

# **The resource management of the Common Fisheries Policy**

With emphasis on Regional Advisory Councils

V-04 Kandidatnr: 371

Veileder: Per Christiansen

Leveringsfrist: 26.04.04

Til sammen 16 812 ord

27/04/2004



# Table of contents

<b><u>1</u></b>	<b><u>INTRODUCTION</u></b>	<b><u>1</u></b>
1.1	INTRODUCTION AND DELIMITATIONS	1
1.2	THE FISHERIES INDUSTRY OF THE EU	1
1.3	WHY REGULATE FISHING?	4
1.4	EC LEGAL SYSTEM	5
1.4.1	SOURCES OF LEGISLATION	5
1.4.2	METHODS OF INTERPRETATION	6
1.5	EXPLANATION OF TERMS	8
<b><u>2</u></b>	<b><u>THE COMMON FISHERIES POLICY</u></b>	<b><u>11</u></b>
2.1	LEGAL BASIS AND LEGISLATIVE PROCESS	11
2.2	THE SCOPE OF THE COMMUNITY COMPETENCE WITHIN THE CFP	13
2.3	THE OBJECTIVES OF THE CFP	16
2.4	THE DEVELOPMENT OF THE CFP	18
2.5	THE RESOURCE MANAGEMENT	21
2.5.1	THE DIVISION OF COMPETENCE BETWEEN THE COMMUNITY AND THE MEMBER STATES	21
2.5.2	TAC AND QUOTAS	25
2.5.3	ACCESS	35
<b><u>3</u></b>	<b><u>REGIONAL ADVISORY COUNCILS</u></b>	<b><u>38</u></b>
3.1	INTRODUCTION	38
3.2	LEGAL BASIS	38
3.3	OBJECTIVES	39
3.4	STRUCTURE	41
3.5	MEMBERSHIP AND PARTICIPATION	42
3.6	COMPETENCE	45
3.7	DELEGATION OF POWER	46
<b><u>4</u></b>	<b><u>CONCLUSION</u></b>	<b><u>59</u></b>



## 1 Introduction

### 1.1 Introduction and delimitations

The management of the fisheries resources is regarded to be a vital interest to Norway and has probably had a great impact on the results of the two referendums regarding a Norwegian accession to the EU. The debate on how best to manage fisheries resources is constant among fishermen as well as environmental groups, researches and politicians both in Norway and the EU.

The aim of this paper is to describe the resource management of the revised Common Fisheries Policy in general - and the establishment of Regional Advisory Councils in particular. Can this novelty of the Common Fisheries Policy - this new level of government, in the future be conferred powers making it able to play a vital role in the resource management regime? This would constitute something new – a direct influence on the management of the fisheries resources from stakeholders in a wide sense.

This can form an interesting point of departure for an informed debate on the resource management regime in Norway as well as in the EU, and be of interest should the Norwegian accession debate again peak on the political agenda.

#### Delimitations

It is within the frames of this paper not possible to describe the resource management of the Common Fisheries Policy in full. I have chosen to exclude the rules related to enforcement control and the penal system to focus on catch limits, the division of catches and the access rules.

### 1.2 The fisheries industry of the EU

The fisheries industry in the European Union is an industry that generally provides less than 1 % of the Gross National Product of the Member States. Still it is regarded as an important industry in the EU. In some regions it is absolutely

crucial for the economic life as an important source of employment where there are few alternatives and it is a provider of fish products to one of the largest markets in the world.

The total yearly catch of the present Member States of the European Union was in 1999 6,3 million tons.<sup>1</sup> Rated by catch volumes Denmark, Spain, UK, France and the Netherlands are the largest fisheries nations. This makes the EU the third largest producer in the world behind China and Peru. Pelagic species such as herring and mackerel make up about 50 % of the catches, but the larger demersal species like cod is by far the most important economically, even though in 2001 it made up only about 10 % of the volume of total catches.<sup>2</sup>

This is the reason that rated by catch values the relation between the Member States changes - Spain is by far the Member State (MS) with the largest catch values, followed by Italy, UK and France. Denmark being fifth because a large portion of its catch is “low-value” species<sup>3</sup> primarily intended for industrial uses.

Though the EU is a large producer of fishery products it is far from self sufficient. The trade deficit is about 2,5 million tons and over 5 billion EUR<sup>4</sup> so the EU is a large importer of fish.

The importance of the fisheries sector varies not only between Member States but also within them. In some regions the fisheries sector is by far the most important source for employment. According to the Commission<sup>5</sup> the fisheries industry<sup>6</sup> employed over 500 000 people in 2001, and a study of the dependency

---

<sup>1</sup> Facts and figures of the CFP 2001. (Office for official publications of the European Community). These figures do not take into account the fish which are caught but not landed, for example discarded at sea.

<sup>2</sup> Facts and figures of the CFP (2001).

<sup>3</sup> Approx. 60% of the Danish catches are Sandeels and Sprat.

<sup>4</sup> Facts and figures of the CFP (2001).

<sup>5</sup> Facts and figures of the CFP (2001).

<sup>6</sup> Including catching, processing, aquaculture and ancillary industries like marketing and ship repair.

on fisheries<sup>7</sup> from 2000 identified 343<sup>8</sup> areas measurable as “zones of dependency”. These zones employed 98,1 % of the fishers in the EU.

The structure of the fleet is another factor that differentiates the Member States. The Total number of vessels of the current 15 Member States in 1999 was 99.170<sup>9</sup> but the size and engine power varies from the smallest one-man coastal vessels to industrial trawlers. The mix between these vessels rated by tonnage and engine power (kW) in the Member States, shows major differences in the structure of the fisheries sector. Greece is the MS with the largest number of vessels (20,4% of the total in EU) but these vessels only makes up 5,5 % of the total tonnage and 8,2 % of the total engine power. On the other end of the scale is the Netherlands with 1 % of the number of vessels and 8,5 % of the tonnage and 6 % of the total engine power.

The reasons for these differences in structure are both the type of waters the fishermen exploit and the different traditions of the local fisheries, but also the available capital and level of industrialization of the fishery sector. This also indicates that the needs of the fishery sector in the Member States will not be the identical, and the policy makers will have to combine these sometimes conflicting interests to create a successful Common Fisheries Policy for the EU.

Fishery was an important issue in the accession debates both when the United Kingdom, Denmark and Ireland became members in 1973 and when Portugal and Spain joined in 1986. With the coming enlargement towards the east, fisheries nations like Poland and the Baltic states will be a part of the CFP.<sup>10</sup> After the enlargement the fisheries in the waters from the Baltic Sea to the

---

<sup>7</sup> Megapesca Lga and the Centre for Agricultural Strategy, UK: Regional socio economic studies on Employment and the Level of Dependency of Fishing (2000).

<sup>8</sup> According to the study this number is substantially underestimated. It is a substantial number of areas in Greece, France and Italy that are smaller than the zones in the study that are likely to meet the threshold criteria of dependency.

<sup>9</sup> Facts and figures of the CFP (2001).

<sup>10</sup> Poland had a total catch of 239 899 tons in 2001, The Baltic states combined had 273 852 tons.

Eastern Mediterranean will be managed by the measures under the Common Fisheries Policy.

### 1.3 Why regulate fishing?

The basic theoretical problem for policymakers on the area of fisheries can be described in game theory through the “tragedy of the commons” dilemma which, when applied to the management of fisheries, states that:

*“No fisherman can limit the fishing of other fishermen, but if he limits his own use of the seas he alone loses. At the same time, unlimited fishing will destroy the common resource on which the livelihood of all depends.”<sup>11</sup>*

When it comes to regulating fisheries Churchill<sup>12</sup> points out four main consequences of the common property nature of marine fish:

- A tendency for fish stocks to be fished above optimum levels
- A tendency for more fishermen to engage in a fishery than is economically justified
- A likelihood of competition and conflict between different groups of fishermen
- The necessity for any regulation of marine fisheries to have a substantial international component.

This brief introduction to the special nature of the fisheries shows what difficulties any fisheries management regime must deal with whether it is regional, national or international, and answers the initial question of the need for regulations of the modern fisheries.

---

<sup>11</sup> Marc-Phillip Cooper In “Politics” no. 19, (1999) p. 61-70 on p. 65. (Blackwell publ.).

<sup>12</sup> (Churchill 1987) p. 3-5.



## 1.4 EC Legal system

The legal system of the European Community is international in the sense that it regulates the relations between several States. One important feature distinguishing it from traditional International law is that Community law in a larger extent has private parties as subjects. In addition to this the Community organs are entrusted with the powers to adopt measures directly applicable or with direct effect<sup>13</sup> in the Member States regardless of the Member State voting for the measure in the Council and without a national act of incorporation.

Academically one can discuss whether the Community legal order is closer related to that of a federal organisation rather than an international<sup>14</sup> - whatever the answer the main pillars of the Community law are the doctrines of direct applicability/direct effect and the supremacy<sup>15</sup> of Community law.

### 1.4.1 Sources of legislation

The main sources of legislation in the EU relevant for the subject at hand are:

#### Treaties

The Treaties are the foundation of the European Community law and therefore named primary legislation. Any Community based law must derive from the provisions in the Treaty. The Community's competence to adopt secondary legislation is limited by Art 5 EC:

*“The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”*

---

<sup>13</sup> These expressions are sometimes confused. Establishing “direct effect” is a matter of interpretation – specific provisions of the Treaty, regulations directives or decisions may when regarded sufficiently clear and precise be the ground for a legal right on a natural or legal person. “Direct applicable” on the other hand is the attribute of a Regulation which ensures its access, in its entirety to a Member States legal order – without the need of specific incorporation.

<sup>14</sup> Advocate General Lagrange in the Fedechar case (Case 8/55).

<sup>15</sup> This is not clearly stated in the Treaty but through contextual and purposive interpretation stated by the ECJ from C 64/6 (Costa v ENEL) and forward.

The secondary legislation consists of regulations, directives, recommendations and opinions.

Art 249 EC states on secondary legislation:

*“A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*

*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*

*A decision shall be binding in its entirety upon those to whom it is addressed.*

*Recommendations and opinions shall have no binding force.”*

Most of the relevant provisions regarding the resource management under the CFP are adopted in Regulations based on Art 37 EC, first and foremost Regulation 2371/2002.

#### 1.4.2 Methods of interpretation

It is a basic judicial function to ascertain the meaning of words in legal texts. Any court will make choices as to the approach they adopt in fulfilling this function. The European Court of Justice (ECJ) is no exception, and the methods of interpretation used by the ECJ are different from that of the national courts<sup>16</sup>.

