Fishing Enterprises towards sustainable fisheries in the EU's reform of the Common Fisheries Policy

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TÍTULO DE LA TESIS: Fishing enterprises towards sustainable fisheries in the EU's Reformo f the Common Fisheries Policy

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INFORME RAZONADO DEL/DE LOS DIRECTOR/ES DE LA TESIS

(se hará mención a la evolución y desarrollo de la tesis, así como a trabajos y publicaciones derivados de la misma).

Este trabajo de investigación que se presenta como Tesis Doctoral, desarrollado en las Universidades de Córdoba y LUISS Guido Carli de Roma bajo la dirección de la profesora Angela del Vecchio y de quien suscribe, reúne las condiciones de calidad necesarias para que se proceda a su defensa. Su estructura y contenido responde al objetivo perseguido. Está apoyado en la documentación, doctrina y jurisprudencia pertinentes y adecuadas y todos sus aspectos están abordados con rigor. El tema elegido es de una evidente actualidad (la reforma de la política pesquera común entró en vigor en 2014). Aporta importantes e interesantes conclusiones en la materia. Como previa publicación derivada de este trabajo, cítese el artículo (capítulo de libro) firmado por la doctoranda "Unione Europea, Mar Adriatico e Mar Ionio: Da una strategia marítima a una strategia macroregionale", recogido en la obra *International Law and Maritime Governance. Current Issues and Challenges for Regional Economic Integration Organisations*, dirigida por los profesores A. Del Vecchio y F. Marrella y publicada en 2016, dentro de la colección *Cahiers de l'Association internationale du droit de la mer*, por la prestigiosa Editoriale Scientifica. Por otra parte, acaba de concluir un trabajo, con el título "Quale governance per il Mediterraneo? Un punto di vista italiano", realizado con el Dott. Ricardo Rigillo, Director General de la Dirección de Pesca y Acuacultura del Ministerio de Política Agrícola, Alimentaria y Forestal italiano, que será publicado próximamente.

Por todo ello, se autoriza la presentación de la tesis doctoral.

Córdoba, a 8 de marzo de 2017

Firma del/de los director/es

Fdo.: Rafael Casado Raigón

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L'obiettivo della ricerca di Giulia Sandalli è stato quello di analizzare il ruolo svolto dalle imprese di pesca nelle diverse fasi di sviluppo della Politica Comune della Pesca (PCP).
La candidata ha messo in luce che nei primi anni di attività della Comunità Economica Europea, la necessità di una politica della pesca non venne immediatamente percepita. Infatti, solo nel 1970 con il regolamento n. 2141/70, sostituito dal regolamento n. 101/76 riguardante l'attuazione di una politica comune delle strutture nel settore della pesca e l'organizzazione comune dei mercati per i prodotti della pesca, prese l'avvio la Politica Comune della Pesca, sia pure solo limitatamente ad alcuni particolari settori.
In realtà,fu solo solo nel 1983 che venne instaurata un'effettiva politica comune della pesca diretta alla regolamentazione di un sistema comunitario per la conservazione e la gestione delle risorse ittiche attraverso numerosi regolamenti, i più importanti dei quali furono il n. 170/83 e il n. 171/83 del 25 gennaio 1983, con cui vennero introdotte misure per la gestione e la protezione delle specie biologiche contro uno sfruttamento eccessivo e misure tecniche per la conservazione di tali risorse. Venne anche fissato per la prima volta il volume delle catture autorizzate, determinate le quote annuali di pesca (TAC) per ciascuno Stato membro e introdotta una politica strutturale per la flotta peschereccia della Comunità. Altri regolamenti vennero poi adottati per organizzare il mercato della pesca ed sicurare all'industria della trasformazione e ai consumatori un approvvigionamento regolare e per migliorare la situazione dei pescatori in mare.
La Sandalli ha mostrato come l'applicazione di tali norme abbia coinvolto le imprese di pesca, che con la loro attività contribuirono notevolmente allo sviluppo ulteriore della normativa elaborata nel 1983.
Dopo un periodo contraddistinto da fenomeni di grande rilevanza nel diritto del mare quali l'entrata in vigore della Convenzione delle Nazioni Unite sul diritto del mare e i processi di globalizzazione della comunità internazionale, nel 2002 l'Unione europea ha effettuato una riforma sostanziale del regime comunitario della pesca con il regolamento n. 2371/2002 del 20 dicembre 2002 relativo alla conservazione e allo

sfruttamento sostenibile delle risorse della pesca, in cui si è proceduto ad un'attenta pianificazione pluriennale della pesca attraverso o piani di ricostituzione degli stocks di pesce più minacciati o piani di gestione per gli stocks che risultavano entro i limiti biologici di sicurezza. Per quanto riguarda in particolare le imprese della pesca, nella tesi si mette in luce che, allo scopo di evitare nelle acque comunitarie il sovrasfruttamento delle risorse alieutiche, la riforma del 2002 della PCP impose agli Stati membri di mantenere la propria flotta peschereccia entro livelli di riferimento di tonnellaggio e di potenza motrice fissati dalla Commissione, in modo da permettere un equilibrio stabile e duraturo fra capacità di pesca e risorse disponibili, condizionando in tal modo in maniera rilevante l'attività delle imprese della pesca.

Dopo l'attento studio dell'evoluzione della PCP, la candidata si è dedicata all'esame della Riforma della PCP del 2013, analizzando i principali aspetti della stessa, a cominciare dal tema della conservazione delle risorse biologiche marine, che della Riforma costituisce il nucleo fondamentale e che coinvolge indiscutibilmente gli operatori marittimi e le organizzazioni dei produttori. Essi infatti sono tenuti a rispettare i piani pluriennali, a collaborare ai fini di uno sfruttamento equilibrato ed attento delle diverse specie, per garantire lo sviluppo economico sostenibile del settore, e ad assicurare l'impegno di tutti gli operatori a favore di un'applicazione corretta delle misure di conservazione delle specie.
L'altro punto fondamentale della Riforma del 2013, sul quale la dott.ssa Sandalli si è soffermata, è stata l'organizzazione comune dei mercati dei prodotti ittici e dei prodotti dell'acquacultura. In tale settore alle imprese della pesca e alle organizzazioni dei produttori è stato riconosciuto un ruolo di importanza primaria, in quanto esse sono state sollecitate a rispettare i nuovi standards stabiliti per l'industria della pesca e tutta l'articolata normativa elaborata in materia. Così come attenzione è stata dedicata in questa parte della tesi alla tutela dei consumatori e alla protezione sociale dei lavoratori impegnati nel settore ittico.
La candidata ha quindi analizzato l'incidenza che il Fondo europeo per gli affari marittimi e la pesca (EMFF) ha riguardo allo sviluppo delle imprese della pesca. Esso rappresenta il nuovo stumento previsto dall'UE per finanziare tra l'altro l'innovazione delle imprese della pesca, il finanziamento di attività di giovani impegnati nel settore ittico, la sicurezza e le condizioni di lavoro dei pescatori, lo sviluppo dell'acquacultura, la trasformazione e la commercializzazione dei prodotti della pesca e le attività delle comunità costiere.
Infine, la Sandalli ha concluso il suo studio con un esame delle relazioni esterne dell'Unione europea nel settore della pesca marittima e delle norme in materia inserite nella Riforma del 2013. In quest'ultima parte della tesi sono stati presi in considerazione non solo i trattati stipulati dall'UE con Stati terzi, ma anche gli accordi di diritto privato conclusi dalle imprese di pesca dell'UE con società ed imprese di Stati non membri UE. Precipua attenzione è stata anche dedicata alle clausole riguardanti il rispetto dei diritti umani previste in tali accordi e alla loro importanza nell'attività delle imprese della pesca.
In conclusione, si ritiene che la candidata Sandalli abbia svolto un lavoro attento ed approfondito delle tematiche riguardanti lo sviluppo delle imprese della pesca e la disciplina per esse stabilita nella Riforma del 2013 e che possa essere ammessa alla discussione finale della tesi davanti alla Commissione congiunta italo-spagnola.

Por todo ello, se autoriza la presentación de la tesis doctoral.

Córdoba, 7 de Marzo de 2017

Firma del/de los director/es

Fdo.:_____ Fdo.: Angela Del Valle

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List of Abbreviations and Acronyms

CAP	Common Agricultural Policy
CFP	Common Fisheries Policy
EEC	European Economic Community
EC	European Commission
EC	European Community
ESI Funds	European Structural and Investment Funds
EU	European Union
EEZ	Exclusive Economic Zone
EFF	European Fisheries Fund
EMFF	European Maritime and Fisheries Fund
FAO	Food and Agriculture Organisation
FIFG	Financial Instrument for Fisheries Guidance
GDP	Gross Domestic Production
IMP	Integrated Maritime Policy
IUU	Illegal, Unreported, Unregulated
MAGP	Multiannual Guidance Programme
MSFD	Marine Strategy Framework Directive
MSY	Maximum Sustainable Yield
RAC	Regional Advisory Council
RFMO	Regional Fisheries Management Organisation
SFPA	Sustainable Fisheries Partnership Agreement
STECF	Scientific, Technical and Economic Committee for Fisheries
TAC	Total Allowable Catch
TFCs	Transferable Fisheries Concessions

UN	United Nations
TFEU	Treaty on the Functioning of the European Union
UNCLOS	The United Nations Convention on the Law of the Sea
UNFSA	The United Nations Fish Stock Agreement
The Union	The European Union
The Council	The Council of the European Union
The Commission	The European Commission
The Parliament	The European Parliament

Introduction

The scope of this research is to analyse the reform of the Common Fisheries Policy (CFP) recently adopted by the European Union in its environmental, economic and social dimension in order to shed light upon those aspects of major relevance for the EU fisheries enterprises.

