⁰⁴ It is questionable whether this is a suitable remedy for limiting the use of Article 14(4) with regard to the programmes of measures. It might

¹⁰³ MSFD, Article 14(1) 2nd paragraph, and 14(4) 2nd paragraph.

¹⁰⁴ Ibid., Article 16, last paragraph.

have been more effective to also require the exception under Article 14(4) to be identified in the programmes of measures.

Commission's competences and obligations under Article 15

Under Article 15, the Commission plays a larger role which matches the Article's title: 'Recommendations for Community action'. A MS which identifies an issue that cannot be tackled by measures adopted at national level, or that is linked to another EU policy or international agreement, shall inform the Commission. In such a situation, the Commission must respond to the MS within 6 months.¹⁰⁵ If in the above case action by EU institutions is needed, the MS must also make appropriate recommendations to the Commission and the Council for measures regarding the above mentioned issues. The Commission must again respond to the MS's recommendation within 6 months. Where appropriate, the Commission may reflect the recommendations when presenting related proposals to the EP and the Council (Article 15(2)). This last obligation assures that possible inconsistencies in the legal framework at EU or international level are picked up by the appropriate actor, namely the Commission (whose general tasks are to submit proposals for legislation and to represent the EU at the international level).

There exists a discussion whether the Commission can or cannot refuse to initiate legislation when requested to do so. This question is relevant for the effectiveness of the procedure under Article 15(2). If the Commission decides to ignore the recommendation made by a MS, there is no next step that can be taken within the framework of the MSFD to further the objectives. This could jeopardize the achievement of the objectives. The said discussion, however, seems to only involve the three main EU institutions: the Council, the EP and the Commission.¹⁰⁶ In that light it would be awkward to incorporate such an obligation with the potential to bind the Commission at the recommendation of a MS under the MSFD. When taking the above and the wording of Article 15(2) into consideration it must be concluded that after a MS has made a recommendation based on Article 15(2), it is up to the Commission to decide whether to draft a

¹⁰⁵ Ibid., Article 15(1) 2nd paragraph.

¹⁰⁶ Crombez et al. 2006, p. 324.

proposal.¹⁰⁷ In other words, the Commission decides if such action is ‘appropriate’. This brings up the question to what extent the respective setting in which action needs to be taken, influences such a decision because of different objectives under that setting.¹⁰⁸

A last resort might be provided by the principle of ‘sincere cooperation’, which entails that “...the Union and the Member States ... in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.”¹⁰⁹ This provision could provide a basis for demanding action by the Commission if the denial of such prevents a MS from fulfilling its obligations under EU law.¹¹⁰

The value – from an EU legal perspective – of the Commission response under Article 15 is also unclear. Suppose the Commission response indicates that, contrary to the MS’s belief, the issue *can* be tackled by measures adopted at national level. Does this carry any legal ‘weight’ – taking into consideration the fact that the sole interpreter of EU law is the ECJ? The role of the Commission in the policy field, which corresponds to the issue, such as the CFP, may be an important factor in determining its legal weight.

Regarding the importance of Article 15 in relation to the hypothesis from the Introduction, and taking account of the rather open-ended or ambiguous obligations arising from its procedure, it could be concluded that the Article is not ideal for what it is meant to perform: to effectuate legislative changes to the pursuit of the MSFD objectives.

Conclusion

Article 14 contains two provisions that provide MSs with a means of making exceptions to taking action under their programmes of measures. Both exceptions must be substantiated – and justified under Article 14(4) – to the Commission. Although there is no explicit obligation or

¹⁰⁷ As opposed to an EP Amendment from its first reading: European Parliament, A6-0373/2006, Amendment 66. Note that the EP introduced this provision in the later Article 14 (Exceptions). It was changed and moved to the later Article 15 (‘Recommendations for Community action’) in the Common Position: Commission, COM(2007) 456 final, p. 7, and Council, Common Position 12/2007/EC, Article 15(2). The amendment in the draft second reading by the EP again did not make it, even though it was already watered down when compared to the first reading version; European Parliament, A6-0389/2007, Amendment 49, Article 14(1)(-aa).

¹⁰⁸ See also paragraph 2.1.2.2 on the CFP objectives, and paragraph 3.4.2. on the compatibility of objectives under the Commission proposal.

¹⁰⁹ TEU, Article 4(3).

¹¹⁰ The ‘sincere cooperation principle’ was addressed in the Introduction.

competence (as is the case under Article 16) to directly comment on these substantiations and justifications, it follows from the preamble that the Commission may comment on them. The reason for the absence of such an explicit competence is unclear and, especially in case of Article 14(4), unjustifiable for a proper degree control of the implementation of the programmes of measures.¹¹¹

Article 15 gives a procedure if a MS recognizes that an issue necessitates legislative action for which the MS has no competence, or which it should not take itself. If EU institutions are required to take action, the MS must recommend such to the Commission. It is unclear what value the response of the Commission can be accorded when a MS identifies an issue under Article 15(1). It makes sense from an EU legal perspective that no obligation for the Commission exists to draft a legislative proposal on the basis of Article 15(2). However, in case the Commission is wrong in not making a proposal, such an omission will be detrimental to the efficacy of the MSFD. The EU principal of ‘sincere cooperation’ could function as a last resort for MSs to ensure that the Commission takes the necessary action in such a case. When comparing the importance of the provision in the pursuit of the MSFD objectives to the open-ended character of its procedure, Article 15 seems not to be ideally suited for its function.

1.3.1.3 The Commission’s assessment in the programmes of measures phase

Article 16 deals with the Commission’s overall control over the MSs’ programmes of measures. This is next to the control exerted on the basis of Articles 14 and 15, which only deals with exceptions and recommendations for EU action.

Commission’s competences and obligations

Article 16 gives the Commission the competence to assess for each MS whether the programmes of measures notified constitute an appropriate framework to meet the requirements under the MSFD. The Commission may ask the MS to provide any additional information that is available and necessary. The drafting history of Article 16 is practically the same as that of Article 12. The

¹¹¹ Regarding the potential of that provision to undermining the MSFD’s effectiveness, see paragraph 1.2.6.3.

Common Position¹¹² removed nearly every aspect of the Commission's control suggested in the proposal,¹¹³ and the final version saw some of it return in the form of the Commission providing "...guidance on any modifications it considers necessary".¹¹⁴

On the basis of Article 13(9) MSs send a notification to the Commission within 3 months after the programmes of measures are established. The Commission informs the MSs 9 months after the establishment of their programmes of measures. The earliest obligation of updating the programme of measures is after 6 years (following the updating of the elements from the preparations phase). It seems strange with regard to the inclusion of an effective feedback system that the programmes of measures come into action before the Commission gives guidance together with the first required updating more than 5 years after the guidance was given.

As is the case with Article 12, Article 16 applies *mutatis mutandis* to updates made by MSs to their programmes of measures (Article 17(4)). This means that the control may be exercised again after updates of the programmes of measures on the basis of Article 17.

Competence regarding pilot projects

On the basis of Article 5(3), MSs may find it necessary, in a marine region or subregion where the status of the sea is so critical, to undertake urgent action. Such a situation may necessitate an earlier entry into operation of programmes of measures, as well as possibly stricter protective measures.¹¹⁵ The Commission must be informed of this by the MSs concerned, and may subsequently consider providing supportive action to MSs for their enhanced efforts, by making the region in question a 'pilot project'. Because of its characteristics, a pilot project is a part of programmes of measures. HELCOM launched in 2007 its BSAP which was quickly signaled as a pilot project under the MSFD.¹¹⁶ The Commission introduced, on the basis of a request made by the Council,¹¹⁷ a Strategy for the Baltic Sea Region. In that strategy the BSAP and the MSFD were mentioned together as guiding the interventions on the environment, but a 'pilot project' was not mentioned.¹¹⁸ Later, the Council made another request to the Commission: "...[calls]

¹¹² Commission, COM(2007) 456, p. 9.

¹¹³ Commission, COM(2005) 505 final, Article 15.

¹¹⁴ MSFD, Article 16 last paragraph.

¹¹⁵ See also paragraph 1.2.5.4.

¹¹⁶ *Ibid.*

¹¹⁷ Council, 16616/1/07 REV 1, p. 17.

¹¹⁸ Commission, COM(2009) 248 final, p. 5.

inter alia for an expedient establishment of the Baltic Sea Region as a pilot project under the MSFD and [invites] the Commission to initiate supportive action within the framework of the EU Strategy for the Baltic Sea Region.”¹¹⁹ As of yet no known supportive action in this sense has been taken by the Commission. It is also not known what kind of action could be taken by the Commission. One suggestion is that the status of a pilot project could ensure EU funding for its implementation.¹²⁰

Conclusion

The Commission can assess the programmes of measures based on Article 16. Drafted in similar fashion to Article 12, one could wonder to what extent this control goes. Since terminology was changed from ‘reject’ to ‘provide guidance’, it is unlikely that the control has a coercive disposition. Since there is no obligation for the MS to follow-up on this guidance, the significance of the control competence seems to depend mostly on the MS in question. As was the case under Article 12, the timing of the Commission’s control seems to add to its casual disposition.

The competence the Commission has with regard to pilot projects was also discussed because such a project is part of the programmes of measures. The concept is not worked out in the MSFD and the Commission has of yet not clarified its significance, procedure or merits. It was concluded in paragraph 1.2.5.5 that the practical relevance of pilot projects under the MSFD will depend on the time needed for their development.

1.3.1.4 Commission reports and reviewing of the MSFD

Pursuant to Article 20 the Commission must publish several types of progress reports. Following Article 23 it is to review the Directive itself and, where appropriate, propose any necessary amendments. This provision is of relevance to the research insofar that it provides the instrument to remedy flaws in the MSFD itself.

The Commission’s report on the contribution to existing obligations

¹¹⁹ Council, 17764/2/09 REV 2, p. 6.

¹²⁰ Backer et al. 2010, p. 648.

Following Article 20, the Commission must publish two reports of which the one based on Article 20(2) is interesting to the research.¹²¹ On the basis of that provision, the Commission must publish a report assessing the contribution of the MSFD to existing obligations, commitments and initiatives of MS or the EU at the EU or international level in the sphere of environmental protection in marine waters. Contrary to the report pursuant Article 20(1), this report does not have a set form. The reporting obligation is very ‘optimistically’ formulated when compared to the earlier EP’s amendment: “The Commission shall publish ...a report pinpointing any conflicts or complementarities between improvements to this Directive and the obligations and commitments [from existing legislation].”¹²²

Progress report on MPAs

Article 21 obliges the Commission to report, based upon information provided by the MSs (Article 13(6)), on progress in the establishment of MPAs, having regard to existing obligations under applicable EU law and international commitments of the EU and the MSs. This obligation was proposed by the EP in its first and second reading. A follow-up, if appropriate, was foreseen in the form of additional EU measures needed to meet the aim of protecting a representative network of MPAs.¹²³ This did not make it to the final version. The report is to be submitted to the EP and the Council.

Reviewing and amending of the MSFD

Article 23 can be seen in the light of the previous two Articles; after the evaluation and progress reports the Commission must review the MSFD integrally and propose any necessary amendments. Similar to Articles 20 and 21, Article 23 was introduced to more content by the EP in its first and second reading. The legislative procedure and its objectives were described in more detail: “submit to the European Parliament and the Council any proposals for amendments necessary in order to ... facilitate the achievement of good environmental status [and] facilitate

¹²¹ The other is an evaluation report on the implementation of the MSFD, based on Article 20(1).

¹²² European Parliament, A6-0373/2006, Amendment 70.

¹²³ European Parliament, A6-0373/2006, Amendment 72; and European Parliament, A6-0389/2007, Amendment 55.

the maintenance of good environmental status...”¹²⁴ In the end however, these amendments were not fully retained.

Conclusions

On the basis of Articles 20 and 21 the Commission monitors the overall influence of the MSFD and the marine strategies on other legislation and on the environment. These reporting obligations form the probable bases for the Commission’s review of the MSFD under Article 23. They consequently also form the basis for the decision whether or not to propose amendments to the MSFD. One can think in this regard of the importance of Article 15 with regard to the hypothesis from the Introduction and the perceived inadequacy of its procedure. This set of provisions thus forms a second – next to the updating requirements for MSs – line of renewal under the MSFD framework.

1.3.1.5 Technical adaptations to the MSFD

The GES Decision was mentioned earlier in paragraph 1.2.2. This Decision has an important role of supplementing Annex I on descriptors for the determination of GES, thereby steering the MSs in their definitions of GES. Its supplement to descriptor 3 on commercially exploited fish and shellfish lays down a detailed list of characteristics that MSs cannot ignore when they determine GES. Similar to this competence, the Commission may adopt methodological standards and technical formats for other Annexes (Article 24). The competence can also be used to streamline the gathering of data or methodological standards with other legislation to improve coherence in data sets; this helps MSs in better decision-making.¹²⁵

¹²⁴ European Parliament, A6-0373/2006, Amendment 73; and European Parliament, A6-0389/2007, Amendment 56.

¹²⁵ See Regulation 2371/2002/EC, Article 2(2)(b): “The Common Fisheries Policy shall be guided by the following principles of good governance: (b) a decision-making process based on sound scientific advice which delivers timely results...” See also paragraph 3.4.1.2 on the gathering of data under the Commission proposal for a new Basic Regulation.

1.3.2. Competences and obligations for the Council and the European Parliament

The tasks of the EP and Council are defined in the MSFD by a few provisions. These provisions are all related to receiving notifications or reports, of which only two are connected to earlier mentioned provisions. No active participation is expressly required within the MSFD framework. Both actors are discussed together, as they are paired in all but one of the provisions.

1.3.2.1 Receiving proposals and reports

The EP is not mentioned together with the Council in Article 15(2), where the latter (together with the Commission) is to receive recommendations for Community action from MSs. The EP and Council are then to be presented, if appropriate, with related proposals from the Commission in response to those recommendations.¹²⁶ Following Article 20(1) the EP and Council receive a first evaluation report from the Commission, and following Article 20(2) they receive the assessment contribution report from the Commission. Based on Article 21, 2nd paragraph, they receive a progress report by the Commission on the establishment of MPAs.

1.3.2.2 Indirect importance

The tasks the Council and the EP have under the MSFD are rather insignificant. However, both actors do play a crucial role in the phase following a Commission proposal under Articles 15(2) and 23. Such a proposal could mark the start of a legislative procedure in which both actors usually share the role of legislator and thus need one another.

1.3.3. Conclusion: the EU institutions in the MSFD with regard to fisheries

The tasks of the EP and the Council under the MSFD are rather marginal. Their combined legislative tasks in the environmental policy area, however, are of importance for the MSFD. After the Commission submits legislative proposals following Articles 15(2) and 23, the Council and the EP – depending on the legislative procedure – must adopt the legislative act.