All Courts gives consideration to the “ordinary” meaning of the words of the text that requires interpretation. The ECJ faces two problems in its literal interpretation distinguishing it from a national court.

---

<sup>16</sup> This section is based on Weatherill and Beaumont: 3. ed. 1999, and Anneke B. Borgli and Finn Arnesen: Institusjoner og rettskildelære I EF og EØS – en introduksjon. Oslo 1993.

First it is the multi-lingual nature of Community law. The EC Treaty is valid in twelve languages<sup>17</sup> – and regulations and directives in eleven<sup>18</sup>. Translations can never be exact and differences in the texts are inevitable. Given the limitations on the literal interpretation the ECJ will often rely on contextual interpretation. The importance of this teleological approach to interpretation is expressed in the CILFIT case<sup>19</sup>:

*“...every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.”*

Secondly there are few clauses defining the words used in the EC Treaty. For example the word “worker” in Article 39 is not defined and the exact definition of when an employment seeker is a “worker” in the context of Art 39 is yet to be finally determined. One must have in mind that within the system of Community law terms can have a meaning different from the one in internal law. This was also expressed by the Court in CILFIT<sup>20</sup>:

*“It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.”*

Another point that distinguishes the method of interpretation used by the ECJ from the one of many national courts is the use of preparatory work. The ECJ

---

<sup>17</sup> In EU 25 it will be 20 (19 for secondary legislation).

<sup>18</sup> The secondary legislation is not given in Irish.

<sup>19</sup> Case 283/81.

<sup>20</sup> Case 283/81.

will be reluctant to use preparatory work as grounds for asserting the literal meaning of a measure because most of it is not published. Documents which are not generally accessible should, for constitutional reasons, be ruled out as aids to interpretation.<sup>21</sup>

The ECJ will in many respects use its methods of interpretation to complete or limit the measures at hand in accordance with the system of Community law. Within the Common Fisheries Policy an example of this is the issue of “quota hopping” discussed below in chapter 2.5.2.

## 1.5 Explanation of terms

I will in this chapter introduce some of the terms needed to explain the Common Fisheries Policy (CFP). Where the text is *italic* it means the definition is quoted from the Conservation regulation – Reg. 2371/2002 Art. 3

### Catch limit

*“Catch limit” means a quantitative limit on landings of a stock or groups of stocks over a given period.*

### Fishing effort

*The product of the capacity and the activity of a vessel or for groups of vessels the sum of the fishing effort of all the vessels in that group. The capacity measured in tonnage or engine power, multiplied by activity measured in days at sea.*

### Community waters

*The waters under the sovereignty or jurisdiction of the Member States*

### Community fishing vessel

*...a fishing vessel flying the flag of a Member State and registered in the Community.*

---

<sup>21</sup> Weatherill and Beaumont (1999) p 187 with references.

## Stock

*...a living aquatic resource that occurs in a given management area*

## Sustainable exploitation

*...the exploitation of a stock in such a way that the future exploitation of the stock will not be prejudiced and that it does not have a negative impact on the marine eco-systems*

## Precautionary approach to fisheries management

*...the absence of adequate scientific information should not be used as a reason for postponing or failing to take management measures to conserve target species, associated or dependent species and non-target species and their environment.*

## TAC

A Total Allowable Catch is usually set for one year at the time, and sets the limit for the amount of fish allowed to catch from a particular stock. The intention is to make sure that the stock is not exploited harder than what is biologically justified.<sup>22</sup>

## Quota

Once a TAC is set it is normal to divide it into quotas allocated to vessels or small groups of vessels. If one did not do so, one would encourage fishermen to catch as much as possible as quick as possible, before the TAC was completely exploited.

Within the CFP the TACs set for each stock is divided into quotas allocated to the different Member States, which in its turn divide them to the vessels registered in, and flying the flag of that Member State.

## Access

---

<sup>22</sup> Churchill (1987) p. 112.

Access is a vessel's right to participate in fisheries activities in a certain area.

#### Technical measures

To ensure sustainable fishing it is not only important to regulate the quantity of fish taken from the sea, but also the species, the size, the catching techniques impact on the marine environment and the areas where fishing is conducted matters. The technical measures in the fisheries regulation are concerned with the types of fishing techniques, the fishing gear and the regulation of the activity in certain zones at specific periods.<sup>23</sup>

The main objective behind these measures is to limit the capture of small fish so that they can grow up (mesh size and other gear regulations, minimum fish sizes, the composition of catches allowed on board etc.) and to protect important spawning areas (closing certain zones at specific seasons) etc.

---

<sup>23</sup> Reg 2371/2002 Art. 4 (g) and (i).

## 2 The Common Fisheries Policy

### 2.1 Legal basis and legislative process

It is an important principle in the EC that the Community institutions can only adopt policies and legislations within the areas and to the extent that the founding treaties so authorize. This cornerstone of the Community law is stated in the EC Treaty Art. 5 (1).

Though the Treaty of Rome makes no explicit mention of a common fisheries policy, the legal basis for a common fisheries policy is found in the Treaty provisions dealing with agriculture; art 32-38 EC. The objectives mentioned in art 33 EC is, according to Article 37, to be achieved through the establishment of a CFP. The objectives are broadly framed so it seems that almost any measures to regulate fishing could be based on Article 37.

In general the legislation process in the EU depends in each case on the provisions of the article in the Treaty conferring the legislative competence to the Community. In the case of the common fisheries (and agriculture) policy and the common organisation of the market in fishery products art 37 EC<sup>24</sup> regulate the legislative process:

*“The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority,*

---

<sup>24</sup> Legislation regarding fisheries can in some cases also be based on Art. 12 (Prohibition of discrimination), Art. 308 (Action to attain Community objectives) and Art. 100 (Short term measures). Legislation based on Art.12 EC follows the same procedure mentioned in the text. The measures based on Art. 308 EC requires unanimity in the Council, and the Council can adopt measures under Art. 100 EC by qualified majority without consulting the European Parliament (due to the urgency). The main Regulations on the Conservation area discussed in this paper are based on Art. 37 EC.

*make regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make.”*

All fisheries legislation starts as a Commission proposal, although the initiative to make the Commission act may have come from an organisation, another EC institution or a Member State. The Commission will often start its work by consulting with other bodies, under the CFP the most important is the Advisory Committee on Fisheries, and the civil servants of the ministries of the Member States concerned.

The proposal is then formulated by the Commission and sent to the Council. The Council is obliged<sup>25</sup> to forward the proposal to the European Parliament (EP).

The EP, or to be precise the relevant Committee within the EP, produce a report together with a draft opinion on the matter which is debated by the EP in plenary sessions. The EP then adopts the draft, sometimes with modifications. The Parliament's opinion on the draft can either be an approval of the proposal, a recommendation to amend the proposal or a recommendation that the proposal is not adopted.

The proposal with the opinion from the EP is returned to the Council for the final decision. The Council, when acting under Art 37 EC, is not obliged to accept the Parliament's proposed amendments or follow a recommendation of rejecting the proposal<sup>26</sup>. The amendments of the Amsterdam Treaty conferring more power to the EP through the so called Co-decision and Cooperation procedure in art 251 and 252 EC is not applied to measures under art 37.

The Council's deliberations on the proposal follows a procedure of discussions in different working groups consisting of representatives from the Council, the Commission and often officials of national ministries, and ends in a final proposal from the Commission to be voted over by the Council.

---

<sup>25</sup> Art 37 EC.

<sup>26</sup> The Draft Constitution Treaty will if it is adopted change this.



The Council can, when acting under Art 37, adopt legislation by qualified majority. The votes of the Member States in the Council are weighed as stated in Art 205 EC<sup>27</sup> and the total number of votes in EU 15 is 87<sup>28</sup>. A qualified majority is reached when a proposal gains 62 votes in favour.

When acting under secondary legislation the situation can be different. Art 29 of Reg 2371/2002 states that the Council shall act in accordance with Art 37 EC: "...except where otherwise provided for in this regulation..." For example, it is otherwise provided for when it comes to setting of Total Allowable Catches in Art 20<sup>29</sup>

## 2.2 The scope of the Community competence within the CFP

There is nothing in the provisions of the EC Treaty dealing with fisheries that define the territorial scope of the fisheries legislation. This means that the geographical scope of the fisheries legislation is the same as for the Treaty in general<sup>30</sup>. The question is whether the EU legislative power on the fisheries sector is limited to the territories of the Member States, or if it reaches beyond the territorial sea and into the exclusive fishing zones, the EEZ or even the High Seas.

Art 299 EC states that the Treaty applies to the Kingdom of Belgium, The Kingdom of Denmark etc. and is not in its wording limiting the application to

---

<sup>27</sup> Divided like this: Belgium 5, Denmark 3, Germany 10, Greece 5, Spain 8, France 10, Ireland 3, Italy 10, Luxembourg 2, The Netherlands 5, Austria 4 Portugal 5, Finland 3, Sweden 4, and UK 10.

<sup>28</sup> In EU 25 (from Jan. 1. 2005) the votes are divided as follows: Belgium 12, Czech Rep. 12, Denmark 7, Germany 29, Estonia 4, Greece 12, Spain 27, France 29, Ireland 7, Italy 29, Cyprus 4, Latvia 4, Lithuania 7, Luxembourg 4, Hungary 12, Malta 3, The Netherlands 13, Austria 10, Poland 27, Portugal 12, Slovenia 4, Slovakia 7, Finland 7, Sweden 10 and UK 29. A qualified majority is 232 votes in favour and the addition in Art 205 EC (4) states that the 232 votes has to represent at least 62% of the population in the EU.

<sup>29</sup> See Ch. 2.5.2.

<sup>30</sup> This is confirmed by the Court in Case 61/77 Commission vs. Ireland.

the territories of these states. It has been claimed in theory both the narrow interpretation of the Article as well as the wider more teleological one<sup>31</sup>.

The European Court has ruled on this issue relating to fisheries management on several occasions, an example is C-405/92 Arman Mondiet. The case was a preliminary ruling questioning the validity of a measure prohibiting driftnets longer than 2, 5 kilometres. Amongst the questions (Question 1.1) submitted to the court for a preliminary ruling<sup>32</sup> was:

*“May Council Regulation No 345/92.....lay down for EEC nationals a limitation on the right to fish on the high seas?”*

The Court answered the question as follows:

*“For the purpose of answering Question 1.1., it should be noted that the Court has consistently held that, with regard to the high seas, the Community has the same rule-making authority in matters within its jurisdiction as that conferred under international law on the State whose flag the vessel is flying or in which it is registered.”*<sup>33</sup>

*As regards fishing, that authority is established in the Geneva Convention of 29 April 1958 on Fishing and the Conservation of the Living Resources of the High Seas (United Nations Treaty Series, volume 559, p. 286), which consolidates the general rules on this subject enshrined in international customary law...*

*Article 6 of the Geneva Convention of 29 April 1958 recognizes the interests of coastal States in the living resources in any area of the high*

---

<sup>31</sup> See Churchill p. 68 and further with references.