To this end, the CFP will be taken into account, firstly, in its historical development, in order to assess to what extend the EU fisheries enterprises have contributed to the birth, the progressive establishment and the shaping of the policy. The historical perspective is, in fact, of a paramount importance to understand the current CFP. In many regions of Europe, both artisanal and industrial fisheries have been practiced for a long time and the world of fishermen is, nowadays, still fundamentally conservative and enshrined in traditional practices and ancient traditions. This explains why the Common Fisheries Policy has maintained, and will probably maintain, a certain degree of continuity in several aspects of the legal framework affecting the businesses of fishing operators, thus combining past traditions and practices with the most innovative solutions for the future.

Secondly, the measures introduced by the CFP reform to promote conservation of marine biological resources will be analysed taking into account their relevance for the catching sector of the fishing industry. Eco-system approach to fisheries management, Discard ban, Maximum Sustainable Yield (MSY), improved scientific advice, technical conservation measures are all elements expected to change the way in which fish is caught, making sustainable fishing a legally binding commitment for EU enterprises. Because of the exclusive competence of the Union in the conservation and management of biological resources, this pillar lies at the real heart of the Common Fisheries Policy. In this specific field, I will focus the attention on the main challenge and the more sensitive issues entailed by the need to harmonize the environmental objectives with the economic and social dimension of sustainable development.

Thirdly, the study will focus on EU enterprises in the framework of the Common Market Organisation (CMO) in fisheries and aquaculture products. The reformed CMO is in fact of a particularly relevance for the economic dimension of the CFP since it promotes, at unprecedented level, a comprehensive vision of the EU fishing industry which includes all the operators involved in the food chain, from the vessel (or the farm) to the table of consumers. Through more marketing-oriented and powerful Producer Organisations (POs) on the one hand, and more transparency and

improved products labelling on the other, private operators and consumers are expected to become the real protagonists of the fish market. The challenge here is selling in a smarter way in order to fish more efficiently in alignment with the market demand. Because environmental objectives are well present behind market mechanisms, together with a quest for economic profitability and social viability, the most technical side of the policy becomes, hence, one of the most fascinating.

It cannot be underestimated, in addition, that the political choices made in the 2013 reform are primarily reflected in budgetary decisions. This requires, hence, to analyse the structural side of the CFP, and in particular the new financial provisions under the European Maritime and Fisheries Fund (EMFF) in order to highlight the implications of the new budgetary framework for the EU fisheries enterprises. Herein lies the decisive step to translate the theoretical basis of the new CFP into actual political and social advancements. National administrations will be the major responsible of this process through the strategic lines and measures adopted in favour of the fisheries and aquaculture sector. But the true success of the reform will depend, even more, upon the genuine acceptance and acknowledgement of its principles by the fisheries operators. In this perspective, it is essential to stress that the new EMFF promotes a reorientation of financial resources from the traditional fleet subsides towards new, broader, political objectives, which deserve particular attention.

Last but not least, the external dimension of the fisheries policy, which has been formally integrated in the CFP will be studied in depth. The sea, for its intrinsic nature of common good, requires undoubtedly international cooperation in dealing with several challenges related to its management. This is of a particularly relevance for EU fisheries enterprises that operate not only in waters under the Member States' jurisdiction, but also in maritime spaces under jurisdiction of third States as well as in the high seas. International cooperation is therefore of paramount importance to establish a network of bilateral and multilateral agreements enabling European fishermen to conduct legally and safely their activities in distant waters, while guaranteeing at the same time sustainable exploitation of resources. Within the reformed CFP the European Union has committed itself to promote the value of sustainable fisheries not only in internal spaces, but also beyond its own maritime borders. This creates new opportunities, duties and scenarios for the EU long distance fleets, in terms of synergies between fisheries and other EU external policies, in the context of multilateral governance of fisheries and, even more, when they operate under private international fisheries agreements.

Finally, the study will seek to assess to which extent the CFP reform can be considered a real step forward for a sustainable fisheries or whether its ambitious, but also theoretical and ideal approach, may entail weakness and drawbacks on the practical side, negatively affecting the implementation and acceptance of the policy by economic operators.

There is no doubt in fact that our times requires innovative solutions to address the governance of seas and oceans, because of the need to accommodate the different economic interests of States on maritime resources, and the growing awareness that these are not unlimited and must be preserved for the benefit of current and future generations.

In this framework, fisheries and aquaculture represent a particularly relevant sector. Demand for fish consumption has significantly increased in both developed countries, as a high quality product for healthy nutrition, and in developing countries, where the growing population faces scarcity of food. In addition to food security, the fishing industry contributes to economic growth through enterprise development and creation of employment, in both the direct catching sector and seafood-related activities such as processing, packing, transport, retail and restaurants. As one of the most traded commodities in the world, fish resources generate incomes and represent a key opportunity for both artisanal and industrial fisheries, as well as for coastal communities.

Nevertheless, it will be highlighted how overexploitation of marine living resources, lack of reliable scientific data, illegal, unreported and unregulated (IUU) fishing, poor control and enforcement of rules, undermine the effectiveness of fisheries governance and have profound environmental impacts, adversely affecting marine ecosystems. In this perspective, conservation and sustainable use of the oceans, seas and marine resources have been expressly included within the global Sustainable Development Goals and targets established under the 2030 United Nations Agenda for Sustainable Development, adopted on 1 January 2016[1].

In order to face these global risks and challenges and transform them in opportunities, the European Union, as a major fishing power having an exclusive competence in the conservation of marine biological resources, has undertaken a reform of its Common Fisheries Policy which is courageous and comprehensive. Designed to promote a both environmentally and economically sustainable fisheries exploitation on the side of EU operators, the reform has in fact at its heart the

[1] See the Resolution adopted by the UN General Assembly, of 25 September 2015, "Transforming our world: the 2030 Agenda for Sustainable Development" which sets-out as one of its core commitments the "conservation and sustainable use the oceans, seas and marine resources for sustainable development" (Goal 14 of the 2030 UN Agenda).

goal to achieve a governance of maritime spaces suitable to safeguard at the same time the European economic interests, as well those of third countries, and to protect the sea environment by avoiding its deterioration.

It can be assumed that, as first recipients and beneficiaries of the norms, EU fisheries enterprises and their organisations play, in this context, a key role in fostering policy implementation, since they are expected to translate rules, principles and general orientations into practice.

The CFP reform envisages, in this respect, a future European fishing industry not dependent on public subsidies, able to adopt sustainable fishing practices and techniques, and whose size is proportional to the amount of fish that can be caught. Small-scale fisheries enterprises are expected to develop added value products (especially fresh fish consumed at local level) and higher labelling standards. Beyond the catching sector, EU fisheries are seen as able to foster coastal economies, acting as a vector for the development of a wide range of fish-related enterprises. The new strategy highlights, in addition, the importance of strengthening the internal production to mitigate the EU significant dependence on imports from third countries through measures aimed at countering the impoverishment of European seas, and especially to develop a sustainable domestic aquaculture. Finally, consumer awareness and transparency along the whole market chain, together with the creation of new employment opportunities, in particular for young people, are additional major objectives of the reform.

Far beyond the relatively small weight of the fishing sector in the total European GDP, therefore, the model of fisheries governance set up under the 2013 CFP reform can play, if properly implemented, a leading role in addressing the major challenges and opportunities arising from the management of maritime spaces, which, in modern times, is becoming increasingly complex. This can be achieved, firstly, through the actual contribution to conservation and right exploitation of marine living resources by means of sustainable economic activities from all operators in the chain, combined with a responsible choice of products on the part of consumers; secondly, through a consolidated awareness of stakeholders and public opinion about the potential value of fisheries for development and sustainable economic growth, when respectful of the environment and human rights.

CHAPTER I

The role of the fisheries enterprises in the development of a Common Fisheries Policy for the European Union

SUMMARY: 1. The relevance of the fishing industry in the economy of the European Union. – 2. The origins and first steps towards a Common Fisheries Policy: the EEC Treaty and the peculiarity of the fisheries sector. – 3. The 1964 European Fisheries Convention: a multilateral preferential regime concerning access to fishing areas and the historical rights of fishermen. – 4. The 1970 Regulations: a structural and a marketing policies for the European fishing industries. – 5. UNCLOS III and further developments in the framework of the 1976 Regulation. – 6. From 1983 to 1992: the CFP as a conservation, structural, market and external policy and its consequences on the fisheries enterprises. – 7. The 2002 Regulation and the starting of 2011 reform process. – 8. The preparatory phase of the 2013 reform: fishermen as stakeholders involved in decision making processes. – 9. **The 2013 reform of the CFP: a preliminary overview. – 10.** The Integrated Maritime Policy of the European Union: fisheries as a part of a broader maritime governance.

I.1. The relevance of the fishing industry in the economy of the European Union

The fishery sector, according to statistical data, has a relatively small weight in the economy of the European Union. Fisheries and aquaculture industries generate a total income of 10.9 billion euros, which represent about 0,1% of the total EU GDP[2]. Even in Spain, the United Kingdom, Denmark, France, Netherland and Italy, the six EU countries with the major output in fisheries production[3], fishery sector contributes to a relatively small part of the total national GDP. However, as for many other activities, measuring the economy through numerical indicators does not provide a complete picture, insofar as some important elements of reality are missed in economic data[4].

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[2]See the Commission Staff Working document *A Diagnosis of the EU Fisheries sector*, prepared to back up and clarify the Green Paper on the Reform of the Common Fisheries Policy, of 22 April 2009, COM (2009) 163 final, p. 40. For a detailed analysis of statistics related to fisheries production in the EU see *Agriculture, forestry and Fisheries statistics*, EUROSTAT statistical books, Luxemburg, 2014, p. 39.

[3] See *Facts and figures on the Common Fisheries Policy*, Basic Statistical data, 2014 Edition, European Commission, p. 19.