¹²⁶ In this provision, the Council is mentioned without being paired to the EP.

The Commission clearly has a supervisory and coordinating role within the MSFD setting, thereby safeguarding the MSFD's objectives. Its competences have been reduced so that powers to reject elements of the marine strategies or elements thereof under Articles 12 and 16 became of a mere advisory nature. Furthermore, the schedule for giving advice makes it unlikely that MSs will be able to effectively follow-up on it.

Under Article 14, the Commission can comment directly on any appeal to the exception clauses. All in all, however, it can be said that the Commission lacks teeth towards the MSs with regard to checking their marine strategies. In the long-term, the Commission does hold an instrument in Article 23 to renovate the MSFD if the need comes up. The tasks of the Commission under the MSFD reflect its general tasks under EU law of managing (or administering) and proposing new legislation.

Next to those tasks, the Commission also holds the general task of enforcing EU law which adds weight to its tasks under the MSFD. By receiving notifications and being able to subsequently request further information, the Commission can form an adequate image of whether the requirements of the MSFD are being fulfilled by the MSs. The 'guidance' the Commission provides on the necessary modifications, implies that a MS is not correctly implementing EU law. Disregard of such guidance might prompt a non-compliance procedure on the basis of Article 258 TFEU. Chances are relatively large that this will amount to a procedure before the ECJ as the pre-litigation phase of the non-compliance procedure has practically been followed by the procedures under Articles 12 and 16. This brings the Commission's control task under the MSFD into another light.

1.4. Conclusion

By simultaneously addressing the relevance to fisheries and the tasks of the actors under the MSFD, the first part of the first research question has been answered: *“What are the tasks for the Member States and the EU institutions in relation to fisheries under the MSFD?”*

The relevance of fishing activities to the MSFD was made explicit in the preamble, but even more in the Annexes, to which references are made throughout the MSFD. The inclusion of

characteristics, such as those related to fish populations, and biological disturbance caused by commercial fishing, will lead to the inclusion of the effects of fisheries in the elements of the preparations phase. The aforementioned inclusion will have an effect for the programmes of measures phase because of the latter's basis in the preparations phase. Noteworthy is also the indicative list for the programmes of measures, which contains a significant amount of possible measures that is already in use under the CFP.

All in all, there are clear indications, that in order to achieve the MSFD objectives, the impact of fishing activities on the environment must be taken into account and, where necessary, limited by means of the programmes of measures.

Chapter 1 also gave an overview of the tasks in the MSFD setting: with the MSs on the one hand and the EU institutions on the other. As most obligations are directed at the MSs, they are the primary drivers of the objectives under the MSFD. If, however, it turns out that measures cannot be taken at the national level, or if an issue is linked to another EU policy or international agreement, the Commission becomes the second actor that is involved in the pursuit of the objectives. The pivotal provision in this sense, however, does seem to have some ambiguities surrounding its procedure. Its practical use will attest whether it is able to meet its purpose.

The Commission has the task to control the degree of discretion the MSs have in implementing their marine strategies. The Commission may steer the MSs by amending non-essential elements, such as in the GES decision which improved the understanding of the GES descriptors and thereby steered the MSs in formulating their GES descriptors. By checking the submissions, reports and notifications made by the MSs throughout the two phases of their marine strategies, and by commenting on them, the Commission exerts influence on those strategies. The process of receiving reports and providing guidance is similar to the non-compliance procedure under the TFEU. Although a MS cannot be forced on the basis of the MSFD to change its marine strategy if the Commission requests it to do so, the possibility of a non-compliance procedure might have that effect nevertheless.

An unfortunate element seems the timing of the guidance the Commission might provide as MSs are required to update the elements of their marine strategies once every 6 years. Finally, the Commission may review and, where appropriate, propose amendments to the MSFD.

This is where the EP and the Council are important. Although their role is marginal when looking at the provisions mentioning them, they are the primary actors after the Commission makes a legislative proposal. Follow-up on inconsistencies with other legislative frameworks – dealt with under Article 15(2) – and deficiencies within the MSFD framework – dealt with under Article 23 – are dependent on their decisions.

In the next Chapter the focus will be on the distribution of tasks under the CFP. If that is similar to the MSFD, it will aid in the pursuit of the objectives of the MSFD.

Chapter 2:

The Common Fisheries Policy

2.1. The CFP setting: an introduction

In Chapter 1, the MSFD setting as well as the tasks of the MSs and EU institutions therein were introduced. Next to the general relevance noted in the preamble, specific elements of the marine strategies were explicitly linked to fishing activities by means of characteristics or pressures. MSs were found to be the primary actors to that must pursue the MSFD objectives regarding fisheries. In the current Chapter the aim is to analyze what measures can be taken to pursue the objectives of the MSFD in relation to fisheries in the context of the CFP, and by which actors these measures can be taken. At the end of the Chapter it will be possible to conclude whether both settings are compatible in their competence distribution and whether the degree of compatibility is adequate to meet the requirements under the MSFD.

2.1.1. The CFP setting in the EU legal framework

2.1.1.1 CFP framework

The entire body of law regulating the CFP finds its basis in the primary EU law, more specifically in Title III TFEU. This title is further worked out in secondary legislation, which consists of a) a Regulation setting out the framework of the EU's managing system (also: the Basic Regulation), b) a number of other Regulations containing the main rules of each of the principal elements of the system that are not regulated in their totality by the Basic Regulation, and c) a mass of separate more detailed legislation implementing those provisions of the

Regulations referred to in a) and b) that require such implementation.¹²⁷ All of these Regulations may contain competences or obligations. Paragraph 2.1.2. primarily addresses the Basic Regulation.

2.1.1.2 Competence division

The conservation of marine biological resources under the CFP falls within the exclusive EU competence field (Article 3(1)(d) TFEU). This reflects the opinion of the Court from the landmark case in the field of fisheries: *Commission v United Kingdom*.¹²⁸ In this case the Court addressed the meaning of Article 102 of the 1972 Act of Accession, which required the Council to determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea. The Court held, that from 1979 the EC had exclusive competence to adopt conservation measures for Community waters and that the MSs no longer possessed such a competence.¹²⁹ The area of fisheries, excluding the conservation of marine biological resources, falls within the shared competence field (Article 4(2)(d) TFEU). The difference between these policy fields is the influence MS have with regard to the adoption of legislative measures.¹³⁰

The decisive word for the difference in competence is ‘conservation’. This concept does not have a precise meaning under EU law, though it certainly encompasses the allocation of resources.¹³¹ Furthermore, it is understood to be a part of the wider concept of ‘fisheries management’.¹³² The lack of a clear definition for fisheries conservation becomes problematic when its objectives are overlapping with objectives that fall under other policy fields, such as the general fisheries policy field. This is so because shared competence to adopt measures – thus a greater competence for MSs – exists in both of those areas. This competence division, established on the concept of conservation, lies at the basis of the competence distribution between the EU institutions and the MSs.

¹²⁷ Description from Churchill & Owen 2010, p. 131.

¹²⁸ ECJ, Case 804/79.

¹²⁹ Churchill & Owen 2010, p. 9.

¹³⁰ This is further explained in paragraph 2.3.1.

¹³¹ Markus 2009, p. 35.

¹³² Churchill & Owen 2010, p. 130.

2.1.1.3 Competence distribution

Next to the aforementioned competence division between the EU on the one hand and the MSs on the other hand, is the internal competence distribution. This distribution follows from the separate bases for legislation in the CFP. The two bases are different from the situation under the TEC, where Article 37(2) was the only legal basis.

These bases are found in the TFEU, more specifically in Chapter III of Part one, named ‘Agriculture and Fisheries’. Article 38(1) reads: “...‘agricultural’, shall be understood as also referring to fisheries, having regard to the specific characteristics of this sector.” This means that the objectives for the CFP are shared with the Common Agricultural Policy (CAP). These objectives are set out in Article 39(1): “... (a) to increase [fisheries] productivity ... by ensuring the rational development of [fisheries] production, (b) to ensure a fair standard of living for the [fishing] community, (c) to stabilize markets, (d) to assure the availability of supplies, (e) to ensure that supplies reach costumers at reasonable prices.”¹³³ Article 43(2) is the basis for legislation on the organization on the common markets and for the pursuit of the objectives of the CFP. Article 43(3) is the basis for legislation on the adoption of measures on fixing prices, levies, aid and quantitative limitations, and on the fixing and allocation of fishing opportunities. Apart from the difference in scope of these provisions, there is also a difference in legislative procedure. Article 43(2) builds on the ordinary legislative procedure, whereas Article 43(3) makes use of a special legislative procedure in which the Council alone, on a proposal of the Commission, decides on the adoption of measures.

The importance of the change in legal bases in the TFEU should be kept in mind in the following paragraphs. As the secondary legislation works out primary legislation, the current Basic Regulation works out the TEC. Since the competence distribution has changed with the adoption of the TFEU, those provisions from the Basic Regulation that do not correctly reflect the new competence distribution can no longer have legal effect to that extent. This has direct consequences for the roles of the Council and the EP.

¹³³ The word ‘agricultural’ has been replaced by ‘fisheries’ or ‘fishing’, to make for easier reading of the Article.

2.1.2. The Basic Regulation

2.1.2.1 *Background*

In the original predecessor of the TFEU,¹³⁴ no expressly articulated competence existed for the authorization of a CFP. However, the provisions dealing with agriculture did provide an implicit authorization by understanding agricultural products to be, *inter alia*, the products of fisheries and the products of first stage processing directly related to fisheries products. Also, by means of a reference to Annex II of the TEC fish, mollusks and crustaceans were to be understood as ‘agricultural products’, which were subject to the TEC’s agricultural provisions. Article 38(4) TEC (now Article 38(4) TFEU) provided that the EC had to develop a common agricultural policy including, following from the above, fisheries.¹³⁵ Until 1983, fishing in the Community waters was regulated by a variety of short-term EC and national measures.¹³⁶ In 1983 one EU management system was set up, made up of several Regulations. This can be seen as the conception of the CFP. In the Basic Regulation, the objectives of the CFP were set out: “to ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions”.¹³⁷ The Basic Regulation also introduced the measures to achieve these objectives. Since 1983, the Basic Regulation has been renewed by two CFP reform cycles, resulting in changes to its scope, objectives and measures.¹³⁸ Currently, the CFP is undergoing a third reform cycle, which shall be addressed in Chapter 3.

2.1.2.2 *Objectives and scope*

The objective in the current Basic Regulation is to “ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions” (Article 2(1)).¹³⁹ This does not exactly reflect Article 39(1) TFEU, insofar that that provision only has an

¹³⁴ ‘Treaty establishing the European Economic Community’, Rome 1957.

¹³⁵ Churchill & Owen 2010, p. 4.

¹³⁶ *Ibid.*, p. 8.

¹³⁷ Council Regulation 170/83/EEC, *OJ* 1983, L24/1, Article 1.

¹³⁸ Council Regulation 3760/92/EEC, *OJ* 1992, L389/1; and Council Regulation 2371/2002/EC.

¹³⁹ Council Regulation 2371/2002/EC. Hereafter referred to as the (current) ‘Basic Regulation’.

economic and social orientation and disregards the environmental perspective.¹⁴⁰ One could wonder whether the Basic Regulation correctly reflects primary EU law. The basis for the environmental protection measures in the CFP, however, is found in Article 11 TFEU, which demands that “[e]nvironmental protection requirements must be integrated into the definition and implementation of the Union politics and activities, in particular with a view of promoting sustainable development.” In addition, Article 38(1) TFEU mentions that while the use of the term agricultural (thus also in Article 39(1)) TFEU must be understood as also referring to fisheries, regard must be had to the specific characteristics of that sector. The objectives stated in the Basic Regulation can, because of these reasons, be regarded as reflecting primary EU law and are consequently the operational objectives for the CFP.¹⁴¹

No hierarchy between the economic, social and environmental aspects exists in the description of the CFP objectives in Article 2(1).¹⁴² However, it is said that in practice the economic and social elements are often prioritized over the environmental ones.¹⁴³ Measures undertaken must apply the precautionary approach to protect and preserve the living aquatic resources, to provide for sustainable exploitation and minimize the impact of fishing activities on marine eco-systems. In this regard, the aim is to progressively implement an eco-system based approach to fisheries management. Article 2 must be understood as having a guiding nature and its principles (precautionary approach, eco-system approach and sustainable exploitation) do not lay down specific standards for environmental protection.¹⁴⁴ Noteworthy is the final ‘guiding’ principle: “consistence with other Community policies, in particular with environmental ... protection policies” (Article 2(2)(d)). Other objectives aim at the economic viability of the fisheries sector, providing a fair standard of living for those who depend on fishing activities and taking into account the interests of consumers.¹⁴⁵ In the following paragraphs, measures and aspects that further the social and or economic aspects (e.g. the common market organization of fisheries products) of the CFP shall be left out. Although they are part of the CFP, they are not relevant to the research question.

¹⁴⁰ ClientEarth 2010, part II.

¹⁴¹ *Ibid.*, part II.

¹⁴² From here onwards in Chapter 2, references to Articles or Recitals will be understood to be from the Basic Regulation, unless stated otherwise. On a critique of the objectives, see Sissenwine & Symes 2007, p. 14.

¹⁴³ Markus 2010, p. 136.

¹⁴⁴ *Ibid.*, p. 136; Wakefield 2010, p. 326.

¹⁴⁵ Basic Regulation, Article 2(1) last paragraph.

It is clear from the above that the objectives in the Basic Regulation are not approached similar to those under the MSFD. Both approaches stem from their respective policy fields. The MSFD primarily pursues environmental objectives. From that point of departure, it pursues sustainable use – thereby covering economic and social objectives. The CFP primarily pursues economic and social objectives through its ‘exploitation’ approach. Within that approach the environmental, economic and social objectives are valued differently than under the MSFD. Account must be taken of this when analyzing the competence distribution. The CFP objectives influence the actual use that can be made of CFP competences for the pursuit of MSFD objectives.

2.1.2.3 Measures

Basic Regulation and the MSFD programmes of measures

To achieve the objectives of the CFP, several measures may be taken. A non-limitative list is found in Article 4(2). In paragraph 1.2.5. on MSs’ programmes of measures under the MSFD, it was mentioned that the indicative list of measures from Annex VI of the MSFD features a number of measures which are in use under the CFP. The following table gives a comparison between the MSFD measures and the corresponding measures under the CFP.