<sup>32</sup> Art 234 EC.

<sup>33</sup> (Joined Cases 3/76, 4/76 and 6/76 Kramer [1976] ECR 1279, Case 61/77 Commission v Ireland [1978] ECR 417, Case C-258/89 Commission v Spain [1991] ECR I-3977 and Case C-286/90 Poulsen and Diva Navigation [1992] ECR I-6019).

*seas adjacent to their territorial sea. In addition, Articles 117 and 118 of the United Nations Convention on the Law of the Sea impose a duty on all members of the international community to cooperate in the conservation and management of the living resources of the high seas.*

*It follows from the foregoing considerations that the Community has competence to adopt, for vessels flying the flag of a Member State or registered in a Member State, measures for the conservation of the fishery resources of the high seas.”*

The Community competence regarding conservation is, in the Courts opinion not limited to the Member States territories.<sup>34</sup> On other issues regarding marine law there is though necessary to draw other borders between the competence of the Community and that of the flag state. A clarification is made by the Community as a declaration upon signing the United Nations Convention on the Law Of the Sea (UNCLOS):

*The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence, in the field of sea fishing it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and to enter into external undertakings with third states or competent international organisations*

*The Community has exclusive competence for certain matters and shares competence with its Member States for certain other matters.*

*1. Matters for which the Community has exclusive competence:*

---

<sup>34</sup> This point is also seen in Reg 2371/2002 Art 1 that states the wide scope of the management measures but when including “nationals of a Member State “ it is with the reservation of the flag states primary responsibility.

*The Community points out that its Member States have transferred competence to it with regard to the conservation and management of sea fishing resources. Hence in this field it is for the Community to adopt the relevant rules and regulations (which are enforced by the Member States) and, within its competence, to enter into external undertakings with third States or competent international organizations. This competence applies to waters under national fisheries jurisdiction and to the high seas. Nevertheless, in respect of measures relating to the exercise of jurisdiction over vessels, flagging and registration of vessels and the enforcement of penal and administrative sanctions, competence rests with the Member States whilst respecting Community law*

*2. Matters for which the Community shares competence with its Member States:*

*With regard to fisheries, for a certain number of matters that are not directly related to the conservation and management of sea fishing resources, for example research and technological development and development cooperation, there is shared competence.”*

This statement makes it clear that the competence to adopt management regulations both within the Member States EEZs and for the Community vessels on the High Sea is transferred from the Member States to the Community through the EC Treaty. The Community organs are also competent to negotiate and enter into agreements within the framework of International fisheries organisations<sup>35</sup>

### 2.3 The objectives of the CFP

Article 33 EC contains the objectives of the CFP. The article is as mentioned in the Chapter of the Treaty dealing with agriculture and it's safe to say that it is mainly created with agriculture in mind.

---

<sup>35</sup> See chapter 2.5.2.

The objectives in Art 33 include the increase of efficiency and optimum utilisation of the factors of production, including labour, while insuring the participants a secure and sufficient income. The article also states that a stable market ensuring supply of agricultural products to consumers at fair prices is to be achieved through the measures under the policy.

The main targets of the conservation sector of the CFP are stated in Council regulation 2371/2002 Article 2:

*“The Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions.*

*For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimise the impact of fishing activities on marine eco-systems. It shall aim at a progressive implementation of an eco-system-based approach to fisheries management. It shall aim to contribute to efficient fishing activities within an economically viable and competitive fisheries and aquaculture industry, providing a fair standard of living for those who depend on fishing activities and taking into account the interests of consumers.”*

The regulation also states four principles of good governance as a guide for the development of measures under the CFP:

- Clear definition of the responsibilities at the Community national and local levels.
- A decision making process based on sound scientific advice which delivers timely results.
- Broad involvement of stakeholders at all stages of the policy.
- Consistency with other Community policies.

## 2.4 The development of the CFP

Despite the Treaty requirement of the adoption of a CFP within two years<sup>36</sup> of the establishment of the EC it was not until 1970, when Norway, United Kingdom, Ireland and Denmark applied for membership, the Council passed legislation to achieve a common organization of the market of fishery products and develop a structural policy for the fisheries sector. The impending first enlargement of the Community probably hastened the agreement on these provisions. The applicant states had different and much greater fisheries interests than the existing Member States. Having a common position on the fisheries issue was important before what was correctly thought to be a tough point of the accession negotiations.<sup>37</sup>

In this first piece of Community fisheries regulation; Reg. 2141/70, the Council introduced the principle of equal access. This meant that all Member States had to admit the vessels of any other Member States access to its waters on the same conditions as its own vessels. Prior to this the Member States was only obligated to allow vessels that traditionally fished in these waters access to the outer 6 miles of its 12-mile zone according to the European Fisheries Convention of 1964. With this regulation discrimination based on nationality was prohibited in fisheries management.

Another important point in the history of the CFP was the development under international law towards extended economic zones. From 1976 onwards coastal states started to unilaterally extend their fishing limits from 12 to 200 miles. The trend from the third UN Conference on the Law of the Sea (UNCLOS) towards agreement on this issue made many North Atlantic States (Canada USA, Iceland and Norway) declare 200 mile fishing zones. In these zones the coastal state claimed sovereign rights to exploit, conserve and manage fishery resources, with an obligation to allow other states to catch the fish it is not capable of harvesting itself. This development reduced the distant-waters fishing activities for the Community vessels and increased the danger of other fishery nations also

---

<sup>36</sup> Art 37 EC.

<sup>37</sup> Churchill (1987) p 12.

affected by such a development to redirect their fishing efforts towards the part of the North-Atlantic not yet covered by 200 mile zones.

The Commission proposed a package of measures in September 1976 to deal with this development. The package contained four main elements<sup>38</sup>:

The Commission proposed that the Council adopted a resolution to call upon the Member States to extend their fishing limits in the North Sea and the North Atlantic from January 1. 1977. This both to avoid the danger of an increased amount of third state vessels into these waters, and to achieve a better position in negotiations on access for Community vessels to the extended zones of other states.

The Commission also proposed that it should replace the Member States in membership in international fishery commissions and in negotiations with third states on access arrangements both for Community vessels access to third state waters, and third state vessels access to Community waters.

Thirdly the Commissions package of measures contained a draft Regulation to establish a Community system for managing the fishery resources within the Member States 200-mile zones, mentioning both the principle of equal access to the waters in the Member States 200 mile zones, and the need to accompany this with an effective conservation policy to avoid over-fishing.

Finally the Commission noted that the reduction of fishing opportunity meant that the Community fishing fleet was bigger than what was necessary to harvest the resources at hand, and recommended adaptation of measures to reduce the fleets fishing capacity.

The Council had little difficulty on agreeing on the first two points of this proposal. Already in November 1976 the resolution calling upon the Member States to declare 200 miles zones from January 1. 1977. This resolution also

---

<sup>38</sup> Churchill (1987) p. 13-14.

gave the Commission the mandate it needed to engage in negotiations with third countries and to become member of several international fishery commissions.

The Community management system and the fleet reduction programme on the other hand proved to be more difficult to agree on, but after six years of hard negotiations<sup>39</sup> especially between France and the UK, the Common Fisheries Policy was established in 1983.

During the accession negotiations with Portugal and Spain fisheries was an important issue due to the size of their fishing industries. The Spanish fleet was in 1986 nearly three quarters of the size of the 10 existing Member States. And the new members had to accept many special arrangements restricting their access to the resources of the existing Member States. The last of these derogations was removed in 2002.

There has been a decennial cycle of revisions of the CFP the first in 1992 with a new management regulation (Reg. 3760/92) and finally the revision in 2002 introducing the current management regulation (2371/2002).

The 2002 revision

For several reasons the CFP as it was prior to the latest revision proved unable to achieve the objectives of conserving fish stocks, protecting the marine environment, ensuring a living for those depending on the industry and provide safe, high quality seafood to the consumers. Especially the resource management part of the policy had failed. The Commission states in its “Communication on the future of the Common fisheries policy”<sup>40</sup> that regarding the conservation of resources many stocks are way out of safe biological limits. The situation is especially severe for the demersal stocks like cod, hake and whiting. These stocks as well as several others were in immediate danger of collapsing if the current fishing activity was to be sustained. The Commission claims that the reason for this situation is that the measures in Regulation 3760/92, that was the

---

<sup>39</sup> See Holden (1994) p 40 flg.

<sup>40</sup> KOM (2001) 135 (The Green paper).



main legislation on the conservation area before the reform, was not properly exploited. There had only been made limited progress on making multiannual measures, and the result of the programs meant to limit the *fishing effort* was not satisfying. The Commission also points out the fact that the Council, for socio-economic reasons, set TACs that exceeded the Commission's suggestions, and that the problems of overfishing, discards and the over-capacity of the fleet had increased the impact of these problems. In addition the weakness of the scientific counselling was meant to be urgent to address.<sup>41</sup>

The Commission also points out that the CFP as it was before the reform was created to reach several objectives and be in accordance with regulations that could be impossible to unite. For instance ensuring the income of those dependent on the fishing industry (in the short term) and ensure a sustainable level of stocks. There was a need to clarify the objectives and maybe more important; specify the order of priority.

On the resource management area these issues are addressed by the provisions in Regulation 2371/2002 (the Management Regulation).

## 2.5 The resource management

### 2.5.1 The division of competence between the Community and the Member States

As mentioned in chapter 2.1 the legislative competence within the fisheries management area is allocated to the Community through Art 37 EC. The question at hand is whether there is any legislative competence left for the Member States.

Reg. 2371/2002 gives the Member States limited competence on two points; necessary emergency measures, and measures within the 12-nautical mile zone. In addition the Member States may take measures for the conservation and

---

<sup>41</sup> COM (2001) 135 p. 6.

management of stocks solely applying to fishing vessels flying their flag as long as they are compatible with the objectives in Art. 2 (1) and not less stringent than the existing Community measures (so-called reverse discrimination).

#### Emergency measures

Taking emergency measures in case of a serious threat to the marine resources or eco-system is a shared competence of the Commission and Member States. This means that when facing such a situation both the Commission and the Member State is competent to take action.

The Commission has priority and measures taken by the Commission can last for up to six months, renewable for another six-month period. The type of measures are not specified so the Commission is given wide discretionary powers, limited though by the principles of proportionality and the specified objectives of the CFP. Member States affected by such a measure may initiate a review process leaving the final decision to the Council.