[4] On the inadequacy of GDP as measurement of economic performance see, among others, M. ROJAS, *The 'Measurement of Economic Performance and Social Progress' Report and Quality of Life: Moving Forward,* in *Social Indicators Research*, May 2011, vol. 102(1), p. 169–180; L. FASOLO & M. GALETTO & E. TURINA, *A pragmatic approach to evaluate alternative indicators to GDP*, in *Quality & Quantity: International Journal of Methodology*, 2013, vol. 47(2), p. 633-657; B. BLEYS, *Beyond GDP: Classifying Alternative Measures for Progress*, in *Social Indicators Research*, Dec. 2012, Vol. 109 (3), p. 355 – 376. For extended treatment of this topic in relation to fisheries, see R.R. CHURCHILL, *EEC Fisheries Law*, Dordrecht, 1987, p. 7 ff.

Firstly, the share of fisheries within the GDP does not include the output of industries dependent on fisheries (such as ship-building, fish processing, fish mongering, fishmeal plants) and that of the constantly developing fisheries-related activities (such as eco-tourism and recreational fisheries).

Secondly, it arises out of very nature of fishing activity, that fisheries do not extend to an overall territory but concentrate on coastal areas. This explains why, although the value of fisheries may not be of a great importance for Europe as a whole, in a number of regions of Europe, and particularly in its poorest coastal regions, the fishery industry plays an essential role in local economies, generating employment, acting as a driver for the development of associated industrial activities, perpetuating ancient historic and maritime traditions through generations, and thus supporting the livelihood and wellbeing of numerous small European coastal communities[5].

Furthermore, far from acting merely as pure economic operators, fishery and aquaculture industries are crucial in supplying food to European citizens, providing them with an important source of animal protein, vitamins and minerals[6]. It has been furthermore widely recognised that ecological sustainability create the basis for the viability and profitability of the fishing industry[7], and that the future of fishermen shall therefore be based on the balance between three pillars: the ecological, social and economic dimension, by this integrating the protection of the marine environment and social concerns into an economic perspective.

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[5] In Galicia (Spain), Ionian islands and Aegean Sea (Greece) fisheries sector exceeds 2% of regional GDP. In Algarve and Azores (Portugal), Peloponesos (Greece), Scotland (UK) the value is between 1 - 2% of the regional total. On this point, see the study of the European Parliament, *Regional Dependency on Fishery*, IP/B/PECH/ST/IC/2006-198, October 2007. Furthermore, in several coastal municipalities in Europe, fisheries accounts for more than 30% of GDP and 50% in terms of employment. Around 116 000 people work full time in catching enterprises, 115 000 in processing activities and 33 000 in aquaculture, and it is estimated that the number of part time workers associated to these sectors is even higher. These figures show that, in several regional contexts, fisheries enterprises and ancillary activities are important source of employment. See E. PENAS LADO, *The Common Fisheries Policy: The Quest for Sustainability,* Brussels, 2016, p. 2 - 3.

[6]The EU is a major consumption market of seafood products in the world with 12,3 million tonnes, representing EUR 52,2 billion in 2011. It is the first importer of seafood products, absorbing 24% of total world exchanges in value. See the *EU Fish Market Report 2014,* from the European Market Observatory for fisheries and aquaculture (EUMOFA), p. 1.

[7] This concept has been highlighted by Member States, agencies, industry groups, civil society organisations, academia and general public in the contributions transmitted to the European Commission in the context of the consultation process launched by the *Green Paper of the European Commission on the Reform of the Common Fisheries Policy*, of 22 April 2009, COM (2009)163 final. See on this point the *Synthesis of the Consultation on the Reform of the Common Fisheries Policy*, of 10 April 2010, SEC(2010) 428 final, p. 4. For a more detailed account of the outcome of the consultation process led by the Commission see par. I.8. of this Chapter.

This picture confirms that 'ensuring the future of the fishing industry is, and must remain, an important policy objective for the European Union', which must be ensured 'in a changing and challenging context'[8]characterised by overfishing and fleet overcapacity (with a consequent decrease in the amounts of seafood fished from Europe's waters and subsequent increase of imports from third States), high volatility of oil prices, climate change impacting Europe's seas and fish stocks, increasing competition for different uses of maritime space[9].

A point which has been of particular complexity in the evolution of a common fisheries policy for the European Union is that the European fishing industry is a complex and diverse reality. It includes a majority of vessels no more than 12 metres long as well as some distant - waters vessels exceeding 40 meters. Across EU Member States, fishermen work in many different ways, and there are differences in fishing traditions, in terms of fishing technology, engine powers and tonnage[10].

Nevertheless, over the past few decades, fisheries industries of EU Member States and regions, despite the heterogeneity of their interests and perspectives, have faced common challenges, such as third States' declarations of 200-miles fishing zones in the 1970s (with a consequent restriction of distant-vessels' traditional fishing grounds and the ensuing extension of Member States' fishing limits), the increase in oil price since 1973, as well as since 1960s the rapid depletion of fish stocks, caused by overfishing. However, as it has been pointed out[11], these common difficulties, together with the heterogeneity of Member States' fishing interests[12], have paved the way for the progressive establishment of a common fisheries policy.

[8] See the Green Paper referred to in note 5 above, p. 6.

[9] For an extensive analysis of conflicts among multiple uses of the sea and of the consequent development of an European integrated approach to maritime governance see A. DEL VECCHIO, *La politica marittima comunitaria*, Rome, 2009.

[10] See the Note '*Profitability of the EU Fishing Fleet*', of the Directorate-General Internal Policies of the European Parliament, Policy Department B: Structural and Cohesion Policies, 2013, p. 19.

[11] R.R. CHURCHILL, op. cit. p. 11.

[12] As pointed out by VAN DER MENSBRUGGHE 'La situation extrêmement différenciée du secteur de la pêche au sein de la Communauté du point de vue de la concentration des ports, des types de pêche, de la structure de la production et de la distribution, de l'emploi ou de la fiscalité, a eu pour conséquence que les Etats membres ont mené des politiques économiques sensiblement divergentes, mais qui comportaient, toutes, aides et interventions diverses. De là, la nécessité d'une politique commune'. VAN DER MENSBRUGGHE, *La mer et les Communautés Européennes*, Bruxelles, 1969, p. 103. Cit. A. REY ANEIROS, *La Unión europea frente a las trasformaciones del derecho internacional de la pesca*, Valencia, 2001, p. 41.

I.2. The origins and first steps towards a Common Fisheries Policy: the EEC Treaty and the specificity of the fisheries sector

At the origins of the European integration process, the fisheries policy did not have an autonomous status: it was not expressly mentioned in the founding treaties of the European Communities. Under the Treaty of Rome of 1957[13] the common market of goods, workers, services and capital '*shall extend to agriculture and trade in agricultural product*s', and agricultural products were defined as "*the products of the soil, of stock-farming and of fisheries, and products of first-stage processing directly related to these products*" (Article 38). Furthermore, Annex II to the Treaty of Rome[14] included "*fisheries, crustaceans and molluscs"* among the products subjected to Title II, dedicated to "*Agriculture"*.

Fisheries were, therefore, included in the founding objectives of the Common Agricultural Policy[15]: i.e. increasing productivity, ensuring fair standards for people working in the sector, stabilising markets, increasing availability of supplies, as well as ensuring that they could reach consumers at a reasonable price (Article 39). It can be understood, in fact, that in the aftermath of World War II, both agriculture and fisheries were primarily seen as sectors producing food and securing food supplies to populations, which was a priority objective of the EEC. Therefore, for the economies of the original six Member States agriculture had more strategic value than fisheries and fisheries operators and products could be inserted in the framework of the PAC.

The framing of an autonomous, common policy in the sphere of fisheries has been, hence, a progressive, tortuous process, driven by a number of elements. In this respect, the strengthening of

[13]Treaty establishing the European Economic Community (EEC Treaty), signed on 25 March 1957 by the representatives of Belgium, France, Italy, Luxembourg, the Netherlands and West Germany.

[14]Annex II to the Treaty establishing the European Economic Community (EEC): *List of the agricultural products subjected to the Common Customs Tariff*, referred to in Article 38 of the Treaty.

[15] Under Article 38(4) of the EEC Treaty "*The operation and development of the common market for agricultural products must be accompanied by the establishment of a common agricultural policy among the Member States"*. On this point Eva Maria VÁZQUEZ GÓMEZ highlights that the Treaty of Rome, in order to achieve the objectives of the common market, and notably "*to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States*" (Article 2), provided for the establishment of a common policy framework in three specific areas: market, agriculture and transport (Article 3). These common policies '*constituyen la manifestación más evidente de la atribución de poder soberano, por parte de los Estados miembros, a favor de las instituciones comunitarias, recibiendo las competencias necesarias para llevar a cabo esas políticas que sustituirán a las distintas políticas nacionales'*. E. M. VÁZQUEZ GÓMEZ, *Organización común de Mercados en el sector de los productos de la Pesca*, in *Revista Andaluza de Administración Publica*, N° 32, 1997, p. 1.

the EEC common market, the enlargement of the EEC to countries with major fishing industries, technological advances in fishing techniques[16], the progressive development and codification of the International Law of the Sea during the 1970s and 1980s, all contributed to highlight the specific nature and relevance of the fisheries sector.

Firstly, it became clear that fisheries cannot be regarded merely as a subpart of agriculture. Seen from the perspective of producers, fisheries and agriculture share some common features[17], such as the fact that, in both sectors, production relies on the natural life cycle of the product, it is influenced by the impact of climate conditions, and the perishability of products affect their commercialisation. However, it has been argued that '*marine fisheries have a number of characteristics which distinguish them from others kinds of economic activities based on the exploitation of natural resources, such as agriculture, forestry and mining*'[18].Those characterises emphasise the need of a specific body of law, dedicated to fisheries.