MSFD, Annex VI measures	Basic Regulation, Article 4 measures
(1) Input controls: management measures that influence the amount of a human activity that is permitted	(a) adopting recovery plans under Article 5 (b) adopting management plans under Article 6 (e) fixing the number and type of fishing vessels authorised to fish (f) limiting fishing effort
(2) Output controls: management measures that influence the degree of perturbation of an ecosystem component that is permitted.	(a) adopting recovery plans under Article 5 (b) adopting management plans under Article 6 (c) establishing targets for the sustainable exploitation of stocks (d) limiting catches (g) “technical measures”: (i) measures regarding the structure of fishing gear, the number and size of fishing gear on board, their methods of use and the composition of catches that may be retained on board when fishing with such gear (g) “technical measures”: (iii) minimum size of individuals that may be retained on board and/or landed (g) “technical measures”: (iv) specific measures to reduce the impact of fishing activities on marine eco-systems and non-target species
(3) Spatial and temporal distribution controls: management measures that influence where and when an activity is allowed to occur.	(g) “technical measures”: (ii) zones and/or periods in which fishing activities are prohibited or restricted including for the protection of spawning and nursery areas
(6) Economic incentives: management measures which make it in the economic interest of those using the marine ecosystems to act in ways which help to achieve the good environmental status objective.	(h) establishing incentives, including those of an economic nature, to promote more selective or low impact fishing

Table 2: ‘Comparison of MSFD and CFP measures’.

It can be deduced from Table 2 that there exists a similarity between measures. In the remainder of this paragraph, the aforementioned measures are briefly introduced.

Quantitative catch limitations

These measures are most commonly used in the form of total allowable catch (TAC). They are the principal fisheries conservation tools within EU waters. The legal basis for setting TACs was Article 4(2)(d), but with the adoption of the TFEU this has changed to Article 43(3) TFEU. It is

possible that the legal basis will be brought under the next Basic Regulation, correctly reflecting primary EU law. TACs are quantitative limits (usually in tonnes) on *landings* of living aquatic resources. They do not *directly* control the amount of fish caught. The difference between the actual amount caught and that which is landed, is discarded. The practice of discarding, however, is not exclusively linked to TACs.¹⁴⁶

TACs are set at the level of a stock or a group of stocks. The term stock has a different definition under the Basic Regulation than was given by the ECJ.¹⁴⁷ The difference seems not to have led to problems to date. TACs are laid down in annual or bi-annual fishing opportunities Regulations. Some of these have a geographical scope,¹⁴⁸ another has a thematic scope,¹⁴⁹ and the principal annual fishing opportunities Regulation (PAFOR) covers every stock not covered by another fishing opportunities Regulation.¹⁵⁰ After TACs have been set, they are divided amongst the MSs.¹⁵¹

Effort limitations

These are limitations on the product of the capacity and activity that a fishing vessel, or a group of fishing vessels, may put into catching fish.¹⁵² Activity is measured in time, generally days (at sea).¹⁵³ Capacity is generally measured in vessel characteristics as engine power (in kilowatts) and tonnage (in gross tonnes). For certain types of fisheries, however, the type of fishing gear may also play a role in capacity measurement (Article 3(n)).

Technical measures

Technical measures particularly aim at protecting juvenile fish, non-target species and the marine environment.¹⁵⁴ Significant is that these measures may also be used to further objectives outside

¹⁴⁶ Churchill & Owen 2010, p. 164.

¹⁴⁷ Compare Basic Regulation, Article 3(g): “a living aquatic resource that occurs in a given management area”, to ECJ, Case C-73/90, paragraph 28 – as referred to in Churchill & Owen 2010, p. 133: “a fish of a particular species located within a given management area.”

¹⁴⁸ Council Regulation 1124/2010/EU, *OJ* 2010, L318/1; and Council Regulation 1256/2010/EU, *OJ* 2010, L343/2.

¹⁴⁹ Council Regulation 1225/2010/EU, *OJ* 2010, L336/1.

¹⁵⁰ Council Regulation 57/2011/EU, *OJ* 2011, L24/1.

¹⁵¹ This was previously done on the basis of the Basic Regulation, Article 20(1).

¹⁵² See Basic Regulation, Article 3(h): ‘fishing effort’ means the product of the capacity and the activity of a fishing vessel; for a group of vessels it is the sum of the fishing effort of all vessels in the group.

¹⁵³ Churchill & Owen 2010, p. 165-166.

¹⁵⁴ Markus 2009, p. 86.

the realm of fisheries conservation, such as environmental protection.¹⁵⁵ Technical measures can include measures regarding fishing gear type, minimum fish landing size, closed seasons and closed areas, and other specific measures to reduce the impact of fishing activities on marine eco-systems and non-target species (Article 4(2)(g)).

Procedural management instruments

These are instruments which may contain one or several of the above mentioned measures. Under the Basic Regulation, they are the multi-annual recovery and management plans, and emergency measures.¹⁵⁶ There are, however, several of these instruments in function that have another legal basis. These procedural management instruments are usually laid down in a Regulation.¹⁵⁷

Fleet capacity

The overall capacity of the EU fleet of fishing vessels is considered to be a major factor contributing to the current state of the fish stocks within EU marine waters.¹⁵⁸ It has therefore been the subject of regulation under the CFP. On the basis of Article 11, reference levels are set, which may not be exceeded. A so-called entry-exit scheme has been set up which demands entry of new capacity to be offset by withdrawal of at least the same amount of capacity (Article 13). The European Fisheries Fund (EFF)¹⁵⁹ also plays a role in the adjustment of fleet capacity;¹⁶⁰ around 25% of its budget is reserved for measures for the adaptation of the fishing fleet.¹⁶¹

Financial incentives

The EFF was mentioned briefly above with regard to the adaptation of the fishing fleet. The EFF has as one of its general objectives “[to] foster the protection and the enhancement of the environment and natural resources where related to the fisheries sector.”¹⁶² Under the EFF,

¹⁵⁵ Churchill & Owen 2010, p. 182.

¹⁵⁶ See for instance the Basic Regulation, Articles 5-8.

¹⁵⁷ See Churchill & Owen 2010, p. 167.

¹⁵⁸ Commission, COM(2009) 163 final, p. 8; and Commission, COM(2001) 135 final, p. 10-11.

¹⁵⁹ Council Regulation 1198/2006/EC, *OJ* 2006, L223/1.

¹⁶⁰ Churchill & Owen 2010, p. 235.

¹⁶¹ Markus, T., 2009, p. 204.

¹⁶² Regulation 1198/2006/EC, Article 4(e).

which works by means of co-finance whereby any EU funding must be coupled to MS and private investments, MSs must submit a national strategic plan (NSP) which contains a summary description of all CFP aspects. In addition, the NSP must set out the priorities, objectives, the estimated public financial resources required and deadlines for its implementation.¹⁶³ The NSP must have particular regard of, *inter alia*, “the strategy for ... the adjustment of fishing effort and capacity with regard to the evolution of fisheries resources.”¹⁶⁴

Although both the aspects of fleet capacity and financial incentives are relevant to the subject of this research, because they can be influenced by MSs and because they can aid in the pursuit of the MSFD objectives, the choice was made to not further address them as they are deemed to be too distant from the typical type of fisheries management measures (e.g. input and output controls).

2.1.3. Conclusion

This paragraph introduced the legal framework of the CFP in a similar fashion to the introduction of the MSFD in Chapter 1. Only the framework that is relevant in the light of the MSFD objectives is considered in this research. In the following paragraphs the distribution of competences amongst the EU institutions themselves (paragraph 2.2), and with the MSs (paragraph 2.3) shall be analyzed.

2.2. Competences and obligations for the EU institutions with regard to the MSFD objectives

2.2.1. Competences and obligations for the Council

In this paragraph the primary actor under the CFP, namely the Council, is addressed. With respect to its rather marginal role under the MSFD, it is interesting to see what measures it can take.

¹⁶³ Churchill & Owen 2010, p. 512.

¹⁶⁴ Regulation 1198/2006/EC, Article 15(2)(a).

2.2.1.1 Primary EU law

As was mentioned in paragraph 2.1.1.3, the CFP under the TFEU has introduced a separation in legal bases and makes use of different legislative procedures than it did under the TEC

(Old) Legislative procedure under the TEC

Under the TEC, the Council was the single legislative institution. Article 37(2) read “[t]he Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority, make Regulations, issue Directives, or take Decisions, without prejudice to any recommendations it may also make.” Following this procedure, the Council merely needed to consult with the EP rather than needing its consent or cooperation. After the consultation, the Council could adopt legislation as it wished.

(Current) Legislative procedures under the TFEU

The TFEU has two procedures; each for a different subject. The procedure from Article 43(2) largely follows the ordinary legislative procedure. It starts, however, with a proposal by the Commission on which the Economic and Social Council is first consulted. The ordinary legislative procedure commences after this consultation. In this procedure, both the EP and the Council need to agree on the legislation. The role of the Council in the decision-making process is thus notably reduced in favor of that of the EP.¹⁶⁵

The procedure of Article 43(3) involves only the Commission and the Council. The Commission submits a proposal on which the Council decides – the EP is not even consulted. The procedure of Article 43(3) covers the fixing and allocation of fishing opportunities. No guidance is offered what the ‘fixing and allocation of fishing opportunities’ exactly means, and what remains to be covered by Article 43(2) which covers “...other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.” It does seem above doubt that the provisions are mutually exclusive, i.e. that they do not overlap.

The setting of TACs certainly falls under the provision of Article 43(3) TFEU. They are by definition the instrument that explicitly quantifies the amount of fish that may be caught, which

¹⁶⁵ See the section on the ordinary legislative procedure in the ‘Introduction’.

matches the definition of fishing opportunity.¹⁶⁶ Accordingly the annual fishing Regulations established after the coming into force of the TFEU, have as their legal basis Article 43(3) TFEU.¹⁶⁷

Uncertain, however, is the possibility of Article 43(3) TFEU as a legal basis for other measures. When looking at the combination of primary and secondary law, indications on the scope of Article 43(3) TFEU can be theoretically deducted. It covers the ‘fixing and allocation of fishing opportunities’ which are expressed in terms of catches and/or fishing effort.¹⁶⁸ Catches are connected to TACs, as seen above. The next step is to determine what measures can be regarded as fishing effort measures and to what extent these measures can be regarded as *fixing or allocating* fishing effort. Fishing effort is the product of fishing capacity and activity,¹⁶⁹ so any measure limiting the fishing capacity or fishing activity can be understood to *influence* the allocation of fishing opportunities. For instance, technical measures for certain types of fishing activity may define capacity in terms of fishing gear.¹⁷⁰ Other technical measures, such as spatial or temporal measures effectuating a prohibition or restriction of fishing activity are also of direct influence on fishing activity.¹⁷¹ The influence these measures have, however, is not equal to ‘fixing’ or ‘allocation’ of fishing effort.

It has been argued that fishing effort regulation is a more uncertain and indirect means of regulating fishing opportunities than TACs, and should therefore be based on Article 43(2) instead.¹⁷² The ‘inclined plane’ of potentially assuming a broad basis on Article 43(3) for every measure which is somehow related to the allocation of fishing opportunities would, from a theoretical point of view, find its limit in technical measures. The argument concerning the indirectness of the measures on the regulation of fishing opportunities, does highlight the current ambiguity connected to the legal scope of ‘fixing and allocation of fisheries opportunities’ and the concepts of fishing effort, fishing capacity and fishing activity.

¹⁶⁶ Basic Regulation, Article 3(q): ‘fishing opportunity’ means a quantified legal entitlement to fish, expressed in terms of catches and/or fishing effort.

¹⁶⁷ PAFOR 2011, opening preamble; Council Regulation 1124/2010/EU, opening preamble; Council Regulation 1225/2010/EU, opening preamble; Council Regulation 1256/2010/EU, opening preamble.

¹⁶⁸ See also Churchill & Owen 2010, p. 166: “Fishing effort limits along with catch limits are referred to collectively as ‘fishing opportunities’.”

¹⁶⁹ Basic Regulation, Article 3(h).

¹⁷⁰ Ibid., Article 3(n).

¹⁷¹ Ibid., Article 4(2)(g)(ii).

¹⁷² ClientEarth 2010, paragraph III.

When looking at recent legislative developments, it can be seen that the Commission has proposed two acts about technical measures on Article 43(2) TFEU.¹⁷³ The use of that legal basis has in one case been accepted by both the Council and the EP: “technical measures *of a permanent nature* ... should no longer be included in the regulatory framework establishing annual fishing opportunities.”¹⁷⁴ It remains unclear whether the technical measures are excluded from the fishing opportunities framework because they are of a permanent nature, or because they are technical measures and therefore do not establish fishing opportunities. If the second abovementioned Commission proposal (on *transitional* technical measures)¹⁷⁵ is also accepted by the Council and the EP, then it can be assumed that the time-scale of technical measures does not play a role for their establishment on Article 43(2) TFEU. On the contrary, technical measures *per se* fall outside the scope of Article 43(3) TFEU – establishing the framework for fishing opportunities. The perceived inconsistency why measures on fishing gear, also qualifying as technical measures,¹⁷⁶ are also taken up in the PAFOR 2011 – and were thus based on Article 43(3) TFEU – is that these technical measures are part of recovery and management plans following Articles 5 and 6. The competence of the Council to define capacity for certain stocks as the amount and/ or the size of a vessel’s fishing gear is connected to these plans.¹⁷⁷ Therefore no inconsistency seems to exist when nowadays Article 43(2) TFEU is used as the legal basis for establishing technical measures on their own, thus outside a recovery or management plan. This position is likely expressed in PAFOR 2011 where it is stated that “[i]t is incumbent upon the Council to adopt measures on the fixing and allocation of fishing opportunities by fishery or by group of fisheries, *including certain conditions functionally linked thereto*, as appropriate.”¹⁷⁸ This should be understood as making it possible to establish technical measures on Article 43(3) TFEU, if they are functionally linked to fishing opportunities.

Indications that the scope of Article 43(2) reaches beyond technical measures – encompassing effort limitations – came only very recently as the Commission proposed a change in the

¹⁷³ See Commission, COM (2010) 325 final; and Commission, COM(2010) 488 final.

¹⁷⁴ Regulation 1237/2010/EU, OJ 2010, L348/34, recital 3.

¹⁷⁵ Commission, COM(2010) 488 final.

¹⁷⁶ Basic Regulation, Article 4(2)(g)(i).

¹⁷⁷ Ibid., Article 3(n).

¹⁷⁸ PAFOR 2011, recital 3 (italics added).

multiannual recovery plan for Bluefin tuna in the eastern Atlantic and Mediterranean.¹⁷⁹ The Commission stated that “[t]he legal basis is Article 43(2) of the Treaty on the Functioning of the European Union.”¹⁸⁰ Since the Bluefin tuna TAC is set in the PAFOR 2011,¹⁸¹ it would seem on the basis of this Commission proposal that all measures, short of setting TACs (and *certain conditions functionally linked thereto*), fall under the shared competence of the Council and EP.