The Member State may require the Commission to take an emergency measure, but is also competent, in exceptional cases to act on its own. The Member State competence to apply emergency measures is regulated by art 8 of Reg. 2371/2002. The competence is limited to situations where:

*“... a serious and unforeseen threat to the conservation of living aquatic resources, or to the marine ecosystem resulting from fishing activities, in waters falling under the sovereignty or jurisdiction of a Member State where any undue delay would result in damage that would be difficult to repair.”*

The duration of the measure shall not exceed three months.

In addition to the time limit the procedural rule limits the Member State competence in these matters. A Member State that intends to apply an emergency measure is obligated to notify the Commission, the other Member States and, if there is one in the area at hand, the relevant Regional Advisory

Council. These organs have five days to submit their comments to the Commission, which in its turn is competent to confirm, cancel or amend the measure.

Member States concerned can refer the Commission's decision to the Council that may take a different (and final) decision.

This competence given to the Member States is limited but will enable them to deal with an emergency situation without waiting for the Commission to make a decision under the CFP. It is important for the Member States to be able to act in situations where the resources are threatened, and immediate action is required. Examples of Member State actions could be closing fields or amendments of technical measures.

The overall principle of non-discrimination applies so a Member State cannot take measures that discriminates vessels from other Member States. The measures cannot be stricter for vessels sailing under flags of other Member States than for vessels registered in the Member State<sup>42</sup>.

The 12-nautical mile zone

Member States can apply conservation measures within its 12-nautical mile zone as long as the Community has not adopted special measures for that area. This is regulated by Reg. 2371/2002 Art. 9:

*“A Member State may take non-discriminatory measures for the conservation and management of fisheries resources.....within 12 nautical miles of its baselines provided that the Community has not adopted measures addressing conservation and management specifically for this area.”*

The measures must be compatible with the objectives of the CFP conservation policy, and may not be less stringent than existing community legislation. If

---

<sup>42</sup> Reg. 2371/2002 Art 10.

these measures affect other Member States, the Commission, the RACs<sup>43</sup> and the Member State(s) affected is to be consulted, and the procedure explained above in art. 8 is to be followed.

Though conservation measures within the 12-mile zone can be of some importance the vital competence given to the Member State regarding the 12-mile zone is on the area of access to the waters. Article 17 (2) creates an exception from the main principle stated in art. 17 (1) that all EC-vessels have equal access to the waters and resources of the Community waters. The Member State is within the 12-mile zone authorized to:

*...restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coast.*

The overall principle of non-discrimination based on nationality<sup>44</sup> applies so a Member State cannot restrict the fishing to vessels flying their flag. All vessels registered in the EC that fulfils the criterion must have equal access to the waters within the zone. The claiming of a 12-mile zone is optional for the Member States but most Member states have made use of this option.

The interpretation of “*the vessels traditionally fish*” created a discussion when the CFP was established in 1983, but is not a problem anymore except for possible issues during future accessions.

The objective for this provision is both related to conservation as well as to socio-economical issues. Coastal areas are important spawning and growing areas for many species and to reserve fisheries in these areas to smaller vessels is considered a rational policy to avoid damages and by-catches by trawlers and other gear used by the large vessels.

---

<sup>43</sup> If there exists one for the area at hand.

<sup>44</sup> Art 12 EC.

In addition it allows a Member State to take measures to secure the link between areas dependent on fisheries and the coastal resources they need to secure a living.

### 2.5.2 TAC and quotas

#### TAC

A TAC is thought to be a conservation measure of considerable effectiveness as long as it is set at the correct level.<sup>45</sup> This can prove difficult but it is still the best known, and the most common tool to ensure a sustainable fishery.

The task that the Community organs assisted by scientists is up against is to set a TAC at the so-called level of Maximum Sustainable Yield, meaning the maximum amount of fish one can take without bringing the stock beyond safe biological limits.

A TAC proposal has its point of departure in an organisation named International Council for the Exploration of the Sea (ICES). It is an international organisation of scientist from 19 countries including 15 of the EU25 Member States together with Canada, Iceland, Norway and USA. The advice from the ICES is the main scientific basis for the political process leading to a TAC together with the suggestions from the Advisory Committee on fisheries.

Based on, but not bound by, this advice the Commission prepare a proposal to the Council on the TAC for each stock. And the Council take the final decision according to Reg 2371/2002 Art 20 (1) acting by a qualified majority without an obligation to consult with the EP.

The system of TACs and quotas has survived all the amendments of the CFP and plays an equally central role in the current Regulation 2371/2002. The major difference after the revision is that TACs are to be set on a multi-annual basis in

---

<sup>45</sup> Churchill (1987) p 112.

accordance with recovery or management-plans instead of the previous one-year prescription.

The system of recovery and management plans is a creation of the 2002 revision, but the objective of long term measures is as old as the CFP.

Art 5 and 6 of Reg. 2371/2002 defines the content of the plans.

The Recovery plans are to be adopted for fisheries exploiting stocks that are outside safe biological limits, and the obvious objective is to get the stocks back within the safe biological limits.

The Management plans are adopted to maintain stocks within safe biological limits and the objective is to make sure they stay within these limits.

This difference constitutes the reason for the differences between the two sets of plans which mainly consists of whether they in themselves or in some of their contents are obligatory or mandatory for the Council.

A Recovery plan *shall* according to Art 5 be adopted by the Council when a stock is outside safe biological limits. It shall be multi-annual, indicating the time frame for reaching the established targets and based on a precautionary approach to fisheries. Its contents can be listed as follows:

- Conservation reference points – expressed targets to measure the recovery of the stocks.
- A priority of the targets if there is more than one.
- They may include all the measures in Art 4 except pilot projects on alternative fishing management techniques.
- They shall include limitation on fishing effort “unless this is not necessary to achieve the objective of the plan”.

A Management plan is to be adopted “*as far as necessary*” to keep stocks within safe biological limits. Point 1 and 2 above applies equally for Management plans but the measures that can be included are slightly different. The reference in Art 6 to Art 4 does not include point c) concerning the establishment of targets for the sustainable exploitation of stocks, and the exclusion of pilot projects does not apply.

The main objective behind the creation of the Recovery/Management plans is according to the Commission in COM (2001) 135 (The Green Paper on the future of the CFP):

*“A multi-annual approach should help in avoiding two major disadvantages of the annual fixing of TACs and quotas: the postponement of difficult decisions for the future and abrupt changes in the volumes of TACs from one year to the other.”*

In the current management regime the setting of TACs within the management or recovery plans can be done by the Council without an obligation to consult with the European Parliament. However when adopting the management or recovery plans the process described in Art 37 EC must be followed - the Council acts on a proposal from the Commission and after consulting with the European Parliament.

As mentioned in the Introduction a fisheries management regime needs a substantial international component in order to be effective. Many fish stocks migrate beyond the 200 mile zones of the Member States and into the High Sea or between the zones of a Member State and a third state.

The UN Convention of the Law of the Sea (UNCLOS) Art 63 (1) provides that:

*“Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional*

*organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks...”*

Where the Community organs act on the international level the process described above is modified. The negotiation with third states, directly or within the framework of an international fishery commission, is directed by the Commission. Once agreement on the setting of a TAC (and the division of it between the parties<sup>46</sup>) is set, the Community cannot unilaterally alter it. The agreement still has to be implemented into Community law, and working within Art 37 EC it must be adopted by the Council after consultation with the European Parliament.

The practical influence of the Council and the EP to these decisions is weakened; especially the EPs advisory amendments will be of little importance. Both these organs will find that the most efficient method of gaining influence over these decisions is to apply its instructional powers over the Commission before and during the negotiations. The Council can of course reject the negotiated result forcing the Commission to try again, but the time limits are narrow – in many cases this would mean that no agreement can be made.

This is not a situation exclusive for the Community – similar situations will arise in States where the negotiated result needs the approval of the legislature.

If the negotiations fail the Community and the third state(s) manage the stock autonomically.

#### Quotas

A Management system solely based on Total Allowable Catches allowing all vessels to participate until the TAC was fully exploited and then close the fishing would lead to several economical disadvantages. The race to get the largest possible share of the TAC would lead to big seasonal fluctuations in

---

<sup>46</sup> The main criteria for the allocation is the proportion of the stock which is of catchable size found in each party's zone. Churchill (1987) p 192.



labour and supply. This would lead to seasonal unemployment both among fishermen and in the industry, poor prices for the fish in the peak seasons and major difficulties in the supply of fresh fish to the consumers.

To avoid these disadvantages the normal approach in international fisheries management - and the approach within the CFP - is to divide the TACs into quotas allocated to the States participating in the fisheries. The Member State can then divide its quota into quotas allocated to vessels or groups of vessels flying her flag.

The fishing opportunities shall be allocated between the Member States in such a way as to assure:

*“...each Member State relative stability of fishing activities for each stock or fishery.”* (Reg 2371/2002 Art 20 (1))

The principle of relative stability

The objective behind this principle was to avoid the yearly battle between the Member States on how to divide the declining fishing opportunities between them. A constant debate on this issue would undermine the efficiency of the CFP. Through the principle of relative stability each Member State is entitled to a certain percentage of the TAC for each stock, ensuring a certain amount of stability in the fishing opportunities.

Reg. 172/83 contained the method of fixing the percentage that can be divided into three criteria<sup>47</sup>:

- Past fishing performance. (Finally fixed to the “legal catch” in the years 1973-1978)
- The needs of regions particularly dependent on fishing
- Losses suffered as a result of the extension of fishing limits by third-states.

---

<sup>47</sup> Churchill (1987) p. 115.

These three main criteria formed the basis of a hard struggle between the Member States resulting in a complex mathematic system of allocation.<sup>48</sup> Despite some minor changes these allocation keys still form the basis of the quota system.<sup>49</sup>

The principle of relative stability is now thoroughly confirmed under the CFP. The revision of the CFP in 2012 stated by Art 35 of Reg 2371/2002 refers only to Chapters I and II of the Management Regulation while the principle of relative stability is in part IV. This does not mean that it can not be altered. The Council may, by following the procedure under Article 37 EC, alter any part of the CFP, but it does not seem likely that the principle of relative stability will be replaced in the foreseeable future. It would be difficult to find an acceptable alternative method of dividing the TACs between the Member States. At the moment the only MS in favour of a revision of the principle is Spain<sup>50</sup>.