Differences arise, in particular, from the fact that fisheries issues have a consistent inherent international dimension. A specificity of marine living resources is that they are mobile, sometimes over wide distances. Therefore, in order to get hold of them, fishermen have to catch them[19] and indeed, fish stocks should been regarded as a common property natural resource[20]. The nature of

[16] As stressed by A. DEL VECCHIO, one of the reasons why the need of a Common Fisheries Policy was not fully perceived by the founding Member Statesat the beginning of the European integration process is that, at that time ' lo sfruttamento delle risorse ittiche veniva sovente esericitato in modo artigianale ed aveva ripercussioni economiche soltanto sulle popolaioni costiere, le quali vivevano quasi esclusivamente del reddito così prodotto. Con lo svilppo economico e il prgredire della tecnologia la capacità di pesca è però fortemente aumentata e si è resa quindi necessaria l'adozione di una Politca Comune della Pesca, che si è andata svoluppando nel corso degli ultimi vent'anni, sulla base dell'art. 32 del Trattato CE e dei primi regolamenti emanati in materia'. See A. DEL VECCHIO, *Politica comune della pesca e cooperazione internazionale in materia ambientale*, in Il Diritto dell'Unione europea, Anno X, Fasc. 3 – 2005.

[17] On the similarities between fisheries and agriculture see M. GIROLAMI*, Commento all'articolo 2 d. Lgs. 18 maggio 2001, n. 226*, in I tre 'decreti orientamento': della pesca e acquicoltura, forestale e agricolo, in Commentario sistematico, a cura di L. COSTATO, in Le nuove Leggi civili commentate, 2001, p. 677 ff.

[18] R.R. CHURCHILL, op. cit. p. 3. On the point see also G. GALLIZIOLI, *Il settore della pesca nel Trattato di Roma, Punti in comune e differenze sostanziali con la politica agricola comune,* in *Quarant'anni di diritto agrario comunitario,* Atti del Convegno di Martina Franca, 12-13 giugno 1998, Milano, 1998, p. 86 ff.

[19]This mobility does obviously not apply to fish produced in aquaculture farming facilities.

[20] In economics, common (environmental) property resources are 'natural resources owned and managed collectively by a community or society rather than by individuals', see the *Glossary of Environment Statistics, Studies in Methods*, Series F. No. 67, United Nations, New York, 1997. According to the theory of the "Tragedy of commons", formulated by H. GARDIN, as far as in nature it is no possible to exclude potential users from the benefits of common property resources, the problem of overexploitation arises. See H. GARDIN, *The Tragedy of Commons*, in *Science Magazine*, Vol. 362, No. 3859, 13 December 1968, p. 1243 ff.. On the problems linked to management of common properties resources, see, among a voluminous literature: J. THOMPSON, H. BARTON, *Tragically Difficult: The Obstacles to Governing the Commons*, in Environmental Law, vol. 30(2), 2000, p. 241 - 278; E. OSTROM, *The Challenge of common-pool resources*, in *Environment: Science and Policy for Sustainable Development*, Vol.50, Issue 4, 2010, p. 8-21.

common property entails, as a first consequence, the tendency to overfishing[21]. As property rights only arise when the stocks are caught, it is not possible to exclude potential beneficiaries from their use. Any operator can therefore enter the fishery and fish as much as possible. However, when the amount of fish caught (together with fish lost because of natural mortality), exceeds the amount of fish repopulation rate through natural reproduction, fish stocks start to decrease to below sustainable levels, a phenomenon known as overexploitation. Furthermore, as the number of fishermen entering in the market increases, the size of catch per vessel as well as the individual revenue per vessel progressively decrease. As a result, there will be more fishermen engaged in fishery than is economically justified to produce a given output (a phenomenon known as over-capacity or over-capitalisation). Last, but not least, the nature of common property resource, may also bring conflicts and competition among different groups of fishermen[22], as well as conflicts between fishing and other uses of the sea[23].

Over-exploitation, over-capacity and the potential to generate conflicts are, indeed, inherent, specific problems of the fishing enterprises. In absence of any regulation, individual fishermen do not have incentive to reduce their activities in the aim of preventing over-fishing, as there is no guarantee that other fishermen will do the same. That is the reason why unregulated fishing generally leads to overfishing and economic inefficiency. A legal regime regulating different aspects such as the amount of fish caught, licences schemes in order to limit the number of vessels entering the industry, individual vessels quotas, scrapping and laying up of vessels is therefore needed[24] .

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[21] For an analysis of the economic theory of natural resource utilisation as it pertains the fishing sector see the Report of the House of Lords Select Committee on the European Union, *Progress of Reform of the Common Fisheries Policy*, 13 May 2003, available at the link: http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/109/10901.htm, Chapter III.

[22] On this point, as remarked by J.P. BOUDE 'La spécificité des activités maritimes portant sur des biens en propriété commune génère des externalités le plus souvent négatives entre une même catégorie d'acteurs. Il s'agit d'effets non régules par le marché et donc difficiles a gérer: l'exemple type est fourni par les activités de pêche ou tout pécheur subit les conséquences de l'activité des autres pécheurs. En l'absence de régulation cela conduit à la dégradation de la situation économique de celui qui subi les conséquences de telles externalités. Des situations de concurrence non réglées peuvent rapidement conduire a des situation conflictuelles importantes. La prise en compte des concurrences e des conflits réels ou potentilles est un impératif pour la réussite de toute politique maritime intégrée. Fixer des règles de gouvernance adaptées constitue donc une priorité'. J.P. BOUDE, *Les enjeux économiques d'une politique maritime européenne*, in *L'Union européenne et la mer: Vers une politique marine de l'Union européenne?*, *Actes du colloque de Brest 18 et 19 octobre 2006,* under the supervision of A. CUDENNEC, G. GUEGUENHALLOUET, 2007, Paris, p.13.

[23]For a comprehensive analysis of the law and policies developed by the European Union in relation to the different uses of the sea, R. CASADO RAIGÓN, *L'Europe et la mer: pêche, navigation et environnement marin*, Association international du droit de la Mer, Bruxelles, 2005.

[24] R.R. CHURCHILL, op. cit. p. 4 ff.

Another fundamental feature of the fishery sector is that fishing usually takes place outside territorial waters. Therefore, issues mentioned above not only require the adoption of specific internal policies and legislation, but they should be also addressed at international level, through international co-operation, negotiation of agreements and application of international law.

However, despite the need of a specific legal framework for fisheries policy, at the time of the foundation of the EEC, geographical and economic disparities between the fisheries industries of the various Member States and those of the potential candidates for accession delayed the adoption of a common fisheries policy. Furthermore, the founding Members States had apparently just little reason to shape a comprehensive and self-reliant common fisheries policy, separated from agriculture. Their most significant fishery resources were largely located faraway, in international waters, outside their national jurisdiction, and multilateral or bilateral agreements could be entered into in case of jointly managed fish stocks.

However, several internal and external developments changed this scenario[25]. Internally, the realisation of a single market among Member States removed national barriers to fish trade (Articles 9–37 of the EEC Treaty), allowed the free movement of fishermen (Articles 48–51 of the EEC Treaty), provided the right of a fishing industry to establish a subsidiary in the territory of another Member State (Article 52–58), guaranteed the free movement of services (Articles 59–69)[26].

Moreover, the enlargement of the EEC to major fishing powers, such as the United Kingdom, Denmark and Ireland first, Greece, Spain and Portugal later, included in the single market Members whose fisheries industries and interests in the sector were larger of those of the six founding Member States. In this respect, it should be argued that, while the idea of shaping a common fisheries policy had been gradually envisaged as a part of the European integration project, it was only when there was a serious perspective of enlargement to members with a relevant fisheries industries that concrete steps towards a common fisheries policy have been put in place. In other words, the fisheries policy had, at least at the beginning of its development, a largely reactive character, being formulated mainly as a reflect of the national self-interests of the fisheries

[25] On this point see R.R. CHURCHILL, op.cit. p. 10 – 11. In the same perspective, see C. LEQUESNE 'Le contexte institutionnel propre à l'UE – en particulier les différentes élargissements – et le contexte mondial – notamment le débat sur le raréfaction de la ressource halieutique qui s'amorce dès les années soixante et l'affirmation, une décennie plus tard, du principe de la riveraineté par le nouveau droit international de la mer -, sont trois éléments essentiels qui expliquent le déplacement, à partir de1970, de la gestion des pêcheries des agendas nationaux vers le nouvel agenda européenne' , C. LEQUESNE, *Quel avenir pour la politique commune de la pêche à l'échéance 2002*?, in La *politique européenne de la peche : vers un développement durable ?,* Rennes, 2003, p.45.

[26] For a fuller account of the implications of the single market on fisheries sector see Y. VAN DER MENSBRUGGHE, *The Common Market Fisheries Policy and the Law of the Sea*, in *Netherlands Yearbook of International Law*, 1975, p. 199.

industries of the six founding Members. This also explains why the principles on which that policy was initially build up in the period between 1970 and 1983, were those of the equal access to fish resources as well as the distribution of TACs on the basis of relative stability[27]. These principles, which served the interests of States already members of the EEC, were often in contrast with those of the applicants, and thus opposed by them.

Externally, a major factor moving towards the establishment of a common fisheries policy came from the practice, started in the 1960s by many countries around the world, of expanding their national waters, until they finally declared Exclusive Economic Zones (EEZs) extended to 200 nautical miles from their baseline.

As a consequence of these developments, the international law governing the sea, namely the most ancient and cemented part of the international customary law, entered in the coming few decades under a process of consolidation and codification led by the **Third United Nations Conference on the Law of the Sea, convened by the General Assembly of the United Nations in 1970.**

These imbalances in the international arena, and above all the mentioned codification and progressive development of the international law of the sea (including the law governing fisheries), were to have a deep impact on European maritime issues, playing as a driver towards the progressive establishment of a common fisheries policy.