The reason for finding effort management and technical measures in the PAFOR 2011 is that they are stemming from active recovery and management plans. As new recovery and management plans, or amendments to them are being adopted, they will be changed accordingly to include these elements. Their basis will consequently be Article 43(2) TFEU to correctly reflect primary EU law.

Conclusion

The Council has lost its unique legislative competence under the TFEU. It now shares the legislative competence with the EP under the legislative procedure in Article 43(2). The scope of this provision is beset by the scope of Article 43(3) in which the Council continues to have a unique legislative competence. The exact scope of Article 43(3) does not follow from the text of the provision itself. However, judging from recent legal developments, it seems that under Article 43(3) the Council will *only* be able to set TACs and, if appropriate, certain conditions functionally linked thereto. All other measures including, *inter alia*, recovery and management plans, are to be based on the procedure following Article 43(2) TFEU.¹⁸² Bringing down the unique legislative competence of the Council, short of its role in the adoption of TACs, brings the CFP more in line with the environmental policy area.

2.2.1.2 Secondary EU law

The basic premise in the Basic Regulation that the Council is the primary actor for the adoption of secondary legislation is no longer reflecting primary EU law. Provisions which are assuming such a role are no longer legally valid *to this extent*. Apart from that, the framework for measures

¹⁷⁹ Commission, COM(2011) 330 final.

¹⁸⁰ *Ibid.*, p. 1.

¹⁸¹ PAFOR 2011, Annex ID.

¹⁸² Commission, COM(2009) 163 final, p. 10.

taken under the CFP is still provided by (these) provisions under the Basic Regulation.¹⁸³ For the adoption of TACs, the Basic Regulation seems not to be the legal basis anymore.¹⁸⁴ For the adoption of other measures, such as recovery plans, the competence is now shared with the EP on the basis of Article 43(2) TFEU.

Competences were in several provisions delegated to the Commission and to the MSs. In the line of the reasoning mentioned here, the frameworks as regards these delegated competences continue to be provided by the Basic Regulation.

Where new secondary legislation is required, which would systematically fall under the Basic Regulation, it can be seen that such adoption is postponed to allow for, *inter alia*, a systematic elaboration of the new distribution of competences, in a new Basic Regulation.¹⁸⁵

2.2.1.3 Comparison with the MSFD setting

A change in the competences of the Council on the level of both primary and secondary EU law has been described. The current situation regarding the scope of the Council's competences is not exactly known as the scope of Articles 43(2) and 43(3) TFEU is not clear. The procedures in those provisions are different from the procedure under the former TEC, on which the current Basic Regulation is based.

The new Basic Regulation will correspond to the change in competence distribution in the TFEU, where the Council now shares a legislative competence with the EP on the basis of Article 43(2). The only comment made to the scope of the redistribution – which is not quite negligible – is that the scope of Article 43(2) is beset by that of Article 43(3) TFEU. On the basis the latter provision the Council has received an independent (apart from the proposal made by the Commission) competence to legislate in the field of the 'fixing and allocation of fisheries opportunities'.

Notwithstanding the comments made above, the Council continues to be overall the primary actor for the adoption of legislative measures under the CFP that can contribute to the

¹⁸³ PAFOR 2011, recitals 2 and 3; and Regulation 1124/2010/EU, recitals 2 and 3.

¹⁸⁴ Compare the opening of the preambles of Regulation 40/2008/EC, OJ 2008, L19/1 and Regulation 1404/2007/EC, OJ 2007, L312/1; to those of PAFOR 2011 and Regulation 1124/2010/EU.

¹⁸⁵ Hence the previously mentioned proposal for a regulation on transitional technical measures; Commission, COM(2010) 488 final.

attainment of GES. This follows from the facts that: a) at the moment TACs are still the main fisheries conservation tool and are set by the Council, and b) all other fisheries management measures are set by the EP *and* the Council.

The importance of the Council under the CFP can be contrasted to its marginal role under the MSFD. Following the changes in competence distribution, however, it seems likely that the competence to take technical measures and effort limitations will in the future be shared between the Council and the EP. Such a situation is again not similar to that under the MSFD as the MSs are the primary actors in that setting. Because decision-making by means of the ordinary legislative procedure is quite cumbersome, it is likely that the choice will be made to delegate legislative competences to other actors in a Basic (framework) Regulation for the CFP. Here exists a chance to work out a scheme that resembles the setting of the MSFD.

2.2.2. Competences and obligations for the European Parliament

2.2.2.1 *Primary EU law*

(Old) Legislative procedure under the TEC

On the basis of Article 37 TEC, the EP did not have a significant role. It was merely consulted by the Council on Commission proposals for measures under the CFP. The Council had a unique competence with regard to the legislative procedure.

(Current) Legislative procedures under the TFEU

Under the TFEU, the EP now has a shared legislative competence with the Council on the basis of Article 43(2) TFEU. The scope of this competence excludes the field of the fixing and allocation of fishing opportunities. The ambiguities surrounding the scope were addressed in paragraph 2.2.1.1.

2.2.2.2 *Secondary EU law*

The Basic Regulation contains several provisions mentioning the EP. All of these are Commission obligations to submit reports to the EP.¹⁸⁶ No feedback is required from the EP, nor does it have any competences to request changes. This role reflects the distribution of competences under the TEC, where the EP merely had an advisory role. To give effect to that role, the EP was only to be held up-to-date. This pattern, of the EP only receiving reports from the Commission, is found in most – but not all – other secondary legislation adopted under the TEC.¹⁸⁷ If the shared competence of the EP in the new Basic Regulation, is reflected in a similar way as the Council's unique legislative competence is in the current, no step towards compatibility with the competence distribution under the MSFD will be made.

2.2.2.3 *Comparison with the MSFD setting*

The EP was an insignificant actor in the CFP. This was due to its marginal role of advisor in the decision-making procedure under Article 37 TEC. Under the new procedure of Article 43(2) TFEU, this has changed. Its role as co-legislator is similar to that in the environmental policy area. With the adoption of a new Basic Regulation, there exists the possibility of a more active role for the EP. As paragraph 2.2.1.3 suggested, however, it might be that the role of the EP and the Council will remain relatively small compared to the role of the Council in the current Basic Regulation. This would be possible by designing a framework Regulation and systematically delegating competences to other actors. In such a situation, the EP's role is more compatible to that under the MSFD than it is now.¹⁸⁸

¹⁸⁶ Compare Basic Regulation, Articles 14(1), 17(2), 19(1), 27(4), and 35.

¹⁸⁷ See for instance Regulation 1954/2003/EC, *OJ* 2003, L289/1, Articles 3(4), 5(2), 6(3); Regulation 1224/2009/EC, Article 118(1).

¹⁸⁸ Chapter 3 will address the CFP reform more in-depth.

2.2.3. Competences and obligations for the Commission

2.2.3.1 *Primary EU law*

(Old) Legislative procedure under the TEC

The general role of the Commission under primary EU law is that of legislative initiator. In the (special) legislative procedure under Article 37 TEC, the Commission submits a proposal to the Council. That was where its role ended.

(Current) Legislative procedures under the TFEU: the setting of TACs

Under the TFEU the Commission submits proposals in two procedures, namely that of Article 43(2) and of Article 43(3) TFEU. Under Article 43(3) TFEU, its role is similar to that under Article 37 TEC in that the Commission is only required to submit a proposal. The procedure under Article 43(3) is for the setting of TACs.¹⁸⁹ TACs are proposed on the basis of scientific advice.¹⁹⁰ Although the Commission bases its proposal on scientific advice, research has shown that many TACs are actually set at a higher level than the scientific advice proposes.¹⁹¹ Some of these levels can be explained because of a recovery or management plan in place, or because the level of change was restricted to a fixed percentage relative to the previous TAC.¹⁹² The Commission, however, is not under the absolute obligation to follow the scientific advice, as that only needs to be taken into account. Aside from this terminology, economic and social conditions may also play a role in the setting of the proposal.¹⁹³

On top of this, the Council is known to adopt TACs which are higher than those proposed by the Commission. In this regard, it has been suggested that for fear of the Council not accepting a certain TAC, a higher level could be proposed. Some evidence to the contrary however, does point towards an – albeit patchy – effort of the Council to move toward Commission proposals on TACs.¹⁹⁴

¹⁸⁹ See paragraph 2.1.2.3.

¹⁹⁰ Churchill & Owen 2010, p. 142.

¹⁹¹ MRAG 2007, p. 13-15, 24.

¹⁹² Commission, COM (2010) 241 final, p. 6. Regarding the role of TACs under procedural management instruments; see paragraph 2.1.2.3.

¹⁹³ See Basic Regulation, Articles 2(1) and 4(2).

¹⁹⁴ MRAG 2007, p. 15-16.

The Commission certainly plays a substantial role in the setting of TACs, which are to date the primary fisheries conservation tool under the CFP. This makes TACs of similar importance to the pursuit of the MSFD objectives. However, the abovementioned practice does shed some doubt on whether that tool is used in a beneficial manner to that respect.

(Current) Legislative procedures under the TFEU: the Article 43(2) procedure

Under the procedure of Article 43(2) TFEU, the Commission has a potentially more influential role. Essentially following the ordinary procedure, the EP is to give its first reading on the Commission proposal. After this, the Council does so too. In case a disagreement exists between the Council and the EP, the Commission communicates its opinion together with that of the Council to the EP. The EP will then draft a second reading. Although the Commission's opinions are not followed *per se* by the Council, or the EP,¹⁹⁵ it is possible that its opinion may be taken up (partially) in those actors' points of view. As most legislative measures are currently taken on the basis of this procedure, the role of the Commission has increased. The Commission could use this increase to the better for the advancement of MSFD objectives by putting emphasis on mutual objectives of both settings.

2.2.3.2 Secondary EU law

Under secondary CFP legislation, the Commission has the role of administrator: it controls and evaluates the implementation of the CFP.¹⁹⁶ The Commission is not, however, under a general obligation under the Basic Regulation to evaluate on measures and report back to measure-taking actors. The most important provision for legislative measures – Article 4 – lacks such an obligation. Articles 5(5) and 6(5) do contain such an obligation with regard to recovery and management plans. Article 8(3) and 9(2) require that the Commission decides over (emergency) measures adopted by a MS. Furthermore, the Commission controls the enforcement of the CFP by MSs.¹⁹⁷

¹⁹⁵ As seen in the redrafting of provisions under the proposal phase of the MSFD.

¹⁹⁶ See Basic Regulation, recital 24.

¹⁹⁷ See Churchill & Owen 2010, p. 222. It was noted in the Introduction that, although enforcement tasks are important to the attainment of the MSFD, they are not addressed in this research.

On the basis of Article 7(1), the Commission may also adopt emergency measures. These measures are ad-hoc procedures and have a rather short duration in comparison to recovery and management plans.¹⁹⁸ As stated above, certain provisions in the Basic Regulation have lost their legal effect to the extent they do not correctly reflect primary EU law. This, however, is not the case for the framework and legal bases for delegated competences to the Commission.¹⁹⁹

The adoption of implementation measures based on the Basic Regulation is done by means of a comitology procedure under the assistance of a Committee for fisheries and aquaculture.²⁰⁰ Some competences for taking conservation measures have also been delegated to the Commission in secondary legislation other than the Basic Regulation. These include for instance the fixing of TACs on capelin on the basis of an agreement with non EU-MSs, and the revision of TACs for certain stocks.²⁰¹ Similarly, the adoption of detailed rules for technical measures is delegated in some instances to the Commission.²⁰²

2.2.3.3 Comparison with the MSFD setting

The Commission has certain limited legislative powers in the Basic Regulation which primarily follow from the administrative role. It can take emergency measures that can be adopted quickly in the case where there is no time to follow the regular procedure for the adoption of measures. Equal to the MSFD, certain implementing competences are delegated which must be effectuated through a comitology procedure. Finally, the Commission has received several other competences by means of delegation under other secondary legislation than the Basic Regulation. Such measures primarily cover subjects of minor importance.

Detailed measures, such as (but not limited to) setting TACs, are currently adopted by EU institutions. Both legislative procedures used for their adoption involve the Commission submitting a proposal. In the ordinary legislative procedure it may be that the Commission

¹⁹⁸ These are 6 months for the Commission emergency measures and 3 months for the Member State emergency measures, see Basic Regulation Articles 7(1) and 8(1). The Commission may take a new decision to extend the measures.

¹⁹⁹ See paragraph 2.2.1.2.

²⁰⁰ See Basic Regulation, recital 26 and Article 30.

²⁰¹ PAFOR 2011, Article 5(3) and (4).

²⁰² Council Regulation 850/98/EC, *OJ* 1998, L125/1 (as amended), Article 45. This was effectuated in Commission Regulation 517/2008/EC, *OJ* 2008, L151/5.

additionally submits its opinion. Through these actions, it could be said that the Commission does influence the other institutions. The Commission could use that influence to further the MSFD objectives to the extent these are compatible with the CFP. The amount of influence under the ordinary legislative procedure is similar to that under the environmental policy area setting.

Under the MSFD itself, the Commission is more structurally involved in checking the implementation thereof. MSs, being the primary actors for the advancement of the MSFD's objectives, are being assessed in both phases of their marine strategies. In the Basic Regulation, such structural assessments of the Council's measures are not provided for. The Commission does have the task to evaluate procedural management measures under Articles 5 and 6. In this sense there exists a difference between both settings. With regard to the control and evaluation competences regarding MSs, the Commission does exert more control under the CFP.

2.2.4. EU institutions: a comparison with the MSFD setting

Taken together, the EU institutions have practically all competences and carry out the majority of the tasks under the CFP. The Commission prepares all legislative acts and administers the implementation of the CFP. It has been delegated several legislative competences which are closely related to its role of administrator. The degree of control the Commission exerts on the primary legislative actors is smaller than under the MSFD, but its control over the MSs is greater. In this sense, the role of the Commission is similar under both settings. The Council and the EP are currently the primary legislative actors for secondary legislative measures. This is different from the MSFD setting where MSs carry most obligations, which would have to be effectuated under the CFP. Despite the similarities between the Commission competences under both settings, the competences of the Council and the EP are so extensive under the CFP that it seems unlikely that the MSs have an adequate set of competences to meet the requirements of the MSFD.

In the next paragraph it will be seen exactly what competences the MSs have under the CFP.