In using its competence to divide its share of the fishing opportunities to vessels or groups of vessels flying its flag the Member States are bound by Community law<sup>51</sup>. The most relevant provision in this context has been the prohibition of discrimination on the basis of nationality. The reasoning behind the principle of relative stability – that the division of the fishing opportunities should be based on historical fishing patterns and the need of regions dependant on fisheries – on the one hand and the prohibition on discrimination based on nationality on the other, has led to several cases before the European Court of Justice.

Some rules on what methods a Member State is allowed to apply in deciding which vessels they grant a quota has been laid down by the European Court of Justice in the cases on “quota hopping”.

---

<sup>48</sup> See Holden (1994) p. 45 for details.

<sup>49</sup> NUPI (2002) p. 54.

<sup>50</sup> NUPI (2002) p 54.

<sup>51</sup> Reg 2371/2002 Art 20 (3).

The issue of "quota hopping" is interesting both practically and theoretically as an example of how the principles for the Common Market influence on the different policies, and how the European Court of Justice handles the collisions of principles.

#### "Quota hopping"

During the early 1980s some Spanish fishery companies started to export and register their vessels in the UK to bypass limits on access to the Community waters laid down in the Spanish-EC fisheries agreement. This was not seen as a problem for the UK's Ministry of Agriculture Fisheries and food at the time<sup>52</sup> but after the accession of Spain and Portugal in 1986 the practice increased because the access of Spanish vessels to EC waters was limited for a transitional period of 16 years<sup>53</sup>. There were of course no such limitations for the principle of freedom of establishment and movement of capital, and this created an opening for Spanish companies to establish in the UK, Ireland or France and fly their vessels under the flag of their new home state. It is to be mentioned that this was not solely a Spanish project; companies from Belgium and the Netherlands also applied this strategy to a certain extent, but most of the case material and the major political debate arose from the Spanish companies' establishment, probably because Spain had the largest fishing capacity in the Community and a poor reputation of observing fisheries regulation.

The Spanish fishery companies, not being able to access the resources of the EC common waters increased the use of a strategy of establishing companies within the UK under the freedom of establishment, and exporting existing vessels or buying new ones in UK and Ireland to gain access to quotas allocated to these

---

<sup>52</sup> Christian Lequesne In: *Journal of Common Market Studies* Vol. 38 No.5 pp 779-93 (on p 783).

<sup>53</sup> The Iberian act of Accession art 156-160. It has also been claimed that the "quota hopping" was increased in this period as a result of the strict limits of the building of new vessels introduced by the CFP. The fisheries companies in Spain and the Netherlands had capital to invest, and without the possibility to build new vessels they turned to the second-hand market that existed in France and the UK.

Member States. The vessels fished on British or Irish quotas, but landed most of their catches in Spanish ports, using Spanish labour, ship plants etc.

The European Court of Justice has ruled on several cases concerning the practice of “quota hopping “, most important are the Factortame cases<sup>54</sup>, Agegate<sup>55</sup>, and Jaderow<sup>56</sup>.

In Jaderow the ECJ specified the Member States possibility to make sure that the vessels fishing on its quotas had a “real economic link” with the population depending on fisheries. This was in accordance with the aim of the conservation policy under the CFP especially the principle of relative stability. The Court underlined that the measures which the Member States may adopt when exercising the power to exclude certain of the vessels flying their flag from sharing in the utilization of their national quota are justified only if they are suitable and necessary for attaining the aim of the quotas. The measures approved by the ECJ in this case and by later negotiations and adjustments are for the UK summarized as follows<sup>57</sup>:

The UK fisheries departments are in the legal position of delivering fishing licenses only to vessels that meet one of the following four criteria:

- Landing at least 50% by weight of the vessel’s catch of quota stocks into the UK.
- Employing a crew of whom 50% are normally resident in a UK coastal area.
- Incurring a given level of operating expenditure in the UK for goods and services provided in UK coastal areas.

---

<sup>54</sup> ECJ C-213/89, C-221/89, C46/93 and C48/93.

<sup>55</sup> ECJ C-3/87.

<sup>56</sup> ECJ C216/87.

<sup>57</sup> Lequesne (2000).

- Demonstrating an economic link by other means (including combinations of the above) providing sufficient benefit to populations dependent on fisheries and related industries.

These criteria were to be used to determine which of the vessels flying the British flag was to be deprived of fishing licenses. The UK government did not find this sufficient to cope with what they thought to be a big problem of “quota hopping” and went on by trying to exclude the “quota-hopping” vessels from flying the British flag. This issue also ended up in the ECJ as the *Factortame* cases.

In the *Factortame* cases the Spanish-owned company *Factortame* challenged the alteration made by Part II of the Merchant Shipping Act 1988 and the Merchant Shipping (Registration of Fishing Vessels) Regulations 1988. It was clear for all parties that the United Kingdom amended the previous legislation in order to put a stop to the practice known as "quota hopping" where fishing quotas are "plundered" by vessels flying the British flag but lacking any genuine link with the United Kingdom. The 1988 Act provided for the establishment of a new register in which all British fishing vessels were to be registered, including those which were already registered in the old general register. However, only fishing vessels fulfilling the conditions laid down in the amended regulations was to be registered in the new register.

The conditions for registrations were as follows:

- (a) The vessel is British-owned;
- (b) the vessel is managed, and its operations are directed and controlled, from within the United Kingdom; and
- (c) any charterer, manager or operator of the vessel is a qualified person or company.

A fishing vessel was to be deemed British-owned if the legal title to the vessel was vested wholly in one or more qualified persons or companies and the vessel is beneficially owned by one or more qualified companies or, as to not less than 75%, by one or more qualified persons. "Qualified person" meant a person who

was a British citizen resident and domiciled in the United Kingdom and "qualified company" meant a company incorporated in the United Kingdom and having its principal place of business there, at least 75% of its shares being owned by one or more qualified persons or companies and at least 75% of its directors being qualified persons.

Factortame owned and managed 95 vessels, some of them previously registered in Spain and exported to the UK and some purchased within the United Kingdom. None of these vessels fulfilled the conditions in the 1988 shipping Act and would lose its license to fish and its quotas from April 1, 1989.

The ECJ points out that though it is within the competence of the Member State to decide which vessels are to fly its flag this competence must be exercised with regard to the principles of Community law. The Court said that the Community principles that the Member States had to regard in its decision were not in conflict with the measures in the Geneva Convention on the High Seas. The principle of freedom of establishment and non-discrimination was to apply on this field, and the nationality requirement in the 1988 shipping act was contrary to both Art 52 (now 43) and Art 221 (now 12).

Politically the issue of "quota hopping", at least in the UK was consider a major problem. This may be a result of the "Euro-sceptics" in some parts of the British political environment. The number of vessels registered as "Franco-Spanish" in the French department of fisheries and as "Anglo-Spanish" in the UK sets the extent of this phenomenon in perspective. In 1998 these vessels amounted to 57 out of 6 496 in France and about 80 out of 8 482 in the UK<sup>58</sup>. This indicates that the principle of relative stability is not seriously threatened by the concept of "quota-hopping".

In the cases referred to above the ECJ pointed out the link between the resources and the population dependant on fisheries as the legal objective for the evaluation of which vessels were to be granted a quota. This also included

---

<sup>58</sup> Lequesne (2000).

possibilities to exclude vessels that fail to land catches within the UK from fishing on the UK quota. The question of whether a Member State can force vessels fishing on its national quota to land catches in specific areas or ports is not answered, but in a situation where the population of the area are heavily dependent on fisheries the rationale behind the principle of relative stability could allow such a measure, given that it is proportionate and suitable for the purpose. I can see no immediate reasons why such a measure should be excluded but to my knowledge the Court has not yet ruled on this issue.

### 2.5.3 Access

The principle of equal access

Since introduced in 1970<sup>59</sup> this principle has been upheld during the different amendments and is now found in Art 17 (1) of Reg. 2371/2002:

“Community fishing vessels shall have equal access to waters and resources in all Community waters...”

There are exceptions both in Art 17 (2) concerning the 12-mile fishing zone mentioned in 2.5.1, and in Art. 18 concerning the biologically sensitive area called the “Shetland box”. The most important modification of the practical importance of the principle is through the system of TACs and quotas dividing the fishing opportunities to the different Member States. There is little use of access to waters unless one has a quota.

But for species where no TAC is set<sup>60</sup> any fishing vessels registered in a Member State can fish anywhere in the Community waters outside the 12-mile limits mentioned in Art 17 (2)

---

<sup>59</sup> See Ch 2.4.

<sup>60</sup> Between 1977 and 1983 there was equal access to all MS 200-mile zones without restriction of any TACs or quotas (Churchill (1987) p 123).

Most provisions under the CFP have its legal basis in Art 37 EC, but it is difficult to relate the equal access principle to the objectives mentioned there<sup>61</sup>. The equal access principle is founded on Art 12 EC stating the prohibition of discrimination on grounds of nationality<sup>62</sup>.

The beneficiaries of the equal access principle are fishing vessels registered in<sup>63</sup> and flying the flag of a Member State<sup>64</sup>. It is up to the Member States to decide which vessels are to be granted the right to fly its flag, but the MS must exercise this right in accordance with Community law. This means that the provisions deciding who is to fly its flag the Member State cannot be in conflict with the Freedom of establishment in Art 43 or the prohibition of discrimination based on nationality<sup>65</sup>.

A flag state has responsibilities towards the vessels flying its flag<sup>66</sup> and a certain connection between the vessel and the flag state is necessary to fulfil these obligations. A demand for a connection suitable and proportionate to achieve this is not contrary to Community law.<sup>67</sup>

The derogations from the equal access principle is according to Reg 2371/2002 Art 19 to be reviewed within 31 Dec. 2004. A report on this was to be presented by the Commission by the end of 2003. This process is according to the Information officer at DG fisheries<sup>68</sup> delayed awaiting the Scientist report from the Advisory Committee on Fisheries. The revision is not to include the rules

---

<sup>61</sup> Churchill (1987) p 128.

<sup>62</sup> A question is whether this principle of non-discrimination on grounds of nationality is not only the legal basis but also a requirement to the Community organs to adopt such a principle. (See Churchill (1987) p 131-133).

<sup>63</sup> Reg 2371/2002 Art 15.

<sup>64</sup> Art 17 (1) and Art 3 (d) see Ch. 1.4.

<sup>65</sup> See Ch. 2.5.2.

<sup>66</sup> The Geneva Convention on the High Seas.

<sup>67</sup> See Ch 2.5.2. (quota hopping) on the Factortame Cases ( ECJ C-213/89, C-221/89, C46/93 and C48/93).

<sup>68</sup> In an e-mail to the author March 19. 2003.



regarding the 12-mile zone<sup>69</sup> but only the access rules in the region called the Shetland box.