1.3. The 1964 European Fisheries Convention: a multilateral preferential regime concerning access to fishing areas and the historical rights of fishermen

It could be argued that the process which led, many years later (in 1983), to a formally established Common Fisheries policy was initiated, at its very origins, by the loss of fishing opportunities of EEC fisheries enterprises (distant waters fleets) in external waters, as a consequence of declarations of Exclusive Economic Zones (EEZs) by third countries.

The first major step that marked this development was undoubtedly US President Truman's Proclamation of 28 September 1945. With such Declaration, the United States, historically opponents of fishing zones, broke the traditional customary international law's dichotomy "territorial sea – high seas"[28], by introducing the idea that it was '*proper to establish conservation*

[27] For a fuller account on this point see Chapter II par. 4.

[28] L. I. SANCHEZ-RODRIGUEZ, *Aprovechamiento de los recursos del mar : de la zona exclusiva de pesca a la zona nacional de recursos*, In A. POCH, *La actual revision del Derecho del mar: una perspective espagnola*, Madrid, 1974, Vol. I (2), p. 11.

zones in those area of the high seas contiguous to the coasts of the US, wherein fishing activities have been, or in the future may be developed and maintained, on a substantial scale'[29].

Firstly, the proclamation highlighted the inadequacy of the international legal framework existing at the time to ensure the protection of the marine living environment. Secondly, but not of secondary importance, it introduced a revolutionary approach, based on the right of unilaterally regulate fisheries in those areas of the high seas where it was necessary for the conservation of the marine living resources and where the national enterprises (vessels fishing the flag of the coastal State) had historically a significant activity [30].

After it was formulated, the idea spread across all South America, giving birth to a Latin American practice of establishing Coastal States' jurisdiction on fishery matters in an area of 200 miles[31]. Even though it was just a local practice which just started to take place, such unilateral extension of the coastal States' maritime jurisdiction was a great concern for the international community. It could have led to unilateral, not concerted and haphazard extensions of States' exclusive zones, thus compromising the interest of several fishing nations, whose fishing enterprises (distant water-fleets) risked to be deprived of their traditional fishing grounds. To understand the relevance of this change, it is worth to recall here briefly the main stages in the evolution of the law of the sea concerning the delimitation of maritime spaces, which has its roots in both military projection of States and in their maritime economic interests[32]. After the discovery of the Americas in 1942, Spain and Portugal started exploring the new lands, in search of wealth and new conquests. They claimed sovereignty rights over the lands discovered, including exclusive navigation and commerce rights (at the time, fisheries was not yet a relevant economic sector). This practice was however opposed by several other maritime nations, giving birth to the progressive consolidation of a core principle of modern international law: the freedom of the seas. According to this principle, which was firstly set out by the Dutch jurist and philosopher Hugo Grotius in 1609 (Mare

[29]Presidential Proclamation No. 2668 28th September, 1945.

[30] J.P. QUENEUDEC, *La remise en cause du Droit de la Mer*, in *Colloque de Montpellier de la Société Française pour le Droit International*, Paris, 1973, p. 34. Cit. J.A. de YTURRIAGA, *The Internatinal regime of fisheries: from UNCLOS 1982 to the presential sea, in Ocean Developments*, Netherlands, 1997, Vol. 30.

[31] The practice was consolidated in the "Declaration of the Maritime Zone", also named "Santiago Declaration" adopted in Santiago by the Government of Chile, Ecuador and Peru in 1952. On the development of such practice in Latin America see R. CASADO RAIGÓN, *Le droit de la mer jusqu'a la Conférence de Genève de 1960*, in *L'evolution et l'etat actuel du Droit international de la mer. Melanges de droit de la mèr offerts à Daniel Vignes*, Bruxelles, 2009, p. 39 ff.

[32] For a fuller account on this issue see R. CASADO RAIGÓN, *Derecho internacional*, p 307-308.

Liberum)[33], seas and oceans are *res communis omnium*, which cannot be subjected to occupation neither claimed as property by any State.

However, demands by some coastal States for increased security and exploitation of resources in the waters adjacent to their coasts brought to progressively recognize the existence of a maritime space falling under national jurisdiction.

The delimitation of such zone, i.e. the correct breath of the territorial seas, has been however for long time a controversial issue, since there was no general view about the extent to which a coastal State may reclaim a special interest on the waters adjacent to its shores. At the turn of 18th century, the Dutch jurist Bynkershoek proposed the 'cannot-shot rule', according to which territorial waters extend as far as projectiles could be thrown from a cannon on the shore.

The cannot-rule, based on military grounds, was adopted by Holland and Mediterranean countries, but not by Scandinavians, which established their respective territorial seas at 4 miles from the coast, basing this statement on economic considerations linked to fish stocks exploitation and trade.

At the end of the 18th century, the Neapolitan jurist F. Galiani clarified the scope of the cannot-shot rule, by specifying that the range of guns was equivalent to three miles, a distance not so far from the maritime limits developed by Scandinavian states. In this version, the 3-miles rule was accepted by the United States and received increasing recognition throughout the 19th and the early 20th century, being seen by the majority of countries as a convenient compromise between conflicting interests[34].

Therefore, around 1960, the extension of territorial sea was convened between the three – six miles from the coastline, when started the practice of some States[35] of declaring fishing zones ranging up 200 miles.

Indeed, in order to avoid potential escalation of conflicts, the United Nations mandated the International Law Commission (ILC) to perform a comprehensive codification of the existing international customary law of the sea.

However, when both the First UN Conference on the Law of the Sea (1958) and the Second UN Conference on the Law of the Sea (1960) failed to find a generally accepted rule regulating

[33] The principle, however, was not accepted as a general principle of international law until the 19th century.

[34] T.E.BEHUNIAK, *The Seizure and Recovery of the S.S. Mayaguez. A legal analysis of United States Claims*, in *Military Law Review*, Vol. 82 (1978) p. 109.

[35] Declarations of exclusive economic zones were made by Latin American and African States as part of the process of decolonisation, since the framework of the traditional international law in the elaboration of which those States did not take part, was regarded by them as non consistent with their national interests and aspirations. See on this point R.CASADO RAIGÓN, *Derecho internacional*, op.cit. p. 310 – 311.

definitively the breadth of the territorial sea as well as the regulation of fisheries in the areas of high seas adjacent to the territorial sea, an increasing number of States unilaterally declared broad maritime areas where they considered to have exclusive jurisdiction and right to exploit fishing resources[36].

Among them, some "European" countries, namely Iceland and Norway. In particular, Iceland established an exclusive fishing zone of 12 miles breadth[37] and, after the indecisive Second UN Conference, also Norway did the same[38], in this way prejudicing the interests of the fishing industries of several countries, and in particular of the United Kingdom, which was at the time a potential adherent to the European Economic Community and a major regional fishing power. Indeed, it was clear that a mechanism of coordination at European level was necessary to deal with these sensitive issues.

A Western European Fisheries Conference, convened in London in 1964, led to the adoption of the *European Fishery Convention*, to which twelve European countries became parties (all except Iceland, Norway, Austria and Switzerland). The Convention, which applied only to the coasts of the Atlantic Ocean, regulated right to fish in the waters of Contracting Parties and established reciprocal obligations of consultation among them, as well as their obligation to apply in the 6-to-12 mile zone the "*most favoured nation*" clause to any favour granted as a Coastal States to non–Contracting Parties[39]. The new legal regime was supposed to have a major impact on the Contracting Parties' fisheries enterprises and to mitigate, as far as possible, the loss of fishing opportunities caused by EEZs declarations.

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[36] The right of the coastal States to declare their respective Exclusive Economic Zones was later consecrated in the United Nations Convention on the Law of the Sea of 1982. This constituted a major break in the classical international law of the sea, notably as far as the ancient dichotomy between territorial sea and high sea is concerned. In particular, as stressed by U. LEANZA on this issue ' Il bilanciamento classico tra libertà di navigazione in alto mare e competenze dello Stato della bandiera, da un canto, e controllo della navigazione marittima nelle acque adiacenti alle coste da parte dello Stato costiero, dall'altro, pur se mantenuto integro dalla Convenzione, appare poi condizionato dai nuovi poteri funzionali che quest'ultimo Stato può esercitare, soprattutto nella zona economica esclusiva, in materia di pesca, di sfruttamento di altre risorse del mare, di ricerca scientifica e protezione dell'ambiente marino che, sia pure indirettamente, influiscono sulla libertà di navigazione e sulle competenze dello Stato della bandiera', *Navigazione marittima internazionale e giurisdizione degli Stati costieri nelle acque adiacenti alle coste*, in *Prospettive del diritto del mare all'alba del XXI secolo, Convegno italo-latinoamericano, 12 – 13 novembre 1998*, Roma, 1999, p. 31.

[37] Act ..?. Iceland extended its zone further to 50 miles in 1972.

[38] Act of 24 March 1961relating to Norway's fishing limits (*NorskLovtdidend*, 1961, Part. I, 508).

[39] According to the clause, any favour granted by the Coastal State to a non – Contracting Party in exploiting the 6-to-12 mile zone should be automatically extended to all Parties. Same principle applied when another Party was granted a right to fish that was not entitled to. See on this point .A. de YTURRIAGA, *The International regime of fisheries: from UNCLOS 1982 to the presential sea, in Ocean Developments*, Netherlands, 1997, Vol. 30, p. 19.

In particular, within six miles measured from the baselines of the territorial sea, fishing was reserved to the fishermen of the coastal State. Special care was devoted, in this context, to the interests of foreign fishermen who had traditionally fished in the three to six-mile zone, by providing, for one side, a phasing-out period to adapt themselves to their exclusion from it and, on the other side, the possibility to accord the continuing of their rights to fish in such zones by voisinage arrangements.