2.3. Competences and obligations for the Member States with regard to the MSFD objectives

This paragraph discusses the possibilities for MSs to take measures under the CFP to pursue the MSFD objectives. These competences are primarily found in Articles 8 to 10. Although the Basic Regulation no longer reflects primary EU law as regards the distribution of competences between the Council and the EP, it continues to provide the legal basis and framework for delegated competences to the MSs.²⁰³

On a more abstract level the competence division emanating from the exclusive EU competence – regarding the conservation of marine biological resources under the CFP – plays a role. MSs still retain a competence to take measures not falling under that area of the CFP.²⁰⁴ Because the concept of ‘conservation’ is not specifically defined, and because several competences are clearly delegated, the possible extent of MS competences outside of those provisions in relation to the shared competence with the EU will not be analyzed in this paragraph.

2.3.1. Primary EU law

Both the exclusive EU competence in the field of the conservation of marine biological resources under the CFP and the shared competence between the EU and the MSs in the field of the CFP excluding the conservation of marine biological resources were noted in paragraph 2.1.1.2. If a policy area is appointed as exclusive, MSs are prevented to act unilaterally or collectively – even if the EU has not yet done so. The only exception to this rule is when the EU has empowered them to do so or for the implementation of Union acts.²⁰⁵ This can be contrasted to the shared policy areas, where in principle national legislation may be adopted as far as the EU has not exercised its competence to legislate.²⁰⁶ Since the scope of the exclusive CFP competence area depends on the definition of the concept of ‘conservation’ – a term which is not clearly defined,

²⁰³ See paragraph 2.2.1.2.

²⁰⁴ See the paragraph ‘The EU legal order’ in the Introduction for the difference in legislative competences between areas of exclusive and shared competence.

²⁰⁵ TFEU, Article 2(1); Kaczorowska 2010, p. 82.

²⁰⁶ TFEU, Article 2(2); the EU competence is in this respect subject to the general principles of EU law mentioned in the Introduction.

there is consequently no answer to what extent MSs may legislate under the shared CFP policy area. The division has even consequences for other policy fields, such as the environmental policy, that overlap with the CFP.²⁰⁷

2.3.2. Secondary EU law

This paragraph analyzes the competences and obligations of MSs under the CFP in the light of their obligations under the MSFD; Articles 8 to 10 are primarily addressed. Because of the aforementioned ambiguity surrounding the scope of the concept of ‘conservation’, the competence division under the CFP is not dealt with in regard to those provisions. Effects of the competence division with regard to obligations under the Habitats Directive, however, are shortly addressed as the overlap and the resulting legal inconsistencies are evident. They are, in addition, connected to the research subject.

2.3.2.1 *Secondary legislation under the CFP*

The Basic Regulation: Articles 8-10

The basic Regulation contains several explicit delegations of competence to MSs for taking measures under the CFP. In this paragraph these provisions shall come under the attention. Their use for the obligations for MSs under the MSFD is addressed in paragraph 2.3.3.

Member State emergency measures

Member states may adopt emergency measures following Article 8. This requires evidence of a serious and unforeseen threat to the *conservation of living aquatic resources, or to the marine ecosystem* resulting from fishing activities. The threat is required to occur in waters falling under the sovereignty or jurisdiction of the MS, and an undue delay would have to result in damage that would be difficult to repair. The duration of these measures may not exceed 3 months. A cumbersome procedure must be followed which, according to some, requires the approval of the

²⁰⁷ Markus 2009, p. 54; Proelss et al. 2011, p. 36.

Commission before the measures may be effectuated.²⁰⁸ This seems unlikely as Article 8(2) reads that draft measures must be *sent* prior to *adopting them*. From a grammatical point of view, it is the same actor (the MS) sending drafts and adopting the measures. Next to this, Article 13(3) speaks of the Commission confirming, cancelling or amending the draft. If the draft was not yet adopted, then why would this provision speak of cancelling? And why does the Article not use the term ‘adopt’ instead of ‘confirm’? It is more likely that the provision merely indicates an ex-post competence of the Commission to check the MS’s action, rather than constituting the original coming into force of the measure.

Member State measures within the 12 nautical mile zone

MSs may also adopt measures within their 12 nm zone (usually matching their territorial waters), following Article 9. These measures must be non-discriminatory, and must pursue the conservation and management of fisheries resources and minimize the effect of fishing on the conservation of marine ecosystems within 12 nm of the MS’s baseline. Another prerequisite is that no EU measures addressing conservation and management for this area specifically may have been adopted. Finally, the MS measures must be compatible with the objectives set out in Article 2 and be no less stringent than existing EU legislation. If these measures are not liable to affect vessels of other MSs, they may be adopted by the MS on its own. If, however, the measures are liable to affect vessels of other MSs, the MS must follow the same procedure as the one which was followed for the emergency measures under Article 8.²⁰⁹ Following Article 17(2) on the restriction of access and resources in the 12 nm zone, it does not necessarily mean that many other MSs are involved in the adoption of measures under Article 9. The Netherlands have sought the approval of the Commission for the adoption of an SPM in the area called the ‘Voordelta’. This approval was given by the Commission in a subsequent Decision.²¹⁰

Member State measures applicable solely to fishing vessels flying their flag

Article 10 contains another competence delegated to MSs. It is applicable to measures for the conservation and management of stocks in waters under the sovereignty or jurisdiction of the

²⁰⁸ Churchill & Owen 2010, p. 192.

²⁰⁹ Basic Regulation, Article 8(3) to (6).

²¹⁰ Commission Decision 2008/914/EC, *OJ* 2008, 332/1.

measure-taking MS. These measures must solely apply to fishing vessels flying its flag and which are registered in the EU, or to (legal) persons established in the MS concerned. Like Article 9(1), the measures must be compatible with the objectives set out in Article 2 and no less stringent than existing EU legislation. Noteworthy is the absence of any mentioning that the measures may be adopted for the protection of ecosystems, as is the case in Articles 8 and 9.²¹¹ No procedure is required for the adoption of any measures, which makes it hard to ascertain whether a MS adopts measures based on Article 10. Therefore it is not known whether such measures have been taken for ecosystem protection. The provision basically extends the measures of Article 9 to fishing vessels flying the measure-taking MS's flag outside of the territorial waters.

Conclusion

The measures above appear to be aimed at the conservation of different subjects, all of which fall under the concept 'marine biological resources'.²¹² In the light of the competence division it can be said that exclusive competence is delegated to the MSs under all three provisions. Next to this, Articles 9 and 10 also aim at the management of those resources, thereby widening the array of measures a MS can adopt under those provisions. Delegation with regard to management of fisheries resources is not entirely reflecting EU law, as the management of fisheries resources falls under the shared EU competence field. Delegation is only possible if the EU has received the exclusive competence.²¹³ It could be meant that the EU delegates its part of the shared competence, thereby giving MSs a sort of *carte blanche* – within the confines and for the purposes of the provisions, and as far as the EU has not already adopted measures.

Several other pieces of secondary legislation contain delegated competences for MSs.²¹⁴ These are incidental delegations and will not be covered by this research. The comparison between the MSs' competences under the CFP and their obligations under the MSFD will be made after the next paragraph, which addresses the effects of the exclusive CFP competence on the Habitats Directive.

²¹¹ Churchill & Owen 2010, p. 191.

²¹² Basic Regulation Article 8(1): "living aquatic resources"; Article 9(1): "fisheries resources"; Article 10: "stocks".

²¹³ Leijen 2011, p. 32.

²¹⁴ See for instance PAFOR 2011, Article 6(1).

2.3.2.2 Indirect effect of the CFP competence division: the Habitats Directive

In this subparagraph, the effect of the competence division under the CFP and its relevance for the pursuit of the MSFD objectives is addressed.

Relevance of the problem to the research

Amongst the obligations for MSs under the MSFD is the adoption of SPMs, in the light of which explicit reference is made to the Habitats Directive.²¹⁵ This obligation to adopt SPMs can be met by adopting SACs in the marine waters under the Habitats Directive. However, the exclusive competence of the EU in the conservation of marine biological resources under the CFP, precludes MSs from adopting national legislation in that field, unless “...if so empowered by the Union or for the implementation of Union acts.”²¹⁶ The adoption of SACs, insofar that amounts to the protection of marine biological resources, resembles such prohibited national legislation.²¹⁷ The effect of the perceived overlap between these two comes down to the situation that MSs on the one hand are obligated to adopt SPMs under the Habitats Directive, but are on the other hand not allowed to do so because of the scope of the exclusive EU competence under the CFP: this clearly is a paradox.²¹⁸ The paradox seems avoidable within the 12 nm zone of a MS, as was proven by The Netherlands by making use of the procedure under Article 9(2).²¹⁹ Outside this zone, thus outside the geographical scope of the provision, the paradox remains strongly visible.

One solution which has been offered entails the interpretation of Article 2(1) TFEU so that MSs *may* legislate for the implementation of environmental EU acts:²²⁰

“When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.”

This provision however, should be read with regard to the implementation of EU acts *in a specific area*, namely the exclusive competence area. The provision cannot, for the effectiveness

²¹⁵ MSFD, Article 13(5).

²¹⁶ TFEU, Article 2(1)

²¹⁷ Markus 2009, p. 54; Proelss et al. 2011, p. 36.

²¹⁸ Leijen 2011, p. 20.

²¹⁹ See paragraph 2.3.2.1.

²²⁰ Leijen 2011, p. 44.

of the regime of exclusive competence, be regarded as an option for overriding the concept of exclusive competence in the case of a perceived legal inconsistency with a shared competence area.

Other solutions which are offered are that the MS requests the EU to act,²²¹ it does take SPMs under the concept of ‘trusteeship of common interest’,²²² or that it files a complaint on the basis of the principle of sincere cooperation (Article 4(3) TEU) before the ECJ against the respective EU institution(s) for their inaction.²²³

Conclusion

The abovementioned paradox seems to limit the extent to which MSs will be able to adopt such measures. This is specifically true in their marine waters seawards from the 12 nm line. Although the adoption of these measures outside the 12 nm zone would be based on non-CFP legislation, half the paradox lies with the CFP thereby making it relevant to this research.

2.3.3. Comparison with the MSFD setting

This paragraph addresses Articles 8-10 to see to what extent MSs can adopt measures under these provisions that aid them to pursue their obligations under the MSFD.

2.3.3.1 Member State measures within the 12 nautical mile zone

When considering the scope of the competence, it can be said that it is quite extensive up to the point that all types of measures in the 12 nm zone may be adopted, including zones where fishing is restricted or even forbidden.²²⁴ The procedure which must be followed, in case the measures are applicable to fishing vessels from other MSs, is quite cumbersome. The role of the Commission in the procedure could be approached in such a way as to achieve a degree of similarity to the procedure under the MSFD for checking the programmes of measures. A MS

²²¹ Proelss 2011, p. 39.

²²² Ibid., p. 42; and Leijen 2011, p. 37.

²²³ Proelss 2011, p. 44; and Leijen 2011, p. 38.

²²⁴ See Commission Decision 2008/914/EC, Annex I, Section 1. Through this Decision, an SPM was adopted within the 12 nm zone of The Netherlands which restricted trawling and cast net fishing activities.

could submit its programmes of measures under the MSFD, including a measure which falls under Article 9, to the Commission. Since other MSs concerned may address the Council if they do not concur with the Commission's Decision, their cooperation is needed for effective use of this competence for MSFD purposes.

2.3.3.2 Member State measures applicable solely to fishing vessels flying their flag

Outside the 12 nm zone, but within its EEZ, a MS may only take measures that are applicable to fishing vessels flying its own flag. This competence may be effective for environmental protective purposes if the only fishing vessels in that zone are flying the flag of that MS. Use of the competence cannot, however, preclude other MSs' vessels from fishing in those waters, nor does it allow application of measures to those vessels. Under the equal access principle it can even be expected after, for instance, the unilateral decision to significantly reduce fishing effort that other MSs' vessels come to fish in the 'under-fished' waters – thereby reducing the measure's effect. In such a case, the costs of a measure adopted on the basis of Article 10 might also undermine its use. The cost-effectiveness of the measure may be called in doubt and the measure will surely not be adopted under programmes of measures.

This is where the cooperation provisions under the MSFD come into play. It is possible that MSs undertake regional coordination in their marine region and subsequently coordinate their programmes of measures by all adopting the same measures on the basis of Article 10 for their respective fishing fleets in their waters of their marine region. In such a case both the reduced environmental effects because of the non-application of the measures to other MSs' fishing vessels in the same water, and the resulting cost-effectiveness doubts are nullified or at least greatly reduced. If such an approach is followed, the Article can provide a possible instrument under the CFP for the pursuit of MSFD objectives.

2.3.3.3 Member State emergency measures

Adopting emergency measures on the basis of Article 8 will not likely be done in the context of programmes of measures under the MSFD. This is primarily because of their short-lived nature of 3 months. Another reason for their unlikely role is the prescribed situation of a serious and

unforeseen threat where any undue delay would result in damage. The drafting process of the programmes of measures under the MSFD does not indicate such a short-term procedure. Emergency measures could theoretically only play a role in the case a threat is detected around the time the programmes of measures are established by a MS.

2.3.3.4 Conclusion

The competences delegated to the MSs under the Basic Regulation do provide some options to take measures for the pursuit of the MSFD objectives. Much of the effectiveness of these measures depends on cooperation which is not obligated nor mentioned under the Basic Regulation. As cooperation is obligated under the MSFD, MSs can coordinate the use of their competences under the CFP by means of the MSFD framework. This would improve the effectiveness of the measures and subsequently the pursuit of the MSFD objectives.

As a large part of the MSs' marine waters consists of their EEZs, a problem continues to exist for the adoption of SPMs in that zone. The Habitats Directive does provide such a competence – even obligation – but because of a paradox it is unclear to precisely what extent MSs can adopt such measures on their own.

The early conclusion which was drawn in paragraph 2.2.4. has been confirmed in this paragraph: MSs do not have a complete set of competences to take all necessary measures under the CFP for the pursuit of MSFD objectives.

2.4. Conclusion

This Chapter sought to answer the question: *“To what extent is the current distribution of competences between the Member States and the EU under the existing CFP adequate to meet the requirements under the MSFD?”*

The method used was to compare the competences of all actors to those under the MSFD. Of general relevance, it was submitted that the objectives of both settings do encompass economic, environmental and social aspects, but their approach and subsequent valuation of these aspects

differs. That difference influences the compatibility between the competences under the CFP and the obligations under the MSFD.

Most competences lie with the Council, and (to a lesser extent) with the EP. These actors do not have a role of similar importance under the MSFD. This situation can be partially explained because of the fact that the current Basic Regulation is not correctly reflecting primary EU law. This necessitates these actors to take rather precise legislative action, which could be delegated to others in the future. Generally, the role of the Commission as an administrator does seem to be similar to that under the MSFD. The MSs have been delegated certain conservation competences with which they can pursue their MSFD obligations to some extent. This is, however, by no means an equal amount when compared to the obligations they have under the MSFD.