---

<sup>69</sup> Art 17 (2) the rules on access to the 12-mile zones are to be revised within 2012.

### 3 Regional Advisory Councils

#### 3.1 Introduction

The Regional Advisory Councils is a creation of the 2002 revision of the CFP and institutes a new level of government within the Common Fisheries Policy. The regionalization of the European Union is seen in many fields of policies and RACs can be seen as a part of that development on the fisheries sector. Within many policies the important decisions is taken on the Community level and the distance from the policy-makers to the ones affected can seem big. The establishment of regional – but still Community – organs can be a solution to this problem.

To create a fisheries policy that is credible among the industry, the fishermen, environmental groups and consumers constitute a challenge for the policy makers on the national and particularly on the international level. The attempts to involve the local and regional level in the decision making process has been many but not very successful so far.

The introduction of the RACs has been upheld as an important part of the revision of the CFP ever since the first document from the Commission<sup>70</sup>. The idea was to create a network of regional councils to give the stakeholders a key-role in the policy making and to create a venue for meetings and debate between the scientists and the participants increasing the transparency of the scientific influence.

#### 3.2 Legal basis

The primary legal basis for the Regional Advisory Councils is Art 37 EC and the objective in Art 33 stating that in creating a CFP one should consider:

---

<sup>70</sup> COM (2001) 135.

*“the particular nature of agricultural (fisheries) activity...”*

In the secondary legislation measures are laid down in Reg 2371/2002 Art 31 and 32, and in a proposal to the Council (COM (2003) 607) from the Commission on the establishment of the RAC. The proposal has not yet<sup>71</sup> been adopted by the Council.

In addition to this the establishing of RACs is compatible with the principle of subsidiarity<sup>72</sup>. This principle in Art 5 (2) EC – introduced at Maastricht, and later specified by a Protocol defining the criteria for applying the principle<sup>73</sup>, states that Community action shall be undertaken:

*“...only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States...”*

The Protocol makes it clear that the principle of subsidiarity is not designed to secure renationalization of power, but a help to identify the “best level” for legislative and administrative action. When applied to the Fisheries Management sector this constitutes an interesting base for examining new concepts for managing the resources.

### 3.3 Objectives

The objectives behind establishing the Regional Advisory Councils were to improve the policy making process under the CFP. The problems with the previous regulations were in The Green Paper<sup>74</sup> identified as follows:

---

<sup>71</sup> 25.04.04.

<sup>72</sup> NUPI (2002) p. 73.

<sup>73</sup> See Weatherill Beaumont (1999) p 27.

<sup>74</sup> COM (2001) 135.

*“Stakeholders do not feel sufficiently involved in some important aspects of the policy.*

*It is has been clear from the application of the CFP so far and from the regional consultations on the 2002 review that the stakeholders do not feel sufficiently involved in some important aspects of the Policy, such as, for example, the elaboration of scientific advice and the adoption of technical measures. Many fishermen, in particular, believe that their views and knowledge are not sufficiently taken into account by managers and scientists. This lack of involvement undermines support for the conservation measures adopted...*

*...The reform of the CFP can only succeed if fishermen consider that fisheries policy takes into account their interests views and experience.”*

The point is to widen the base for the decision making. Scientific advice is naturally important, but they need to be modified by “hands on” competence from the catching sector, the industry and other stakeholders. It is as stated by the Commission<sup>75</sup> important to increase the transparency of scientific advice through dialogue between scientific experts and fishermen. A better understanding between scientists and fishermen can also lead to improvement on another important point, expressed in the Communication on the CFP<sup>76</sup> as the need:

*“...to promote greater accountability and responsibility for all those involved.”*

If included in the decision-making process one believe that not only will the quality and level of precision of the measures adopted be higher, but the fishermen and the industry’s compliance will increase.

---

<sup>75</sup> COM (2003) 607 (proposal for a Regulation on establishing RACs) Annex II part 5.1.2.

<sup>76</sup> COM (2002) 181 p 24.

Many of the objectives mentioned above are related to the establishment of the Regional Advisory Councils themselves. The aim of the Council's work, once established, is to contribute to achieve the targets in Reg 2371/2002 Art 2 (1):

*“...ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions.”*

The RACs is meant to have a key-role in the creation of a management regime based on the precautionary principle and be an arena for the exchange of information and experience between scientists, the industry, fishermen, consumers, environmental groups and national and Community officials.

### 3.4 Structure

According to Reg. 2371/2002 Art 32 Regional Advisory Councils shall cover sea areas falling under the jurisdiction of at least two Member States. The Proposed Regulation Art 2 fixes the six Regional Advisory Councils that are to be established.<sup>77</sup>

The reasons behind the current fixation of the RACs are expressed in the Explanatory Memorandum of the proposed Council Regulation<sup>78</sup>:

*“In order to offer meaningful advice to the Commission and to the Member States, Regional Advisory Councils should be large enough to cover management units based on biological criteria. In line with this approach, Annex 1 of the Regulation lists the Regional Advisory Councils that the Commission proposes to establish. Such an approach will ensure that all fisheries are covered by a Regional Advisory Council and also*

---

<sup>77</sup> A map is found on [http://europa.eu.int/comm/fisheries/news\\_corner/pictures/RACs\\_en.pdf](http://europa.eu.int/comm/fisheries/news_corner/pictures/RACs_en.pdf)

<sup>78</sup> (COM (2003) 607).

*avoid an overlapping of fisheries between different Regional Advisory Councils.”*

The proposed Regulation Art 2 provides an opportunity to create “sub RACs” dealing with specific issues or with specific areas with particular needs. (E.g. parts of the Mediterranean or the Irish Sea).<sup>79</sup>

The detailed structure of the RACs are to be decided by the RACs themselves but the proposal from the Commission on a Regulation on RACs contains a framework for the structure. Art 4 (1) of the proposed Regulation states:

*“Each Regional Advisory Council shall consist of a general assembly and an executive committee”*

The general assembly appoints an executive committee and meets at least once a year to review the work of the RAC (Art 4 (2)).

The executive committee, consisting of between twelve and eighteen members, is responsible for the management of the RAC and the adoption of its recommendations and suggestions (Art 4 (3)).

The objective behind this structure is to combine the large participation needed to justify the RAC as a tool for all the stakeholders through the general assembly while having an executive committee working efficiently and being able to react quickly when needed.

### 3.5 Membership and participation

The RAC is in principle open to all those concerned with the fisheries in the area in question either as Members or as participants (observers or experts). The Members of the general assembly shall, according to the proposed Regulation Art 5 (1) be appointed by common agreement between the Member States

---

<sup>79</sup> Institute for European Environmental Policy (2004) *RACS DELIVERING ECOSYSTEM-BASED MANAGEMENT* (IEEP (2004)).

concerned. Organisations representing the different interest groups have the right to propose members to the RAC.

#### Members

The Regional Advisory Councils are according to Reg 2371/2002 Art 31 (2) to be composed:

*“...principally of fishermen and other representatives of interests affected by the Common Fisheries Policy, such as representatives of the fisheries and aquaculture sectors, environment and consumer interests and scientific experts from all Member States having fisheries interests in the sea area or fishing zone concerned.”*

The question on whether the word “principally” relates only to fishermen or to all the representatives mentioned has been raised by both environment groups and recreational fisheries interests<sup>80</sup> but in the Commissions proposal to the Council on a Regulation<sup>81</sup> Art 5 (3) reserves two thirds of the seats in the general assembly as well as in the executive committee to the “fishing sector” – defined in Art 1 (2) as:

*“...shipowners, small scale fishermen, employed fishermen, producer organisations, processors, traders and other market organisations and woman’s networks”*

The professional fisheries industry will after this have a majority of the members of the RAC both in the general assembly and the executive committee.

The executive committee must at least have one representative from the catching sector of each Member State concerned.

---

<sup>80</sup> Jan Kappel. The European Angler Association [online] <http://www.eaa-europe.org/2003/PFP/Press/Press-List%20-%20EN.htm>

<sup>81</sup> COM (2003) 607.

The last third of the members of the general assembly are to be appointed among the representatives from “the other interest groups” defined in the proposed Art 1 as:

*“...environmental organisations and groups, aquaculture producers, consumers and recreational or sport fishermen.”*

These interest groups will according to the proposal share from four (if the total number is 12) to six (if the total number is 18) seats in the executive committee.

### Participants

When a Regional Advisory Council adopts its recommendations and suggestions it is the views of the members of the RAC that is expressed. But in addition to the members there are others allowed to take part in the work in the RACs as participants.

The proposed Regulation Art 6 divides the participants in two; experts and observers. Art 6 (1 ) it states:

*“Scientists from institutes of the Member States concerned or international bodies shall be invited to participate as experts in the work of the Regional Advisory Councils.”*

There is an obligation on the RAC actively to incorporate scientists in its work but they are not members of the RAC. They have no saying in the structure and composition of the RAC organs and their opinions are not necessarily included in the RAC recommendations and proposals.

The observers are, according to Art 6, representatives that can express their opinion on the recommendations and suggestions that are to be adopted by the RAC. Their participation is not mandatory. Observers can represent the following:

- National and regional administrations of the Member States concerned



- Member States not having fishing rights for regulated species in the area covered by the RAC but that declare a fishing interest
- The Commission
- The Advisory Committee on Fisheries and Aquaculture
- Third countries that have a fishing interest in the area or fisheries covered by a RAC.

This means that, if functioning as planned, the RAC will have a broad based working process ensuring the participation of stakeholders in the wide sense and end up with the informed opinion of the members. It will also be a ground for the exchange of knowledge and views between the ones delivering the major premises for the CFP.

### 3.6 Competence

The RACs are advisory bodies to the EU organs.

*“The RAC may (my underlining) be consulted by the Commission in respect of proposals for measures...”<sup>82</sup>*

The European Parliament Committee on Fisheries proposed as an amendment that consultation should be mandatory and that the Community should encourage third countries to set up their own councils, but this was not included in the final proposal from the Parliament. It is in other words up to the Commission if it is to consult with the RAC when proposing a measure. Despite this it's safe to say that the normal approach for the Commission will be to consult the RAC on matters relevant for the fisheries within their zones.

In addition to this the RAC can always take action on their own and produce recommendations without any initiative from the Commission. (Reg 2371/2002 Art 5 (a)).

---

<sup>82</sup> Reg. 2371/2002 Art 31 (4).

The RAC is not limited to be involved in the measures taken by the Commission and the Council – the RAC shall also be involved in the Member State measures within the 12-mile zone, and MS initiated emergency measures.