Between six and twelve miles, fishing was still reserved to fishermen of the coastal State and, without any limit of time, to the fishermen of Contracting Parties which had habitually fished in that area in the period between 1st January 1953 and 31st December 1962.

Over the whole 12-mile zone, the Coastal State was invested with the power to regulate fisheries and enforce regulations, in such a way as to prevent discrimination, in form or in fact, against fishing vessels of other contracting parties engaged in fisheries pursuant the Convention.

Furthermore, in the 6-to-9 miles area the new regime provided the possibility for a coastal States to exclude, subject to approval of another Contracting Party, the exercise of historical rights by that Party in order to reserve fishing to the local population '*overwhelmingly dependent upon coastal fisheries'*(Articles 2, 3, 5, 8, 9 of the Convention).

In that way, a first European level rapprochement on fisheries issues was realised, by the creation of a peculiar multilateral preferential regime concerning access to fishing areas[40]. The European Fishery Convention was indeed an initial, important step towards the emerging of a common prospective in the management of fisheries resources, combined with an effort of guaranteeing, at the same time, the interests of the fisheries industries. Furthermore, the implementation of the Convention in the internal legal systems of Contracting States marked an initial rapprochement of national fishery legislations in Western Europe[41]. Article 10 of the Convention stated '*Nothing in the present Convention shall prevent the maintenance or establishment of a special regime in matters of fisheries: (a) as between States Members and Associated States of the European Economic Community',* therefore implicitly recognising the possibility for the Community to acquire an exclusive competence in the fishery field[42]. Last, but not least, the relevance of local communities dependent upon coastal fisheries was expressly recognised through the establishment a derogatory regime in relation to historical rights of fishermen of a Contracting Parties, by this stressing the importance of small-scale fishing industries

[40] J. A de YTURRIAGA, op. cit. p. 20.

[41]For a fuller account on the implementation of the European Fisheries Convention in the national legal orders of Contracting Parties see F. LAURSEN, *L'Europe bleue: La politique communautaire des ressouces marines, Amsterdam*, p. 68.

[42] In this sense see A. REY ANEIROS, op. cit. p. 45.

linked to local communities, and also of fisheries-related enterprises based on activities performed on the land.

I.4. The 1970 Regulations: a structural and a marketing policies for the European fishing industries

The Commission took its first steps towards the formulation of a comprehensive scheme for a common policy in the field of fisheries at the turn of the 1960s and 1970s. In those years, the increased liberalisation of trade in fish products due to the progressive enactment of the EEC custom union, together with tariff reductions in GATT, generated a stronger competition for the fishing industries of some Member States, such as Italy and France. This led the Commission to carry out a study on the economic trends in the European fishery industry, resulting in a Report on the *Situation in the Fisheries Sector of EEC Member States and Basic Principles for a Common Policy*[43], published in 1966. The report contained a proposal for the establishment of a common policy in the sphere of fisheries which was conceived as articulated in four main parts: a structural policy, a common organisation of market, a trade policy establishing trade rules with third States and a social policy. Two years later[44], on 6 June 1968, the Commission presented to the Council two draft Regulations (whose scope, not including social issues, was less ambitious compared to the 1966 Report).

In this respect, it is worth to say that these documents mainly reflected the vision of French fishermen' organisations, and in particular the need to establish mechanisms similar to those of the Common Agricultural Policy (CAP) to compensate the acceptance of a common customs tariff in fisheries products. As aforementioned, fisheries at that time was still perceived as a specific component of the CAP, to be managed essentially through the same two core instruments that applied to agriculture: a common market organisation supporting prices and protectionism on the one hand, and a structural policy to support modernisation of Member States' industries (in this case fishing fleets) on the other[45].

The imminent enlargement of EEC to United Kingdom, Denmark and Ireland, nations whose fishing capacity largely overpassed all the EEC Members, undoubtedly accelerated the

[43] "*Relazione sulla situazione del settore della pesca negli Stati membri della C.E.E. e sui principi di base per una politica comune"*, COM (66) 250, reproduced in OJ 29 March 1977, N° 58, p. 862.
[44] The practice of the'Luxembourg Compromise' started in 1966, according to which a systematic quest for consensus among the Member States should be required before adopting any decision, blocked for two years any significant process.
[45] See E. PENAS LADO, op. cit. p. 21.

process of adoption. Indeed, with the starting of the applications for membership in 1969, the expected increase of the European fishing industry as well as the potential declaration by the candidates of exclusive economic zones, or of a fisheries zone extending to 200 miles, pushed towards the approval of the first two structures and markets regulations.

Furthermore, the six Member States had established, as a general principle of enlargement policy, that any State wishing to join the European Economic Community shall accept the framework of EU law existing at the time of accession (the so called '*acquis communautaire*'). It was therefore felt the need of shaping a common position and 'acquis' in the domain of fisheries management, before the starting of negotiations with applicants[46].

As far as the scope of the new legislative framework, Regulation (ECC) No 2141/70 of the Council, of 20 October 1970, laying down a common structural policy for the fishing industry, provided that 'specific measures shall be adopted for appropriate action and the co-ordination of structural policies of Member States for the fishing industry, to promote harmonious and balanced development of this industry within the general economy and to encourage rational use of the biological resources of the sea and of inland waters' (Article 1). Furthermore, Article 2, integrating into the EEC structural policy the rules established under the 1964 European Fisheries Convention, established the principle of equal access (hereafter: the EA principle), according to which 'Member States shall ensure equal conditions of access to and the use of the fishing grounds for all the fishing vessels flying the flag of a Member State and registered in the Community territory'. In other words, the EA principle implies that any fishing vessels registered in a Member State has right to the same (equal) access to the waters of any other Member State, as vessels registered in that Member State, without any difference in treatment[47].

The EA principle, was to be particularly important in the further development of the Common Fisheries Policy. This principle, represents also nowadays one of the pillars on which the policy is based on. At the time, it represented a significant break with the international customary

[46] It can be argued that the principle of equal access established under the first fisheries Regulations founds its origin mainly in the prospect for the six EEC Member States of greater fishing opportunity in the waters of the new applicants, which possessed relevant fish resources. It is worth to note in this regard that the Regulations were adopted by the Council the day before the negotiations for accession with candidates were due to start.

[47] For a comprehensive analysis of the evolution of the principles of the CFP an notably of the principle of non-discrimination applied to the common fisheries policy see A. DEL VECCHIO, *La politique commune de la peche: axes de developpement*, in *Revue du Marchè unique europeenne*, 1995, p. 27 ff.; G. CATALDI, *Les principles generaux de la politique commune de la peche à l'aube du troisieme millenaire*, in *La Mediterranée et le droit de la mer à l'aube du 21e siecle*, under the supervision of G. CATALDI, Bruxelles, 2002, p. 413 ff ; D. SIMES, K. CREAN, *Historic prejudice and invisible boundaries : dilemmas for the develpment of the Common Fisheries Policy*, in BLAKE, *Peaceful management of trasboundary resources,* London, p. 395 – 411.

law of the seas, which had for long time allowed States to reserve the right to fish in the maritime areas under their jurisdiction for their own nationals and fishing vessels flying their flag. The principle was, moreover, a break with the general international practice established since 1945 by the Truman Declaration, of granting Coastal States exclusive or preferential fishing rights in specific zone of their coasts. The new rules confirmed the limitation of certain fishing grounds[48] to local population of the coastal regions concerned if depending primarily on inshore fishing (Article 4)[49].

In order to '*promote the rational development of the fishing industry within the framework of economic growth and social progress and to ensure an equitable standard of living for the population which depends on fishing for its livelihood'* (Article 10), special measures were encouraged, including restructuring of fishing fleets and other means of production to increase productivity, development of canning and processing installations in order to better adapt production to marketing requirements, effort to improve, in line with technical progress, standard and conditions of living of the population which depends on fishing for its livelihood.

Under Article 12, moreover a Standing Committee for the Fishing Industry was established, in order 'to promote the co-ordination of structural policies for the fishing industry and to ensure close and constant co-operation between Member States and the Commission*'*.

However, the new members, and particularly the UK, opposed the EA principle as they considered it as big threat to their national fishing industries' interests. It is worth to highlight in this respect that at that time fishermen of the Community of six used to fish well beyond their territorial waters, and that their catches were mainly concentrated in the waters adjacent to those of the future Member States, especially of United Kingdom and Ireland. In this sense, the EA principle was strongly supported by fishermen organisations in some of the six Member States (especially in Germany and Netherland), because it would have implied a recognised and secured access to the waters of new Members. Other countries, such as Italy and France, preferred to protect and reinforce their national industries by enhancing structural and market aid. In any case, both the EA principle and the structural and market Regulations adopted in 1970 must be understood as measures wished by producer organisations in the six original EEC Members to face the

[48]Situated within a limit of three nautical miles calculated from the base lines of the Member State bordering on the areas concerned (Article 4).

[49] This exception which was established in order to protect the interests of local communities depending from small-scale fisheries, was originally provided for 5 years from the entering into force of the 2141/70 ECC Regulation. However, it has been renewed every time in successive regulations, at present amounting to 12 miles. Such regime constitutes a derogation from one of the fundamental principles of EU law: non-discrimination. For a full account on this issue see A. DEL VECCHIO, *Politica comune della pesca e cooperazione internazionale in materia ambientale*, in *Il diritto dell'Unione europea*, anno X, fasc. 3, Milano, 2005, p. 530-531.

competition of the more developed fishing fleets and industries of the new entrants, with a view to protecting themselves from the possible consequences of enlargement. This explains why Regulation 2141/70, setting-out the EA principle, was adopted in October 1970 and entered into force on 1 February 1971, the same day in which the negotiations for the accession of new Member were opened. This was perceived as a *fait accompli* by the new comers, that had an obvious interest to reserve their territorial waters to their national fishermen.