Overall, the distribution of competences was found to be in favor of the EU institutions, which does not correspond to the MSFD setting where most obligations rest upon the MSs. This incompatibility of competences distribution is significant, to the degree that the current competence distribution under the CFP is not adequate to meet the requirements of the MSFD for the pursuit of its objectives.

The next Chapter shall address the identified incompatibility between obligations under the MSFD setting and competences under the CFP setting. The Commission proposal for a new Basic Regulation shall form the basis for the analysis.

Chapter 3:

The Common Fisheries Policy reform

3.1. The CFP reform: an introduction

The relevance of fisheries to the MSFD's objectives was established in Chapter 1. That chapter also introduced the distribution of competences between the EU institutions and the MSs. Chapter 2 analyzed the CFP with regard to the distribution of competences that may be adequate to meet the MSFD objectives. The overall compatibility of competences was found to be inadequate to meet the requirements of the MSFD. This Chapter addresses the CFP reform with the aim of finding solutions to the inadequate competence distribution under the CFP.

3.1.1. The green paper

The CFP reform is a policy reform, but its effects will primarily be seen in EU legislation. It was mentioned in Chapter 2 that primary EU law regarding the CFP has already undergone changes. Secondary law – most significantly the Basic Regulation – is due to follow. The Commission released in 2009 a green paper on the CFP reform in which it gave a description of the current state of the CFP, its outcomes and structural failings, and the proposed changes to improve both. That green paper formed the basis for a public debate on the CFP reform. The outcome of that debate, a legislative proposal for a new Basic Regulation, was published right before the closing of this research.²²⁵ The legislative proposal is the first step of the ordinary legislative procedure for secondary legislation under the CFP. Both the EP and the Council are to perform a first reading after which the proposal might be approved or amended.²²⁶

²²⁵ Commission, COM(2011) 425 final.

²²⁶ See Introduction, 'The ordinary legislative procedure'.

3.1.1.1 Relation to other maritime policies

As fisheries require access to marine waters and healthy marine ecosystems, the Commission stated in the green paper that the CFP should not be seen in isolation from other maritime sectors and their policies.²²⁷ An integrated approach, such as advocated by the IMP, was to be incorporated in the reformed CFP. This approach would address the impacts of other sectors on fisheries resources, which is beneficial for fisheries.²²⁸ A central element to the IMP is the ecosystem approach, which covers all maritime sectors. That approach is implemented through the MSFD, also dubbed the environmental pillar of the IMP. The CFP is to be “...set up to provide the right instruments to support this ecosystem approach.”²²⁹

3.1.1.2 Decision-making issues

Another important point that was addressed in the green paper is the poor state of the EU fish stocks. 88% of the stocks are being fished at a level higher than the maximum sustainable yield (MSY), which means the amount of fish that can be taken indefinitely from a stock.²³⁰ The resulting overall poor economic performance of most fisheries has increased political pressure to aim for increased short-term fishing opportunities at the expense of the future sustainability of the industry.²³¹ The current decision-making structure is oriented at the highest political levels.²³² Both the setting of principles and detailed implementation measures are taken at that level, resulting due to political pressure in the prominence of short-term considerations. Another negative consequence of taking implementation measures at the highest level is a little degree of flexibility in fisheries management.

A related aspect is the current dependence on TACs as the main fisheries tool.²³³ This tool is ‘suboptimal’ in mixed fisheries where unwanted by-catches occur if a species’ quota is exhausted. The setting of lower TACs for certain stocks in mixed fisheries does not help it to

²²⁷ Commission, COM(2009) 163 final, p. 5.

²²⁸ Ibid., p. 19.

²²⁹ Ibid., p. 19.

²³⁰ Commission, COM(2011), 425 final, Article 5.

²³¹ Commission, COM(2009), 163 final, p. 7.

²³² See paragraph 2.2.

²³³ See paragraph 2.1.2.3.

recover because of the abovementioned practice.²³⁴ It was noted in Chapter 2 that TACs are often set at levels higher than advised,²³⁵ thereby aggravating the problems connected to its functionality.

3.1.1.3 Focusing the policy objectives

The Commission also accentuated the contradiction in the formulation of the current CFP objectives, which “...shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions.”²³⁶ The problem is that no priority is set for those objectives and although direct references are made to adopting a precautionary and an ecosystem approach, it is not clear how this relates to economic and social conditions.²³⁷ The Commission decided in that regard that a new approach was necessitated: “[e]conomic and social sustainability require productive fish stocks and healthy marine ecosystems.”²³⁸ The attainment of environmental objectives is thus a premise for the attainment of the economic and social objectives.

3.1.2. Conclusion

Several suggestions for reform were found to be relevant to this research. With regard to the relation between the MSFD and the CFP – and the latter’s environmental objectives – it was pointed out that the CFP needs to provide the instruments to facilitate an ecosystem approach and that environmental objectives outweigh the economic and social objectives in a long-term approach. Next to that, the decision-making structure needs an overhaul because of the current short-term and centralistic approach.

Noteworthy as the Commission’s point of view may be, similar warnings on the problematic status of many fish stocks,²³⁹ on the incompetent short-term decision-making structure and

²³⁴ Commission, COM(2009), 163 final, p. 15.

²³⁵ See paragraph 2.2.3.1.

²³⁶ Basic Regulation, Article 2(1).

²³⁷ Commission, COM(2009), 163 final, p. 9.

²³⁸ *Ibid.*, p. 9.

²³⁹ Commission, COM(2001), 135 final, p. 7.

inadequate (use of) measures,²⁴⁰ and on the importance of environmental concerns²⁴¹ were already articulated 10 years ago in the previous CFP reform green paper. The conclusion from this reappearance may be that the subsequent – current – Basic Regulation has proven to be inadequate to face the problems.

The next paragraph shall address the Commission proposal. Next to a general analysis of the proposed changes, its proposed approach to the CFP objectives will be analyzed. In paragraph 3.3 the competence distribution shall be addressed. Both the proposed objectives and the competence distribution are evaluated in paragraph 3.4.

3.2. The proposal for a new regulation

3.2.1. General structure

The proposal is made up of 14 Parts. Parts I and II contain general objectives and principles. Part III contains the types of conservation measures (Article 7) and technical measures (Article 8), those measures which are taken at the EU level (Articles 9-16), and the measures taken at the regional (read: MS) level (Articles 17-26). The main focus of this paragraph will be on these Parts. Part IV sets up the new system for access to resources whereby MSs hand out (transferrable) concessions which are entitled to individual fishing opportunities. Part V sets out the framework for measures regarding the adjustment of fishing capacity to allocated fishing opportunities (at the MS level). Part VI addresses obligations regarding the science basis for the CFP. Part XIII on procedural provisions specifies the delegation to the Commission of the competence to adopt acts under the CFP, the right to revoke that delegation, and the coming into force of the acts adopted following the delegation.²⁴² It also arranges for the adoption of implementation decisions by the Commission through the examination procedure under Article 5 of Regulation 182/2011/EU.²⁴³ The remaining Parts deal with: ‘external policy’ (Part VII), ‘aquaculture’ (Part VIII), ‘common market organization’ (Part IX), ‘control and enforcement’

²⁴⁰ Ibid., p. 8,11.

²⁴¹ Ibid., p. 9.

²⁴² Commission, COM(2011) 425 final, Article 55.

²⁴³ See paragraph 3.3.1.2.

(Part X), ‘financial instruments’ (Part XI), ‘Advisory Councils’ (Part XII), and ‘final provisions’ (Part XIV).

3.2.2. Environmental objectives

The approach taken by the Commission in the green paper as regards the premise of the environmental sustainability for economic and social aspects, is reinstated in the text accompanying the legislative proposal: “overall stock improvement lead[s] to significant economic and social improvements...[which underlines] the premise of ecological sustainability as a requirement for long-term economic and social sustainability.”²⁴⁴ Such wording is not explicitly found in the preamble, or in the provisions of the proposal. Effectuation of the approach however, may be derived from the provisions dealing with the objectives of the CFP.

In the proposal, the provision which deals with general objectives contains a reference to the long-term approach: “... shall ensure that fishing and aquaculture activities provide long-term sustainable environmental economic and social conditions...”²⁴⁵ Additionally, the precautionary approach and the eco-system approach are to be implemented,²⁴⁶ but that is also the case under the current Basic Regulation. Specific objectives aiming for, *inter alia*, eliminating unwanted catches and gradually ensuring that all catches of such stocks are landed are also included.²⁴⁷

Pursuing these objectives should be done by making use of opportunities for synergy, most notably with the environmental policy area. The primary instrument for such an approach is the MSFD. To this purpose, the preamble mentions the MSFD:

“The Common Fisheries Policy should contribute to the protection of the marine environment and in particular to the achievement of good environmental status by 2020 the latest as set out in Article 1(1) of [the MSFD].”²⁴⁸

This intention is, in more general terms, reinstated in a new objective: “The Common Fisheries Policy shall integrate the Union environmental legislation requirements.”²⁴⁹

²⁴⁴ Commission, COM(2011), 425 final, p. 6.

²⁴⁵ Ibid., Article 2(1).

²⁴⁶ Ibid., Article 2(2) and (3). Notice the omission of ‘progressive’ in relation to the implementation of the ecosystem approach; measures must immediately implement that approach.

²⁴⁷ Ibid., Article 3(a).

²⁴⁸ Ibid., recital 8.

²⁴⁹ Ibid., Article 2(4).

The major reason for the failing of environmental principles under the CFP was said to be that they are not granted legal effect and cannot be operationalized in management measures.²⁵⁰ From this view one can conclude that mere changes to general CFP objectives will not truly enforce them into management (measures). For this to happen, those environmental principles must be ‘operationalized’ under the CFP. Such operationalization can be effectuated by additional guiding principles in the specific frameworks for measures under the CFP. These additions might be called superfluous, but as the history of the CFP regarding the environmental aspects has shown, general principles are just not enough. The next paragraph shall deal with the decision-making structure and the measures which may be adopted. The operationalization of the environmental objectives therein will receive special attention.

3.2.3. The frameworks for decision-making

In an effort to change the short-term decision-making and to bring the CFP structure more in line with other EU policy areas, the Commission proposes a division between decisions made at the EU level and at the regional level. At the highest level principle-oriented abstract decisions that guide towards a long-term approach should be taken which can be implemented at lower levels. Accordingly, the Commission proposal envisages that multiannual plans and technical measures frameworks are drafted at the EU level. These form frameworks for different subjects (such as fish stocks or technical measures in a region), on the basis of which measures are to be adopted at the regional level. The multiannual plans and technical frameworks are to be adopted by the Council and EP and the (implementation) measures on the basis of those plans and frameworks are adopted by MSs (or the Commission). The next subparagraphs address the framework of these measures.

²⁵⁰ Markus 2010, p. 144.

3.2.3.1 New focus on measures

Significant is the move away from TACs as the primary means of fisheries conservation measures. This is effectuated by a multiannual approach in the framework for measures. The preamble notes to this account that “[t]he objective of sustainable exploitation of marine biological resources is more effectively achieved through a multi-annual approach...”²⁵¹ On the relation of multiannual plans to other measures, the preamble notes that “[t]he multiannual plans should establish the basis for fixing fishing opportunities and quantifiable targets for the sustainable exploitation of stocks and marine ecosystems concerned...”²⁵² This statement implies a ‘hierarchy’ of measures in which multiannual plans are established and TACs may subsequently be established within those frameworks.

Multiannual plans cover fisheries that target a single stock or mixed stocks.²⁵³ Such an approach might provide opportunities for the current problem of individually set TACs for the species caught in the mixed fisheries. Technical measures frameworks support multiannual plans, but function alongside them. The goal of this new tandem of measures is to contribute to maintaining stocks above levels capable of producing MSY, which is by definition the ideal carrier for the long-term objectives of the proposal.

3.2.3.2 Pursuing objectives by means of the measures

Important in the pursuit for the environmental objectives, is that they are imbedded in all measures and that they are pursued at all levels of decision-making. It was concluded in paragraph 3.2.2 that the mere inclusion of principles in the Basic Regulation on its own may not be effective. Therefore, it should be analyzed whether the proposal operationalizes the objectives by inserting them throughout the entire hierarchy of decision-making.

The principal measure for the management of fisheries is the multiannual plan. The objective for this type of measure is the aim of managing fish stocks at MSY by 2015. Furthermore, in the light of science based management, the precautionary approach is reiterated. This means that

²⁵¹ Commission, COM(2011) 425 final, recital 16.

²⁵² Ibid., recital 17.

²⁵³ Ibid., Article 9(3).

precautionary measures must be taken in case the MSY cannot be properly determined.²⁵⁴ Multiannual plans are made up from a rather large amount of elements. When comparing the wording of the provision to that of Articles 5 and 6 Basic Regulation, which are also procedural management plans, it seems that the list contains minimum requirements. Of significance here is the definition of the scope, which must refer to the ecosystem it applies to. Secondly, the plan requires minimization of impacts of fishing on the eco-system. Finally, technical measures *including* measures concerning the elimination of unwanted catches need to be included. These requirements are a departure from the procedural management instruments of the current Basic Regulation where it was optional to include references to non-target species and ecosystems, and their conservation.²⁵⁵

The obligation under Article 12 proposal is not only a clear example of the operationalization of environmental objectives, but also of Article 2(4) proposal which aimed at integrating EU environmental legislation requirements:²⁵⁶

- “1. In special areas of conservation within the meaning of Article 6 of Directive 92/43/EEC, of Article 4 of Directive 2009/147/EC and of Article 13(4) of Directive 2008/56/EC, fishing activities shall be conducted by Member States in such a way so as to alleviate the impact from fishing activities in such special areas of conservation.
2. The Commission shall be empowered to adopt delegated acts in accordance with Article 55, to specify fishing related measures to alleviate the impact of fishing activities in special areas of conservation.”

The provision does not aim at environmental legislation requirements in general, but seems to specifically aim at areas where SPMs have been adopted. More attention is given to the provision in paragraph 3.4.1.3 which deals with the competences and obligations that follow from it.

On the basis of Article 14 proposal, technical measures frameworks shall be established which, *inter alia*, must reduce catches of unwanted and undersized marine organisms, and mitigate the impact of fishing gear on the ecosystem and the environment, with particular regard to the protection of biologically sensitive stocks and habitats. The possible technical measures are more

²⁵⁴ Ibid., Article 10(2).

²⁵⁵ See Basic Regulation Articles 5(2) and 6(2).