The RAC's tools in advising and raising problems before the Commission or a Member State are in Reg. 2371/2002 Art 31 (5) defined as recommendations and suggestions on matters relating to fisheries management. The proposed Regulation on establishing RACs Art 5 (2) states that the executive committee shall seek to reach consensus when submitting a recommendation or suggestion but if this is not possible the dissenting measures shall be recorded.

### 3.7 Delegation of power

It has been claimed that - if successful – the RACs represent the most important shift in the EU fisheries governance in the last two decades<sup>83</sup>. Starting out as an advisory board with the potential of being an important part of the Common Fisheries Policy several observers<sup>84</sup> have indicated that the competence of the Regional Advisory Councils can - if they function properly - be more than advisory in the future.

The 2002 revision of the CFP contains as mentioned above the introduction of management plans and recovery plans<sup>85</sup> where the Council sets the frames for the Management measures and the first TAC, but the setting of the subsequent TACs is delegated to the Commission.

If the Regional Advisory Councils prove successful the possibility to include them closer in the TAC-fixing process can be a natural next step. This can be done in different ways. One of the methods could be through a sub-delegation of the TAC fixing competence from the Commission to the RAC<sup>86</sup>.

---

<sup>83</sup> IEEP (2004).

<sup>84</sup> NUPI (2002) and IEEP (2004).

<sup>85</sup> Ch 2.5.2.

<sup>86</sup> NUPI (2002) p. 37-39.

If this next step should be established the main legal obstacle would be to create a chain of delegation that is in line with Community law. The division of power between the Community institutions is established through the EC Treaty, and the European Court of Justice has set limitations regarding both the Councils ability to delegate power to the Commission and the Commissions ability to sub-delegate its powers.

The EC Treaty confers legislative powers not only on the Council but also on the Commission. However the main law making powers of the Commission are conferred on it by the Council under Art 202 EC (3) and Art 211 EC (4). These Articles gives the Commission competence to legislate to implement the rules laid down by the Council in a manner according to the Councils decision. The major question raised by such implementing law making is: What can be delegated to the Commission for implementation and was has to be decided by the Council, and how should the delegated powers be exercised?

This is not clearly answered by the Treaties, and the European Court of Justice has played an important role in shaping the rules on this field, and a clarification on the above raised questions is found in case law<sup>87</sup>.

To the first question the Court of Justice has held that a distinction must be drawn between rules which, since they are essential to the subject-matter envisaged, must be reserved to the Council's power, and those which, being merely of an implementing nature, may be delegated to the Commission<sup>88</sup>.

A definition of “essential” in this context was given by the ECJ in C-240/90:

---

<sup>87</sup> Among the cases may be mentioned: C- 25/70, Einführstelle v Köster, C-23/75 ”Rey Soda”, C-240/90 Germany v Commission.

<sup>88</sup> C-25/70. The Court based this not on art 155 (4) (now 211 (4) but on the “legislative scheme of the Treaty, which is reflected in particular by the last indent of Article 155”. This means that the Court could mean that this distinction is on an EC constitutional level.

*“...only those provisions which are intended to give concrete shape to the fundamental guidelines of Community policy can be classified as essential”*

In our case - the delegation of power to fix TACs under a management or recovery plan - one must note that the Commission proposed such a delegation in its initial proposal to Reg. 2371/2002 but the Council, already in its first debate, had reservations on that point.<sup>89</sup> The delegation was not included in the next proposal from the Commission. It is clear that the Council was not willing to give up its powers to set TACs now, but should it change its mind in the future it is little doubt that such a delegation would be within the frames of Community law. A power to set TACs within the framework of a management or recovery plan is not beyond what can be called an implementing power after Art 202 and 211 EC.

To the question of how these delegated powers are to be exercised the most important feature is the procedure of Consultative Committees<sup>90</sup>. Initially this was a procedure within agriculture, where the concept of implementation has been given a wide interpretation<sup>91</sup>, but is now used within many other policies. The Council delegates powers to the Commission with the condition that in exercising these powers, the Commission must consult a Consultative Committee. The Committee consists of representatives of each Member States and is managed by a representative of the Commission. Where the Committee issues an opinion contrary to the Commission the Commission is obliged to communicate the measure taken to the Council. The Council is then able to review the situation.

---

<sup>89</sup> PRES 2002/172.

<sup>90</sup> Also called the Management committee procedure. I use Consultative committee to avoid confusion of terms. There are now several types of committees in use and one of them is named “management committee”. See also note 96.

<sup>91</sup> C-23/75.

There is now created a legal basis in the Treaty for this procedure in Art 202 (3).<sup>92</sup>

The rationale for the Consultative Committee procedure was stated by the Court in C-25/70 Köster:

*“The function of the Management Committee is to ensure permanent consultation in order to guide the Commission in the exercise of the powers conferred on it by the council and to enable the latter to substitute its own action for that of the Commission. The Management Committee does not therefore have the power to take a decision in place of the Commission or the Council. Consequently, without distorting the Community structure and the institutional balance, the Management Committee machinery enables the Council to delegate to the Commission an implementing power of appreciable scope, subject to its power to take the decision itself if necessary.”*

It is after this clear that if the Council, after consultations with the European Parliament is willing – the setting of TACs under a management or recovery plan can be delegated to the Commission. The sub-delegation of competence from the Commission to the RAC is much more problematic.

In the discussion of whether it is possible to delegate the TAC fixing competence from the Commission to the RAC my starting point will be the “delegated power model” presented in NUPI (2002).

The “delegated power model” suggests that after the Council has decided on a recovery/management plan and fixed the TAC for the first year the Commission sub-delegates its power to fix the subsequent TACs to the RAC.

---

<sup>92</sup> It is now through Council Decision 1999/46 established four procedures for the adoption of implementing measures providing the Commission with various degrees of autonomy.: The advisory committee procedure, the management committee procedure, the regulatory committee procedure and the safeguard measures procedure.

The RAC will set the subsequent TACs within the framework of the recovery/management plan and its specified targets, and based on the ICES and other scientific advice. The Commission may make another decision but can be limited to reduce the TAC by a set percentage e.g. 5 %. If the Commission wants to exceed this limit the decision is referred to the Council which may uphold or reject the Commissions decision.

Since the establishment of RACs is a novelty in Community law and they constitute a new level of government – a regional based Community organ - the Case law on sub-delegation of power does not give a clear answer to whether a delegation of the TAC fixing competence from the Commission to the RAC would be legal. It does however raise interesting issues that is relevant to the discussion of the legality of the “delegation of power” model.

The case law on delegation to bodies other than EC institutions can be divided into three groups – the delegation of powers to an agency, the delegation of powers to an International body and delegation of implementing power to Member States<sup>93</sup>.

#### Delegation of powers to an Agency

In the Meroni case<sup>94</sup> The Court stated that the delegation of powers to an agency in principle was permissible, but the right to such delegation was subject to strict conditions.

The Court first declared that the High Authority could not delegate more power than it possessed and that the delegation was to be explicitly laid down. The kind of delegation from the Council to the Commission under Art 202 and 211 EC that leaves the Commission with wide margins to adopt measures needed to

---

<sup>93</sup> This section is based on “*Shaping European law and policy : the role of committees and comitology in the political process.*” Edited by: Robin H. Pedler and Guenther F.Schaefer. (1996).

<sup>94</sup> C-9,10/56 Meroni v High Authority.

implement the rules laid down by the Council is not permissible when delegating to an agency.

The Court continued by stating that the measures taken by the agency were to be subject to the same requirements as the High Authority would have to respect had it taken the measures itself, and the High Authority was only allowed to delegate powers it had clearly defined in advance and which were subject to its strict supervision. A delegation of discretionary powers to agencies was not possible - the Court states that:

*“The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy.*

*“A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility”.*<sup>95</sup>

A further restriction in the possibility to delegate powers was given in the Romano case<sup>96</sup>, a case dealing with power delegated to the “Administrative Commission” – A Commission set up to aid social security institutions responsible for applying community law. The Court states that:

*“A body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law.”*

---

<sup>95</sup> C-9,10/56 Meroni.

<sup>96</sup> C-98/80.

The Courts reasons for this is mainly that under the EC judicial systems acts of a body like the Administrative Committee would not be subject to review by the ECJ. Delegation of decision making powers that included adoption of acts having the force of law was after this impossible, no matter what restrictions the delegation was subject to.

These decisions make it practically impossible for the Commission to delegate powers that includes the adoption of acts having the force of law to agencies.

Delegation of powers to an International body

In the Inland Waterway funds case<sup>97</sup> the Court confirmed its approach in Meroni and applied it on international agreements. The case was about the delegation of power from the Community to a fund established through an agreement between the Community and Switzerland. The funds intention was to reduce the traffic on the Rhine by paying compensation to ship-owners for withdrawing their vessels from the river for a period of time.

The Court opened for a delegation of power through an international agreement and accepted the delegation in this case since the agreement

*“define and limit the powers ... so clearly and precisely that in this case they are only executive powers”.*

Despite of this the Court rejected the agreement because it did not approve of the structure of the bodies entrusted with the delegated powers. It found that the Community’s influence in these bodies was very limited and that the Member States’ (the once represented in these bodies, some were excluded) influence had too much influence over the decision-making that fell under Community competence. In the Court’s opinion the agreement constituted:

---

<sup>97</sup> C-1/76.



*“both a surrender of the independence of action of the Community in its external relations and a change in the internal constitution of the Community”*

#### Implementation of EC law by Member States

The Member States are by Art 10 obliged:

*“to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community.”*

This means that the Member States regardless of any delegation are obligated to implement Community law. The Commission is however not allowed to use this as a reason not to fulfil its own responsibility to implement EC law. This was clearly stated by the Court in the *Rey Soda Case*<sup>98</sup>. The Courts opinion is that the Commission is not permitted to delegate its powers to the Member States and this point is indeed consistent with the one taken in the *Inland Waterway funds case*<sup>99</sup> - There is no need to differentiate between a delegation to the Member States as a participant in an international agreement and a direct delegation to the Member States.

The case law referred above on the rules on delegation of powers to bodies other than EC institutions have relevance in the discussion of delegation to RACs but can not decide the matter completely. There is a difference in Community law between the delegation of power within the Community system and the delegation of power to a body outside the Community. The Regional Advisory Councils constitutes new level of government, and if we follow the rationale behind the decisions referred above, it is not unlikely that the Court would accept a wider delegation to this Community organ than to private agencies and Member States.

---

<sup>98</sup> C-23/75.

<sup>99</sup> C-1/76.