They therefore required and obtained finally in the 1972 Act of Accession a 10-year derogation, for which each State '*could restrict fishing in waters under its jurisdiction, situated within a limit of 6–12 nautical lines, calculated from the baseline of the coastal Member State, to vessels which fish traditionally in those waters and operate from ports in that geographical coastal area'* (Article 100 of the Act of Accession)[50]. It was however also agreed that, during the derogatory period the existing special fishing rights (historical rights) of fishermen from the other Member States should have been preserved.

Regulation (CEE) n° 2142/70 of the Council, of 20 October 1970, established a common organisation of the market in fishery products. The aim was to promote the efficient marketing of fisheries products as well as to ensure market stability in order to help producers. For this purpose, the Regulation laid down common marketing standards to improve the quality of fisheries marketed (Articles 1–4), a common pricing system (Articles 7–16) as well as trade rules with third countries (Articles 17–21). But especially, the Regulation promoted the formation of enterprises associations, the so-called "producers' organisations" to implement those rules and represent interests of their members. In particular, under Article 5, producers' organisations shall undertake measures 'designed to promote implementation of fishing plans, concentration of supply and regularisation of prices'. Rules by means of which Member States could grant financial aid to 'encourage producers' organisations formation and to facilitate their operation' were also provided (Article 6).

I.5. UNCLOS III and further developments in the framework of the 1976 Regulation

In 1973, the same year in which Denmark, Ireland and the United Kingdom joined the EEC, the first session of the UN Third Conference on the Law of the Sea (UNCLOS III) was held in New York. The negotiation process in the framework of this Conference, resulting in the 1982

[50] On the confirmation of such exception in the following CFP regulation see foot note above. For an analysis of the issue in relation to Regulation (CE) n. 2371/2002 of 20 December 2002 see C. CATTABRIGA, RUGGERI, LADERCHI, L. VISAGGIO, *Art. 32 TCE*, in *Trattati dell'Unione europea e della Comunità europea*, under the supervision of A.TIZZANO, Milano, 2004, p. 315.

Convention on the Law of the Sea[51], was an important factor towards the development of a Common Fisheries Policy in Europe[52]. Indeed, since 1976, it appeared evident that an acquired principle of the Conference (that for sure would have been included in the final text of the Convention)[53] was the Coastal States' rights to declare a 200 nautical miles Exclusive Economic Zone[54] from their coastlines, following a trend initiated by Truman's proclamation of 1945[55]. It was equally clear that many countries would have established such a zone without waiting for the formal adoption of an international Convention. This caused concerns to the European Community, taking into account the impact that a worldwide practice of extended maritime boundaries would have had on the Community fishing industries[56]. Firstly, there was a risk of exclusion of Community fishing enterprises (long distant fleets) from the new declared exclusive zones of third States. Secondly, the risk that third-State vessels, excluded by the exclusive zones of other States, would have started to fish in the marine spaces adjacent to Member States' coastlines, thus overexploiting the already

[51] For an account of the principal elements of the United Convention of the Law of the Sea, and notably on its process of negotiation, rights and duties of coastal States and impacts of the Convention on the evolution of international law of the sea see, among a large literature, J.C. LUPINACCI, *Enfoque general de la Convencion de las Naciones Unidas sobre el derecho del mar*, in *Prospettive del diritto del mare all'alba del XXI secolo, Convegno italo-latinoamericano, 12 – 13 novembre 1998*, Roma, 1999, p. 77 – 105; Société française pour le droit international, *Perspectives du droit de la mer à l'issue de la 3e conférence des Nations Unies: Colloque de Rouen,* Paris, 1984.

[52] On the correspondent influence of fisheries law in the evolution and progressive development of the International Law of the Sea see T. SCOVAZZI, *La pesca nell'evoluzione del diritto del mare*, Parte prima, Milano, 1979, p. 33 – 90. For an analysis of the historical development of the International Fisheries Law and of the current regime of fisheries in International Law see D. VIGNES, G. CATALDI, R. CASADO RAIGÓN, *Le droit international de la peche maritime*, Bruxelles, 2000.

[53] The extension of exclusive economic zones under the United Nations Convention of the Law of the Sea raised several conflicts among coastal States and States whose distant fleets were no longer allowed to fish in areas fallen into the exclusive zones of coastal States. On this topic and notably in relation to swordfish see, among broad literature, A.E. LARSON, *Conflictos pesqueros contemporaneous: el caso del pez espada*, in *La gestion de los recouros marinos y la cooperacion internacional* (under the supervision of A. DEL VECCHIO), Rome, 2006, p. 111 – 152.

[54] For an extended analysis of the notion of Exclusive Economic Zone, its historical origins and evolution see A. DEL VECCHIO, *Zona economica esclusiva e Stati costieri*, Firenze, 1984.

[55] It is worth to mention, in this respect, that changes occurred in the fisheries field gave a strong contribution to the evolution of the general framework of international law of the sea. As it has been pointed out 'it was owing to pressure from the States to keep for themselves the exploitation of the living resources in their own territorial seas that the exclusive economic zone was introduced, first as a customary and then as a treaty norm. And, it is well known, the ZEE has profoundly changed the traditional law of the sea', U. LEANZA, A. DEL VECCHIO, *Fifty years of international case law on fisheries*, Napoli, 1996, p.7.

[56] For a fuller account on the implications of the 200 miles zones for the European fisheries industries and on the measures undertaken by the European Community in order to face it see R. CHURCHILL, D. OWEN, *The EC Common Fisheries Policy*, Oxford, 2010, p. 6 ff.

overwhelmed marine living resources. As a consequence[57], Council Resolution of 3 November 1976 on certain external aspects of the creation of a 200-mile fishing zone in the Community with effect from 1 January 1977 (generally referred to as the Hague Resolution)[58] was adopted. The Resolution was based on an initial package of proposals[59] submitted by the Commission to the Council, which outlined four topics of special interest for the EEC fisheries industries, and namely: - the extension of Member States' fishery limits to 200 miles in the North Sea and North Atlantic; - the drafting of a Regulation to establish a system of common fisheries management within such new established limits;- the empowerment of the Commission, and not of individual Member States, to negotiate international arrangements allowing Community vessels to fish within the limits established by third States or allowing the continuity of third States' right to fish in waters which have become, after the extension to 200 miles, 'Community waters'; - financial aid measures to restructure the EEC fishing fleets as a consequence of the extension of maritime limits to 200 miles[60].

With regards to the first topic, the Hague Resolution allowed EEC Member States 'to extend the limits of their fishing zones to 200 miles off their North Sea and North Atlantic coasts, without prejudice to similar action being taken for the other fishing zones within their jurisdiction such as the Mediterranean'[61] (Second paragraph of the Resolution). The provision provided, in other words, a '*concerted action*' aimed at the establishment of a 200 miles fishing Community zone[62]. Another topic of the Commission's proposal on which a compromise was easily reached had been the Commission's empowerment to negotiate international agreements. The Hague Resolution imposed

[57] And notably after the declaration by Iceland of an Exclusive Economic Zone in 1973, followed by declarations of United States, Canada, Norway, Soviet Union.

[58] Published on the O.J. n°105, Vol. 24, 7 May 1981, p.1.

[59] Communication of the Commission to the Council, *Future external fisheries policy. An internal fisheries system*, of 23 September 1976, COM (76) 500 final.

[60] By reducing the fleet catching capacity, on the one side, and by adapting the distant water fleets for fishing in EEC waters, on the other.

[61] Taking into account the nature of semi enclosed sea of the Mediterranean (Article 121 of the UNCLOS), the Hague Resolution did not provided for the establishment of national zones by Member States in this basin. However, over the last few decades, several Mediterranean Coastal States have declared both Economic Exclusive Zones (Egypt, French, Lebanon, Libya, Malta, Morocco, Syria, Tunisia) as well as *minoris generis* zones, such as ecological zones (French, Italy), fisheries protection zones (Spain, Algeria, Malta), and mixed ecological and fisheries zones (Slovenia e Croazia). For a comprehensive analysis of these developments and their impact on the evolution on the Law on the Sea, see A. DEL VECCHIO, *Inmaiore stat minus: la ZEE e le zone di protezione ecologica nel Mediterraneo*, in *Studi in onore di Vincenzo Starace*, Napoli, 2008, pp. 207-220. On the legal regime of the Mediterranean Sea and the factors influencing the implementation of the Common Fisheries Policy in the Mediterranean see R. CASADO RAIGÓN, *El régimen jurídico de la pesca en Mediterráneo. La aplicación de la Política Pesquera de la Comunidad Europea*, Sevilla, 2008.

[62] See A. DEL VECCHIO, *Pêche maritime – Politique commune de la pêche*, Fasc. 1351, Lexis Nexis Juris Classeur – Traité européen, 2015, B.

on Member States the obligation to not take unilateral actions in this sense by providing that national fisheries measures shall be 'approved' by the Commission (Annex VI to the Resolution)[63]. The Resolution then empowered exclusively the Commission (and not individual Member States) to negotiate and conclude international agreement with third States, in accordance with the Council's directives (Fourth paragraph). This statement was the first step towards the recognition of an exclusive competence of the Commission to deal with fisheries issues independently from the Member States. In this respect, it is worth noticing that the idea of such a competence was further developed in several cases brought before the Court of Justice of the European Union in the following years. Firstly, in the Judgment *Cornelis Kramer and Others, Joined Cases 3, 4 and 6/76 (14 July 1976),* the Court of Justice stated that it follows from Article 102 of the Act of Accession, from Article 1 of Regulation 2141/70 and moreover from 'the very nature of things' that 'the rule-making authority of the Community *ratione materiae* also extends — in so far as the Member States have similar authority under public international law — to fishing on the high seas'.