²⁵⁶ See also paragraph 3.2.2.

precisely formulated in their purposes than those under the current Basic Regulation.²⁵⁷ A significant addition is a category for the protection of marine biodiversity.²⁵⁸ These precise specifications make for easier use of the measures in order to pursue ecosystem and biodiversity protection objectives; of which the latter signifies a step further away from the original scope of the CFP – and arguably closer to environmental legislation objectives.²⁵⁹

3.2.4. Conclusion

This paragraph provided a brief introduction to the Commission proposal for a new Basic Regulation. In the light of the previous Chapters two aspects were addressed, namely that of the CFP objectives and that of the competence distribution. Both aspects have seen changes under the proposal.

The Commission advanced suggestions in its green paper which established the premise of environmental conditions for long-term economic and social conditions under the CFP. To that purpose, the environmental objectives need to be prioritized over economic and social objectives. Although the primary objective still is ‘exploitation’, the valuation of the three aspects became more aligned with that under the MSFD. The legislative proposal did not explicitly include this valuation of aspects. It did introduce a multitude of environmental objectives throughout its framework. Firstly, general and specific objectives regarding the environment are included at different levels of decision-making. Secondly, references to the MSFD are made. Thirdly, there is a specific provision dealing with SPMs and the impact of fishing activities thereupon.

The decision-making structure has also been changed extensively. A change in competence distribution is the logical consequence thereof. The next paragraph will add detail to the distribution of competences and obligations that the different actors have under the proposal. Both objectives and decision-making structure are subsequently evaluated in paragraph 3.4.

²⁵⁷ Basic Regulation, Article 4(2)(g).

²⁵⁸ Commission, COM(2011) 425 final, Article 8(g).

²⁵⁹ See to this extent the numerous mentions of biodiversity in the MSFD, *inter alia* in, Article 3(5)(a) on GES.

3.3. Competence distribution

This paragraph addresses the competence distribution following from the proposal of the Commission for a new Basic Regulation.

3.3.1. Competences of the EU institutions

3.3.1.1 Council and the European Parliament

Whereas under the current Basic Regulation, the Council alone is appointed as the actor that takes measures (Article 4(1) Basic Regulation), under the proposal the Council and the EP share that task. They adopt multiannual plans (Article 9 proposal) and technical measures frameworks (Article 14 proposal). The adoption of measures on the regional level within these multiannual plans and technical measures frameworks is delegated to both the MSs and the Commission.²⁶⁰

Adopting multiannual plans and technical measures frameworks

The Council and the EP may set by means of specialized thematic legislation the outlines for fisheries conservation measures. These specialized types of legislation are multiannual plans and technical measures frameworks. Both are framework measures that set out their scope and objectives, much in the same way as the proposal does for the whole of the CFP legal framework. Significant differences however, are the inclusions of quantifiable targets, time frames, quantifiable indicators for monitoring and safeguards and criteria activating them. These elements altogether make multiannual plans and technical measures frameworks adjustable to the regional specifics, without allowing for deviations that might preclude its objectives.

The Council retains the unique competence, based on Article 43(3) TFEU, to adopt measures on quantitative limitations and on the fixing and allocation of fishing opportunities. This unique competence should be understood in the light of the new ‘hierarchy’ of measures under the proposal: multiannual plans are the primary tool for fisheries conservation and subsequently form the basis for the fixing of fishing opportunities. The Council will thus not be able to adopt measures (referred to in Article 43(3) TFEU) in isolation from the rest of the CFP.

²⁶⁰ See paragraph 3.3.1.2 on the Commission’s delegated competences, and paragraph 3.3.2. on those of the MSs.

Delegation of competences

The competence for the adoption of measures has been delegated to the Commission and to MSs. The delegation of a competence to adopt measures for MSs is not regulated by the proposal, and cannot accordingly be revoked on the basis of the proposal. The delegation of the competence to the Commission is regulated in Article 55 proposal. From that provision it follows that the competence is conferred for an indeterminate period, unless it is revoked by either the EP *or* by the Council.²⁶¹ This is interesting because the competence, on which the decision of delegation was based, is shared between them. From the one hand it makes sense to enable revocation if either of them does not agree; there is no mutual authorization anymore. From the other hand it could be argued that, as the conferral involved both actors, it should accordingly be both their decision to revoke the delegated competences. If such would be the procedure, the decision could be made on the basis of argument rather than threat (of revocation).

Of importance is that any earlier adopted acts by the Commission under the delegated competence will not be affected by such a revocation. The entry into force of these individual acts only takes place after no objection has been expressed by either the EP or the Council within 2 months of notification thereof.²⁶² This can be seen as the regular means of supervising the exercise of the delegated competences to the Commission. The ultimate sanction would be revocation of competences. Finally, the adoption of certain (detailed) implementation measures has also been delegated to the Commission.²⁶³

3.3.1.2 Competences of the Commission

Compliance with obligations under EU environmental legislation

Article 12 proposal was mentioned above as a provision which pursues an integrated approach to environmental legislation requirements. Article 12 proposal only deals with areas for which SPMs – within the meaning of the Wild Birds and Habitats Directives *and* the MSFD – have been adopted. The Commission has been delegated the competence to adopt acts to specify

²⁶¹ Commission, COM(2011) 425 final, Article 55(2)(3).

²⁶² COM(2011) 425 final., Article 55(5). Notice that several references to Articles are incorrect: 12(3), 15(4) and 37(7) should be 12(2), 15(6) and 37(6).

²⁶³ *Ibid.*, Articles 36(5) and 37(7). The exercise of that competence is addressed in paragraph 3.3.1.2.

‘fishing related measures’ to alleviate the impact of fishing activities in these areas (Article 12(2) proposal). The Article also contains a provision directed at the MSs, but no relation between both provisions is described.²⁶⁴

Commission’s assessment and control of Member States

The Commission exerts control over the measures MSs adopt under the multiannual plans and the technical measures frameworks. Following Articles 18 and 22 of the proposal, MSs adopting such measures must notify the Commission thereof. The Commission may assess the compatibility and effectiveness of these measures – at any time – on the basis of Articles 19 and 23 of the proposal.

In 3 circumstances, the Commission may replace the MS measures by adopting its own measures instead. These circumstances are when: a) the MS authorized to take measures does not notify them within 3 months of the date of entry into force of the EU measure,²⁶⁵ b) the MS measures are deemed not to be compatible with the objectives of the EU measures (on the basis of the aforementioned assessment),²⁶⁶ and c) the MS measures are deemed not to meet the objectives (and quantifiable targets) of the EU measures effectively (on the basis of the aforementioned assessment).²⁶⁷ Upon adoption of the Commission measures, the MS measures cease to be effective.²⁶⁸

The competence to replace MS measures in the case of no compatibility with the objectives *or* no effective pursuit of the objectives (and quantifiable targets), effectively leaves the MSs little to no margin of discretion. This is primarily so because the decision as to whether a measure is ‘effective’ is made by the Commission. In this sense, the competence to assess measures at any time gives the Commission the option to evaluate the actual effectiveness of the MS measures. By doing so, the Commission is able to support its argumentation in the case of adopting its own measures.

²⁶⁴ Article 12 is evaluated more extensively in paragraph 3.4.1.3.

²⁶⁵ Commission, COM(2011) 425 final, Articles 20(1) and 24(1).

²⁶⁶ *Ibid.*, Articles 20(2)(a) and 24(2)(a). Notice that the second provision is not numbered correctly as it reads 24(2)(b) twice.

²⁶⁷ *Ibid.*, Articles 20(2)(a) and 24(2)(b).

²⁶⁸ *Ibid.*, Articles 20(3) and 24(3).

The extent of control can be viewed in the light of the fact that the competences have been delegated to the MSs. It is important to be able to thoroughly control a delegated competence. In the case of the Commission, the Council and the EP need to confirm that they have no objection against a measure. As an ultimate sanction they may revoke the exercise of the competence by the Commission to take such a measure. As revocation is not possible for the delegated competences of the MSs, the rigorous assessment by the Commission may be considered a functional safety net in this sense.²⁶⁹

Other delegated measures

Other relevant delegated competences conferred to the Commission are: the competences to adopt emergency measures,²⁷⁰ to adopt measures regarding the (new) obligation to land all catches,²⁷¹ and to specify requirements for the collection, management and use of data gathered by MSs.²⁷²

Implementation competences

The Commission has also been delegated implementation powers for the specification of detailed elements.²⁷³ The procedure for the adoption of such measures is the examination procedure (formerly the regulatory procedure with scrutiny) under Regulation 182/2011/EU. Under that procedure, the Commission submits a draft of the suggested legislation to a Committee which consists of representatives of the MSs. If the Committee opposes the suggested legislation, no act can be adopted.²⁷⁴ In principle, both the Council and the EP do not play a role in the procedure.²⁷⁵ The (new) examination procedure is a significant departure from the (former) regulatory procedure with scrutiny, where the Commission could bypass the committee, but

²⁶⁹ If the Council and the EP revoke the Commission's competences, they will need to find another way to effectively control the MSs. The Commission may under that scenario only assess the MSs measures, but not adopt its own if they are incompatible or not effective.

²⁷⁰ COM(2011) 425 final, Article 13. Note that this competence, although delegated, cannot be revoked on the basis of Article 55(3).

²⁷¹ Ibid., Article 15(6).

²⁷² Ibid., Article 37(6).

²⁷³ Ibid., Articles 36(5) and 37(7).

²⁷⁴ Regulation 182/2011/EU, Articles 5(3) and 6(3), 3rd paragraph.

²⁷⁵ They do retain a right of scrutiny however; see Regulation 182/2011/EU, Article 11.

always had to receive approval from both the Council and the EP.²⁷⁶ The examination procedure basically has the Commission working together with the MSs; the former drafts a proposal on which the latter's representatives vote by majority.²⁷⁷ Under the proposal, the subjects for the procedure are of no importance to this research.

3.3.2. Competences of the Member States

Under the current Basic Regulation, MSs are actors with a marginal role. They have been delegated certain competences, but these cannot be considered a coherent set for the implementation of conservation measures under the CFP. Above it was mentioned that under the proposal MSs have more competences than they have now under the Basic Regulation.

3.3.2.1 Competences under multiannual plans and technical measures frameworks

Under the proposal, MSs become the primary actors for the adoption of conservation measures at the regional level. They have been delegated the competence to adopt conservation measures by the Council and the EP.

It was already mentioned that the competence of MSs to adopt measures is limited by the objectives of both the proposed Basic Regulation and those of the multiannual plans or technical measures frameworks.²⁷⁸ It was also noted that the measures must not only be compatible to the objectives, but must also meet them effectively. The Commission thoroughly assesses the MS measures to that extent.²⁷⁹

The MS measures are only applicable to vessels flying the MS's flag in relation to stocks in EU waters for which they have been allocated fishing opportunities.²⁸⁰ It has not been possible to verify whether most national fishing fleets operate in their respective marine regions. If such is

²⁷⁶ See Council Decision 1999/468/EC, Article 5a, as amended.

²⁷⁷ Regulation 182/2011/EU, Article 5(1). The type of majority vote depends on the proposal and the weighing of the individual votes is dependent on the referred Articles.

²⁷⁸ See paragraph 3.3.1.1.

²⁷⁹ See paragraph 3.3.1.2.

²⁸⁰ Commission, COM(2011) 425 final, Article 17(1).

the case, the competence for MSs to adopt measures as a means of effectuating a regionalization approach is a functional option. Regarding that regionalization approach, it is interesting to see that no obligation to cooperate exists in relation to the adoption of measures. The obligation to notify other interested MSs is the only provision referring to other MSs in this context.²⁸¹ The competence for the Commission to assess whether MS measures are meeting the objectives (and quantifiable targets) effectively, and subsequently adopt its own measures if such is not the case, is another provision within the proposal that may steer the MSs into cooperative action. It could, for instance, be that the Commission decides to adopt a measure for a marine region under a technical measures framework if it deems one uniform (sustainable) fishing technique in that region to be more effective than several techniques, which might also be effective when assessed on their own.

3.3.2.2 Other competences and obligations

Next to the competences to adopt measures described in the previous paragraph, there are several other relevant provisions to the research.

Alleviating fisheries impact on SPM areas

Article 12(1) proposal obligates MSs to take account of areas where SPMs have been adopted insofar that they must adjust conservation measures in order to alleviate the impact from fishing activities in such areas. Interestingly, there is no explicit relation to the second paragraph from this Article. This provision is further analyzed in paragraph 3.4.1.3.

Competences similar to those under the Basic Regulation

MSs have also been delegated the competences to adopt measures for the conservation of fish stocks in EU water for fishing vessels flying their flag, outside of the frameworks of the multiannual plans and technical measures mentioned above.²⁸² This is a revised version of Article 10 Basic Regulation.

²⁸¹ Ibid., Articles 18 and 22.

²⁸² Commission, COM(2011) 425 final, Article 25.

Another competence from the Basic Regulation (Article 9) is Article 26 proposal which gives MSs the competence to adopt measures within the 12nm zone, outside of the frameworks of the multiannual plans and technical measures mentioned above. A difference with the current version is that the procedure²⁸³ which is to be followed has changed. The MS must only consult with the Commission, relevant MSs and relevant Advisory Councils before adopting the measure.²⁸⁴ It is unclear what action can be taken by the Commission or the relevant MSs. It would be reasonable for the Commission to control the exercise of this competence, as it does for those exercised under Articles 17 and 21 of the proposal. As these measures almost exclusively affect fishing vessels flying that MS's own flag,²⁸⁵ this problem will likely not occur often.

The competence to adopt emergency measures, which is found in Article 8 Basic Regulation, has not been included in the proposal.

Monitoring requirements

MSs are required to collect, manage and make public biological, technical, environmental and socio-economic data necessary for ecosystem-based fisheries management. With regard to the collection of data, MSs must coordinate their actions with other MSs in the same marine region, and must set up a multiannual programme for that collection.²⁸⁶

3.4. Evaluation

In the previous paragraphs, the overview of the proposal was addressed. Two relevant aspects were distilled from the proposal: the change in objectives and the change in competence distribution. Under the current Basic Regulation the weighing of objectives was different than under the MSFD, and it was found that the distribution of competences was strongly in favor of EU institutions instead of the MSs as it is under the MSFD. Both changes shall be evaluated in this paragraph with regard to the inconsistencies between the current Basic Regulation and the MSFD. The aim is to see whether these changes will increase the compatibility of the

²⁸³ See paragraph 2.3.2.1.

²⁸⁴ Commission, COM(2011) 425 final, Article 26(2).

²⁸⁵ *Ibid.*, Article 6(2). MSs may restrict access to the 12 nm zone. As a result, few foreign flagged fishing vessels are allowed in those waters. This is currently also the case under the Basic Regulation; compare Article 17(2).