This point is seen in the establishment of the European Aviation Safety Agency (The Agency). Through Reg. 1592/2002 this community expert organ is conferred implementing powers regarding technical standards for aircrafts. Some principle comparisons between the Agency and the RACs can be interesting even if the differences are many. The Agency is an expert body in a field where a high level of expertise is needed, and the level of discretion of the measures they are competent to adopt is arguable. In addition to this the Agency works in a field where the competence is shared between the Member States and the Community. Still there is no doubt that Reg 1592/2002 is an evolution of Community law that – if it continues – can pave the way for a system like the “delegated power model”.

It is clear from the case-law referred above that if the delegation of power to fix TACs from the Commission to the RAC is to be accepted by the Court it has to have certain features.

1. The discretion must be limited

It is clear that a power to fix TACs is a discretionary, not merely an executive, power. To decide what weight to put on scientist advice against socio economic reasons or supply and consumer issues is definitely discretionary. The margin of discretion can though be claimed to be limited. The setting of TACs will have to be within the framework of the management or recovery plans and especially in the case of the latter the Council decision stating the content of the plan will limit the discretion. The management /recovery plans will in most cases have specified references that a RAC would have to aim to fulfil. Still there is little doubt that if the “delegated power model” is to be adopted new EC law would have to be created to allow the Commission to delegate powers with such a margin of discretion. Another point is that it is possible that the case-law can prohibit even a lesser transferral of power to the RACs. If one creates a system where the formal power to set TACs is with the Commission but with procedural rules that limit the Commission to adjust the suggestions from the RAC, one could argue that this is an actual delegation of power. After the Courts decisions referred above it is not likely that such a system would be accepted.

It may be added that the Commission's need for a delegation possibility has been raised by many. With the increasing workload the Commission is likely to face over the next years a possibility to delegate some of its powers may be absolutely necessary. This, together with the development seen in Reg 1592/2002, can open the way for a wider opportunity for the Commission to delegate its powers – especially to a Community organ such as the RAC. On the field of the CFP the need to relate the fisheries management closer to the stakeholders to increase the transparency and credibility of the measures can also catalyze this development.

## 2. The Commission or the Council must be able to intervene

The rationale behind the Consultation Committee procedure can be reused to make the “delegated power model” less problematic. It is clear – and also stated in the description of the model<sup>100</sup> that the sub-delegation must be viewed in the context of the procedural rules for the possible overruling of the sub-delegated decision.

The delegating authority, it being the Commission or the Council will have to have the possibility to intervene and make the decision itself if it is needed. A system for this could be created in a manner fulfilling the rationale behind the Consultation Committee procedure.

The “delegated power model” states that when the RAC has made a decision on a TAC the Commission may take another decision. The Commission is however in the model not allowed to increase the TAC and limited to decrease it by no more than 5 %.

Considering the Courts reluctance to allow delegation of power from the Commission I would think that this could constitute a problem for the “delegated power model”. The model has an opening for the Commission to suggest a larger decrease of the TAC than 5 % making the RAC refer the final decision to the Council.

---

<sup>100</sup> NUPI (2002) p 37.

It seems that the Commissions possibility to intervene under the “delegated power model” is not sufficient to fulfil the demands of the Court. The Commission will never be able to increase the TAC, and although this can be seen as in line with the pre-cautionary principle, and the fact that the stakeholders in the RAC would be the ones suffering the most from a too high TAC leading to depletion of stocks - it leaves the RAC with a margin of discretion far from what the Court has accepted in the past.

It would probably also be necessary to build in a safe-guard measure if the RAC went beyond the framework of the management or recovery plan issued for the area at hand giving the Commission a possibility to intervene.

A comparison with the system created by Reg 1592/2002 has some value in this context. The European Aviation Safety Agency is in Art 12 given the power to:

*“... assist the Commission by preparing measures to be taken for the implementation of this Regulation. Where these comprise technical rules and in particular rules relating to construction and design and operational aspects, the Commission may not change their content without prior coordination with the Agency.*

This is a clear limitation of the Commissions possibility to intervene even if it is on a limited field. It is however clear that aviation safety is a field that requires a high level of expertise, and that the Agency is an expert body. This procedure can be seen as nothing more than a safety measure to ensure that the Commission is aware of all the consequences of its action. The power to make the final decision is still with the Commission. It is in my opinion clear that the procedure described in the “delegated power model” constitutes a much stricter limit on the Commissions possibility to intervene than what is the case in Reg 1592/2002.

The “delegated power model” will not be within the Community law as it is today and will, if established, create new EC law on this field.

3. The RACs decisions must be subject to review of the ECJ

After the case-law referred above there seem to be little doubt that if the “delegated power model” is established the RAC’s decisions – in the degree they are legislative - would have to be subject to review of the Court. This would have to be done through the adaptation of new EC-law.

In the case of the European Aviation Safety agency<sup>101</sup> mentioned above this is done by giving the Member States and the Community organs the right to appeal an Agency decision directly before the Court of Justice. All other parties entitled to appeal lodge their appeal before a Board of Appeal - the decisions made by the Board of appeal can in its turn be brought before the Court. This is a method that without any difficulties could be adopted also for the RACs.

4. The RACs must be EC institutions – not Member State institutions

The RACs are definitely EC institutions. The Member State influence on the work of the RAC is limited. They do have a saying in the appointment of the Members of the general assembly<sup>102</sup> but when the RAC is established their role is merely to support and observe. The “delegated power model” will not face any problems fulfilling this criterion.

This point is also stated in the Reg 1592/2002 establishing the Aviation Safety Agency. Section 11 in the preamble to the Regulation states:

*“...certain tasks currently performed at Community or national level should be carried out by a single specialised expert body. There is, therefore, a need within the Community's existing institutional structure and balance of powers to establish a European Aviation Safety Agency...  
...To that end, it is necessary and appropriate that it should be a Community body having legal personality and exercising the implementing powers which are conferred on it by this Regulation.”*

---

<sup>101</sup> See Reg 1592/2002 Art 31 – 40.

<sup>102</sup> See ch 3.5.

It is after this clear that the “delegated power model” is not within the frames of the Community law as it is today. However both the establishment of the European Aviation Safety Agency and the future need to deprive the Commission of some of its workload can make way for the adjustments necessary to adopt such a model. The legal obstacles can in my opinion not be regarded as impossible to overcome.

The most critical point can be whether the Regional Advisory Councils are successful. If they prove to be representative and able to create a sufficient level of consensus between stakeholders the RACs will gain great influence over the CFP already under the current management regime. A further conferral of powers can then be a natural next step.

#### **4 Conclusion**

Through the revision of the Common Fisheries Policy (CFP) the resource management regime in the EU is modified in an effort to improve the quality of the measures, reducing the risk of depletion of stocks and to increase stakeholder influence on the policy.

The division of competence between the Community and the Member States is not altered – the Fisheries Policy is still to be adopted on the Community level. However a secondary right to apply emergency measures and the right to apply conservation measures within the 12-mile zone are still in the hands of the Member States acting within the frames of Community law.

The system of Total Allowable Catches (TACs) is modified by the introduction of multi annual management/recovery plans fixing the long-term aims of the stock-level. The TACs set must be capable of fulfilling the aims of these plans. The system of dividing the TACs to the Member States according to the principle of relative stability is confirmed in the revised CFP. Through the discussion of the “quota hopping” cases one can conclude that this practise does not seem to impose a serious threat to the principle of relative stability. The principle of equal access to EU-waters is also confirmed in the revised CFP

The establishment of Regional Advisory Councils (RACs) can, if they are successful, prove to be an important factor in the resource management of the revised CFP. Under the proposed regulation the possibility to influence through its role as a key advisor to the Commission can give the participants direct influence on the measures adopted under the CFP.

On the question of the possible future role of the RACs I have concluded that the “delegated power model” described in NUPI (2002) is not within Community law as it is today, but there are indications in the development of the Community

structure that can pave the way for a delegation of more power to regional Community organs such as the RACs.



## 5 Bibliography

Borgli, Anneke Biesheuvel. *Institusjoner og rettskildelære I EF og EØS – en introduksjon*. Anneke Biesheuvel Borgli og Finn Arnesen Oslo (1993)

Churchill, Robin Rolf *EEC Fisheries Law* Dordrecht 1987 ISBN 90-247-3545-9

Cooper Marc-Phillip , The tragedy of the commons In: Politics (1999) no. 19 p. 61-70 (Blackwell publishing.)

Facts and figures on the CFP – Basic data on the Common Fisheries Policy  
European Commission, Luxembourg 2001, ISBN 92-894-1842-7.

Holden, Mike. *The Common Fisheries Policy Origin, Evaluation and Future*.  
[Oxford]: Fishing News Book, Blackwell publ, 1994 ISBN 0-85238-205-7.

*Iceland Norway and the EC Common Fisheries Policy*. Torben Foss, Thorolfur  
Matthiasson and Hanne Ulrichsen (eds.) [Oslo] NUPI 2003

Institute for European Environmental Policy (2004) *RACS DELIVERING  
ECOSYSTEM-BASED MANAGEMENT* [online] IEEP/UK URL:  
[www.ieep.org.uk/  
PDFfiles/PUBLICATIONS/Conclusions%20IEEP%20UK%20Agencies%20RAC%20mee  
ting%206%20Feb.pdf](http://www.ieep.org.uk/PDFfiles/PUBLICATIONS/Conclusions%20IEEP%20UK%20Agencies%20RAC%20meeting%206%20Feb.pdf)

Kappel, Jan. (15.10.2003) -Opinion of the European Anglers' Alliance (EAA)-  
Concerning proposal for a council decision establishing Regional Advisory  
Councils.

The European Angler Association [online] [http://www.eaa-  
europe.org/2003/PFP/Press/Press-List%20-%20EN.htm](http://www.eaa-europe.org/2003/PFP/Press/Press-List%20-%20EN.htm) (quoted 01.04.04)

Lequesne, Christian. *Quota Hopping The Common Fisheries Policy between States and Market*. In: Journal of Common Market Studies Vol. 38 (Dec. 2000) No.5 pp 779-93.

Megapesca Resource Centre (2000) *Regional socio-economic studies on employment and the level of dependency on fishing* [online] Megapesca Lda./Centre for Agricultural Strategy

URL:

[http://europa.eu.int/comm/fisheries/doc\\_et\\_publ/liste\\_publi/studies/regional/guide.pdf](http://europa.eu.int/comm/fisheries/doc_et_publ/liste_publi/studies/regional/guide.pdf) [quoted 12.03.04]

*Shaping European law and policy : the role of committees and comitology in the political process*. Edited by: Robin H. Pedler and Guenther F.Schaefer. Maastricht : European Institute of Public Administration, (1996).

Weatherill, Stephen. *EU Law*. Stephen Weatherill and Paul Beaumont 3. edition London 1999