²⁸⁶ *Ibid.*, Article 37(4) and (5).

competence distribution in both settings and thereby aid in the pursuit of the objectives of the MSFD.

3.4.1. Compatibility of competences

3.4.1.1 EU institutions

The Council and the EP together fulfill the role of primary legislative actor. They are responsible for the adoption of the proposal itself and any multiannual plans and technical measures frameworks adopted accordingly. The Council alone adopts TACs and sets fishing allocations, but following the new long-term approach to fisheries conservation these must be adopted according to multiannual plans. Next to these tasks, the actors also play a role in the exercise of delegated competences to the Commission. Their (silent) approval is required for acts to be adopted following those competences.

The tasks of both actors under the CFP are mostly reduced to the drafting of framework legislation. Such is similar to the MSFD setting insofar that the actors have only a legislative role under the environmental policy area. From the point of competence distribution, there exists almost complete compatibility between both settings. This could change if delegated competences to the Commission are revoked on the basis of Article 55 proposal. Another factor which could potentially affect the competence distribution under the proposal is the extent to which the Council and EP will exert influence on the Commission regarding its exercise of delegated competences.

The Commission is tasked with proposing legislative acts such as multiannual plans and technical measures frameworks, and it will develop implementation measures in certain circumstances through the examination procedure. These tasks are similar to those under the environmental policy area.

The Commission is also tasked with the control and assistance of the MSs in their adoption of measures under the EU multiannual plans and technical measures frameworks. The task and procedure of inspecting the implementing MSs is similar to the MSFD setting. MSs must notify the Commission after adopting their measures. On the basis of that notification, the Commission

performs an assessment in the light of the objectives of the CFP. The Commission takes action if the assessment comes to a negative conclusion. It is the degree of control the Commission may exert when taking action that differs under both settings. Under the MSFD the Commission may only provide guidance, whereas under the proposal, the Commission may replace the MS measures. On the basis of the proposal, the EU institutions have received competences that are generally compatible to those under the MSFD.

3.4.1.2 Member States

MSs have been delegated a set of competences to systematically manage fisheries under the CFP. They must adopt such measures within the confines set by frameworks at several EU levels: that of the proposed Basic Regulation, and those of the multiannual plans and technical measures frameworks. These confines are similar to the general structure of the MSFD where MSs are also given direction for the implementation of that instrument. Furthermore, the measures are after their adoption subject to assessments by the Commission. This *ex post* control is also similar to the MSFD setting, though the Commission cannot substitute elements of the marine strategies.

There are no specific obligations that steer MS cooperation to the marine region level, though the Title containing the MS competences is named ‘Regionalization’. The obligations to cooperate under the MSFD could facilitate such an approach also under the CFP, but the incorporation of such an obligation under the proposal would have secured it and thus made for a higher degree of compatibility.

Several requirements regarding the gathering of data match the obligations MSs have under the MSFD. For instance, the state of exploited marine biological resources²⁸⁷ corresponds to ‘biological features’ in the MSFD,²⁸⁸ and the level of fishing and the impact fishing activities have on the marine biological resources and on the marine ecosystems, correspond to ‘biological disturbance’ in the MSFD.²⁸⁹ Both these Tables are used in several elements in the preparations

²⁸⁷ Ibid., Article 37(1)(a).

²⁸⁸ MSFD, Table 1, Annex III.

²⁸⁹ MSFD, Table 2, Annex III.

phase of the marine strategies under the MSFD. Furthermore, there exists an obligation to “avoid duplication of data collection for different purposes”.²⁹⁰ Data collection must take place in cooperation with other MSs in the same marine region and must be performed within the framework of a multiannual programme as of 2014,²⁹¹ the year in which the monitoring programmes under the MSFD need to be established and implemented.²⁹²

As there is an overlap with the subjects of the monitoring obligations under the MSFD setting, and the provision steers towards streamlining or even combining the gathering of data for several purposes, there exist strong indications that the enactment of these obligations should be pursued in an integrated manner. Using a single data-set for both settings might prove to be essential in the pursuit of MSFD objectives.²⁹³

3.4.1.3 Article 12

Article 12 proposal is analyzed individually as it contains obligations for the MSs and competences for the Commission. It can be said that the provision neatly connects to Article 13(5) MSFD, whereby MSs must address the *competent authority* in the case *the management of a human activity at EU level* is likely to have a *significant impact* on areas where SPMs have been adopted, with a view to adopt measures. MSs must thus address the Commission on the basis of Article 13(5) MSFD, after which the Commission can adopt measures on the basis of Article 12(2) proposal. At the same time, on the basis of Article 12(1) proposal, MSs are under the continued obligation to alleviate the impact from fishing in such areas.

The analysis of Article 13(5) MSFD concluded that the provision would primarily provide a means of advancing the ecosystem approach in other legislative frameworks. If Article 12 proposal is meant to effectively connect to Article 13(5) MSFD, it is strange that no mentioning of ecosystems is found.

If the aim of the provision is to integrate environmental legislation requirements, as is suggested by its title, a choice could have been made to include direct references to those

²⁹⁰ Ibid., Article 37(2)(e).

²⁹¹ Ibid., Article 37(5).

²⁹² MSFD, Article 5(2)(a)(iv).

²⁹³ See paragraph 3.4.2.

requirements. Instead, rather indeterminate terminology ('alleviate') is used to describe the degree of effort that needs to be put into the obligation or competence of the MS or Commission.

Furthermore, it is unclear with regard to what object the impact should be alleviated. The provision does not read "the impact from fishing activities *on* [such areas]", but "*in* [such areas]" which could signify that the impact on specific biological elements *within* such areas must be alleviated, rather than the impact on the area as a whole. Following this line, the proposal could hint at any biological 'element' mentioned therein: e.g. non-target species, ecosystems, habitats or even biodiversity.

Finally, it was mentioned that no relation is made between both paragraphs. Therefore, it seems that the provisions are merely directed at the individual actors without providing for a procedure to streamline the taking of action – which is essentially in the same pursuit – to alleviate the impact from fishing activities.

Article 12 proposal could be interpreted and even used in combination with Article 13(5) MSFD, if MSs and the Commission pursue the MSFD and CFP objectives to the fullest. As both provisions are drafted rather loosely, however, such does not necessarily follow from the wording of both provisions themselves. The provision could therefore use more accurate wording and more elaborate thinking on a procedure for its functioning to make it useful as a bridge between both policy areas.

3.4.2. Compatibility of objectives

Compatibility for the objectives of both settings is of importance to the attainment of the MSFD objectives. Actors that have similar tasks under both settings, but cannot take action under the CFP because the objectives do not allow such, are likely to reach an impasse similar to a situation where their tasks are incompatible but the objectives match. In both situations the actors themselves cannot undertake the required action.

It was noted in Chapter 2 that the objectives of the MSFD and the current CFP are different in their valuation of economic, environmental and social aspects. That difference originates primarily from the respective policy fields. Whereas the original difference is difficult to

overcome in a legal system which is characterized by a sectoral structure, the valuation of the aspects does not necessarily need to remain different.

The green paper featured a change in the valuation of environmental objectives. This position is not explicitly taken up in the proposal, but a significant change in its objectives can be noticed. Overall objectives focus on long-term sustainable conditions. To attain those conditions, the precautionary and an ecosystem approach are to be implemented, along with an integration of the EU's environmental legislation requirements. These objectives, although notable, do in themselves not constitute a major improvement from the current Basic Regulation. Important is that the environmental objectives are 'operationalized' under a reformed CFP. This requires that they are consequently embedded in all levels of the frameworks for decision-making. It was seen that such is the case in the proposal. Under different provisions objectives were inserted to ensure the protection of non-target species and habitats, marine ecosystems and even biodiversity.²⁹⁴ Both at the EU and the regional level these environmental objectives were mentioned and were to be pursued in the taking of all measures. At the regional level, the Commission plays a role in securing the operationalization of the objectives by assessing the MS measures. It is unclear however, how operationalization is secured at the EU level: i.e. how multiannual plans and technical measures frameworks are indeed adopted according to the environmental objectives. This will be decided in the interplay between the Commission, the EP and the Council in the drafting process of such measures.

The implicit change in valuation of the economic, environmental and social aspects of the objectives under the proposal seems a move in the MSFD direction. The effectuation of this by means of the objective of integrating environmental legislation requirements and the numerous provisions dealing with environmental objectives at all levels of decision-making add to that.

However, the proposal is at least one step short of overcoming differences between both settings with regard to objectives. If terminology and procedures for certain approaches to objectives are identical to those under environmental legislation, but these approaches are effectuated under the CFP, there is still the possibility that they develop differently from the

²⁹⁴ See paragraph 3.2.3.2.

environmental legislation. Consider the following situation: the Commission assesses a MS's programme of measures and concludes that it is consistent with the (objectives of the) MSFD. The MS, in pursuing its obligations under the MSFD, subsequently adopts measures under the reformed CFP. Thereunder however, the Commission finds that the measures are compatible, but do not effectively meet the objectives of the technical measures framework within which they were adopted by the MS. It is not impossible that under both settings the Commission has come to a legitimate conclusion in its assessments. This example shows that precise provisions on the relation between the MSFD marine strategies and the CFP measures, at the EU and the regional level, or possibly even a *single framework* for the assessment of their objectives are required to secure an effective pursuit of MSFD objectives by MSs under the CFP. If such a solution is not found, it might be that the situation as described above may be negated by the use of data from a single source in a science-based decision-making framework. This is so because such a combination would bring differences in terminology immediately forward.

3.5. Conclusion

This Chapter addressed the question “*What changes are to be made in the CFP during the upcoming revision in terms of the distribution of competence between Member States and the EU in relation to the MSFD?*” The choice was made to provide an answer by coupling the Commission proposal to the conclusions from Chapter 2. This approach aimed at giving the chapter more practical value.

The distribution of competences between EU institutions and the MSs has been changed so that the latter are now the principal actors for the implementation of the CFP on the regional level. The EP and the Council only adopt legislative frameworks – apart from the ‘archaic’ competence of the Council to fix catch limits and fishing opportunities. The Commission is the administrator, but is more able to structurally control the primary actors (the MSs) for the implementation of the CFP. All these changes generally bring the decision-making structure and the legislative competences in line with the environmental policy area. The degree of compatibility with regard to the competence distribution greatly increases when compared to the situation under the current Basic Regulation. Because of the addition of various environmental objectives at different levels

of the decision-making framework, it might even be said that the distribution is adequate to meet the requirements of the MSFD.

However, because of a persistent difference of objectives in both settings, and because of an absence of some sort of provision or procedure on the relationship between them, the proposal could be one step short of securing the actual pursuit of the MSFD obligations as it also provides for opportunities not to pursue those objectives.

In this sense, it is remarkable that the most explicit provision on the relation between the environmental policy setting and the CFP – namely Article 12 proposal – is not precise in its scope, and therefore the competence and obligation following from it cannot absolutely be said to function as an effective means to pursue the requirements under the respective environmental legislation.

Finally, an obligation of cooperation for MSs on the marine region level, which exists under the MSFD, should have been proposed in the field of taking measures. Such an obligation does exist for the monitoring requirements. An obligation of cooperation will strengthen structural decision-making at the regional level under the CFP, thereby likely increasing the integration of such decision-making under both settings.

Conclusion

Summary

To start with, the research addressed the distribution of tasks between the MSs and EU institutions under the MSFD. The MSFD is addressed to the MSs and primarily imposes obligations towards the attainment of the objectives on them. The role of the EU institutions is to oversee and correct the implementation process (Commission) and to amend or adopt (related) legislation (Council and EP).

The next step was to analyse the distribution of competences under the current CFP setting. As expected, the distribution was different from the MSFD setting. The Council and the EP are the primary legislative actors that hold nearly every legislative competence necessary for the pursuit of the MSFD objectives. The MSs are given competences that do provide some possibilities to pursue the MSFD objectives, most notably within their 12 nm zones. These competences however, do not make up a legislative set which is on par with the obligations the MSs have under the MSFD. The degree of incompatibility was found to be extensive to the point that the current distribution of competences is inadequate for the requirements of the MSFD.

With these conclusions, the final step was to see what changes should be made in terms of distribution of competences under the revised CFP. This was done by analyzing the Commission proposal for a new Basic Regulation. The most relevant change is the division in the decision-making framework: with an EU level and a regional level. At the EU level frameworks containing principles and time-schedules are drafted. At the regional level these are subsequently implemented thereby offering flexibility and taking account of the regional specifics. Other noticeable changes are the increase in provisions dealing with environmental objectives and the aim to integrate environmental legislation requirements. The conclusion was that the proposed changes are bringing the competence distribution more in line with the MSFD as is currently the case. Combined with the increased profile of environmental principles, this will aid in the pursuit of the MSFD objectives.

It was also stated that for more compatible results from the exercise of CFP competences, decision-making should be strengthened at the marine regional level by means of obligations to cooperate. Next to that, environmental legislation requirements should have been integrated by means of direct references to environmental legislation provisions. A step further would be to apply a single framework for balancing of objectives, rather than importing principles from environmental legislation. Introducing such principles to the CFP and subsequently applying them therein opens the possibility of a different application than under the original environmental legislation.

Conclusion

Taking aforementioned into account, it may be questioned whether there is sufficient political determination to address the necessary changes to fully achieve the MSFD's objectives.

What the MSFD offers is an integrated framework for an ecosystem approach to all human activities. By taking account of every impact and pressure on the environment, regardless of the source, it offers a chance to pursue environmental protection from a realistic point of view and not from an isolated sectoral policy view. The integrated approach to marine environmental protection which the MSFD assumes is not in line with the sectoral structure of EU law. That structure hinders the integrated approach from being fully effectuated. Under the CFP, reference may be made, or account must be taken of environmental legislation requirements, but those requirements, nor the objectives that MSs set for themselves, are followed under the CFP. As a result, the MSFD may not reach its objectives.

The approach taken by the MSFD will not make decision-making easier; it will likely make it more difficult. No longer is there a one-dimensional 'policy activity v. environment' balancing, but instead account must be taken of *every policy activity* after which the balancing v. the environment follows. What justifies the environmental prominence in the balancing under the MSFD is the fact that the environmental well-being is the premise for all human activities; it is not without a reason that every policy area already has to integrate environmental concerns.

The premise for overcoming that legal constraint is the desire to do so. It is here that the true importance lies. The conviction of the necessity to achieve improvement of the marine

environment, if required at the cost of economic or social activities, is the real basic premise for the success of the MSFD.

This brings the subject back to political decision-making. With the reality of present-day changes in political valuation of environmental objectives in the face of economic downturn, the MSFD might not be the instrument that brings GES by the year of 2021, but it could be the instrument that secures the structural balancing of environmental objectives in maritime activities.

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