In others words, the Court estimated that the duties and powers which Community law has established and assigned to the Institutions of the Community at the internal level, should also been regarded as the foundation of the Community's authority to adopt any measure aiming at the preservation of marine living resources, including the conclusion of international agreements in this field.

The principle of the exclusive competence of the Community was then further confirmed by the several following cases law[64] and grounded the idea that the European Commission should participate as representative of the Community as a whole, in all the international fora and, firstly, within the sessions of the Third UN Conference for the Law of the Sea[65].

Indeed, in many occasions, during the Conference, the European Commission stressed the need to express a common European stance, which should balance the diversified and fragmented interests of the member States with the European Community's own international obligations. In particular, during the eleventh and last session (Spring 1982) the Commission recalled that Members States had transferred competence to the Community with regard to the conservation and management of fishing resources, and that the Community was hence competent to adopt the

[63] On the binding nature of the annex see **Case C-4/96, Judgment of the Court of Justice of the European Union of 19 February 1998, Northern Ireland Fish Producers' Organisation Ltd (NIFPO) and Northern Ireland Fishermen's Federation vs Department of Agriculture for Northern Ireland.**

[64] CJCE, 4 oct. 1979, aff. 141/78, *French Republic vs United Kingdom, p. 2923; 1982 aff. 287/81, Anklagemyndigheden vs Jack Noble Kerr; Wolfgang Gewiese , p. 4053; 1984, aff.24/83 Manfred Mehlich vs Colin Scott Mackenzie p. 817.*

[65] On this point see, among others: A. DEL VECCHIO, *La Pêche maritime– Politique commune de la pêche*, op. cit. par. B.

relevant rules that Member States shall later to enforce, as well as to enter into international agreements with third States and/or international organisations[66]. Otherwise, in its important judgment Commission vs. United Kingdom of 1981, the Court had interpreted Article 102 of the Act of Accession having the meaning that, as of 1979, the EC had an exclusive competence to adopt conservation measures for Community waters[67].

It was particularly difficult, however, to find an agreement on the second element of the 1976 Commission's package of proposals, concerning the collective fisheries management in Community waters. In this field, conservation of living resources through catches limitation might be in contrast with the interests of the European fishing industries, since EU fleets were too large in relation to stocks as to guarantee to fish them at a sustainable level. This raised problems in terms of allocation of quotas among Member States as well as in terms of access to fishing zones, as some States, and notably the UK, intended to reserve national zones to their fishermen on the basis of historic rights and on the basis of their major fleets. Agreements on these aspects were reached only in 1983[68], when the Council adopted a revised version of the Commission proposal to establish a Community system of fish stock management in EEC waters[69].

As far as the last point of the Commission package, related to the structural measures to modernize the EEC fishing fleets, in 1978 the Council adopted an interim regime for restructuring the inshore fishing industry. However, as for the collective management of fisheries, only in 1983 a more complete agreement was reached.

Moreover, in 1978, the Commission undertook a review of the 1970 CFP Regulation establishing a common market organisation for fishery products to see whether, and to which extent, amendments should be made in this field as a consequence of the extension of EEC fishing limits to 200 miles and in the light of experience gained in the first years since when this practice was established. The proposal of revision maintained the fundamental elements of the common

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[66]On the influence of the Community's international obligations and external relations in shaping the Institutions' exclusive competence over the conservation of marine biological resources see A. DEL VECCHIO, *Politica commune della pesca e cooperazione internazionale in materia ambientale*, in *Il Diritto dell'Unione europea*, 2005, p. 529 ff.

[67]Article 102 of the 1972 Act of Accession provided that: *"[f]rom the sixth year after accession at the latest, the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view of ensuring the protection of the fishing grounds and the conservation of biological resources of the sea*". On this basis, the Court in the Kramer case commented the exclusive EU decision-making competence as follows: "[*i]t should be stated first that this authority which the MS have is only of a transitional nature … it follows from the foregoing considerations that this authority will come to an end 'from the sixth year after accession at the latest' since the Council must by then have adopted … measures for the conservation of resources of the sea".*

[68]Unitl 1983, a system of short term Community and national conservation measures was in place. See R. Churchill, D. OWEN, *The EC Common Fishery Policy*, op. cit. p. 45.

[69] See below in this Chapter , par. I. 6.

organisation of the market already in place but introduced some little details, such as the reduction of the amount of fish withdrawn from the market, the reinforcement of the role of producers' organisations, the strengthening of measures to protect the fishermen of the Community from imports. Similarly, Council Regulation (EEC) 101/76 laying down a common structural policy for the fishing industry, cannot to be considered as a real reform of the 1970 regulation on structural policy. The only significant change it introduced was the removal of Article 4, concerning a derogation from the principle of free access within a three nautical miles limit from the Member States' coast lines, because this provision had already been introduced by Articles 100 and 101 of the 1972 Act of Accession, allowing for a general six nautical miles limit (later extended to 12 nautical miles).

I.6. From 1983 to 1992: the CFP as a conservation, structural, market and external policy and its consequences on the fisheries enterprises

The main factors that, after the failure to reach a compromise on the establishment of a common fisheries management, acted as powerful incentives to set a comprehensive framework for a common fisheries policy were, on the one side, the expiration of the ten-year derogation of the equal access principle set in the 1972 Act of Accession, and on the other side, the perspective of a further enlargement of the EEC to Spain and Portugal, two important fishing actors. Indeed, without any further derogation, after 1982 the principle of equal access would have had to fully apply, a consequence that would have harmed the industries of several countries. Moreover, it was appropriate to adopt a common system of fishery management before starting the negotiations with new potential adherents.

The result was the adoption of a set of Regulations in 1983. The most significant were the Council Regulation (EEC) No 170/83 of 25 January 1983 establishing a Community system for the conservation and management of fishery resources and the Council Regulation (EEC) No 171/83 of 25 January 1983 laying down certain technical measures for the conservation of fishery resources.

Several important changes were introduced. Firstly, the scope of the common fisheries policy was enlarged, since Article 1 of Regulation 170/83 explicitly stated the primacy of conservation amongst its objectives. In particular, the aim of the Community system for the conservation and management of fisheries resources was described as to 'ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their balanced exploitation on a lasting basis and in appropriate economic and social conditions'. It was much more compared to the 1976 Regulation that, on the contrary, merely provided for"[encouraging] a

rational use of the biological resources of the sea and of inland waters". Secondly, Article 2 and 3 required the adoption of conservation measures necessary to achieve the objectives specified in Article 1, providing that the Council, acting by a qualified majority on a proposal from the Commission, shall adopt 'conservation measures in the light of the available scientific advice and, in particular, of the report prepared by the Scientific and Technical Committee for Fisheries'[70].Conservation measures were laid down in Regulation 171/ 83 and included a range of obligations for EU fisheries enterprises, such as limitation of the use of specific gears or vessels, minimum fish sizes, closed areas and seasons.

With regards to total allowable catches (TACs), it was confirmed the idea that it was to the Council to adopt TACs for the main fish stocks of commercial interest in the Community's waters. TACs had to be divided into quotas distributed among Member States in order to ensure the relative stability of fishing activities for each stock concerned, which was evaluated by considering, as criterion, the '*past fishing performance*, the *specific needs of regions particularly dependent on fishing activities and the potential loss of fishing opportunities in non EC-waters as a consequence of the extension of fishing limits to 200 miles'*[71]. The regime was, therefore, targeted on the specific needs of national fisheries industries. In particular, it was agreed that allocation of common resources would have be done on the basis of percentages fixed in line with historical catches (i.e. the demonstrated activities of the fleets) and not subjected to re-negotiation each year, in other to preserve the continuity and stability of the sector.

Furthermore, the new framework introduced provisions for member States to exchange quotas amongst themselves, requirements for reporting of information, adoption of supervisory measures and established a Management Committee for Fishery Resources with advisory powers, consisting in representative of Member States (Article 13 and ff) . Finally, it provided an evaluation of the CFP and assessed the need of a subsequent reform of it within 10 years'.

In summary, after changes made by the 1983 Regulations, the Common fisheries policy appeared as to be organised around four main pillars: a structural policy (the 1976 Regulation was not repealed in 1983) and a market policy, that both supported the economic development and growth of the European fisheries enterprises, together with a conservation policy designed to balance the pressure on stocks with environmental objectives and, finally, an external policy,

[70]Established under Article 12 of the Regulation.
[71]See RR. Churchill, EEC Fisheries Law. Op. cit. p. 11.

concerning international fisheries agreements and the activities of fisheries enterprises operating in external waters[72].

As can be noted when considering the CFP of today, some elements such as the principle of relative stability, the 12-mile access regime, TACs system, conservation measures and the structure and articulation of the policy itself have remained stable throughout 30 years, despite EU fleets, consumers' habits, economic conditions have evolved over time. This can be explained, on the one hand, by the fact that these elements were often the result of long and complex negotiations, so that it is difficult to re-open these issues even nowadays. On the other side, the continuity of the CFP shows how the world of fisheries is substantially conservative, enshrined with traditions and consolidated practices, and therefore particularly resilient to changes[73]. The maintenance of the 12-mile access regime in the current CFP, for instance, is a persistent exception to the principle of non-discrimination, which been preserved and even extended up to 100 nautical miles for the Union outermost regions (Article 2 and 3 of the new CFP Basic Regulation).

After Spain and Portugal became Members of the EEC in 1986, the Common Fisheries Policy entered in a phase of progressive consolidation. Every year, the Council was able to fix quotas and TACs. The system of fishery management, applied until then only to the North Sea and the North East Atlantic, was extended to the Baltic Sea. At the external level, the EC continued to negotiate access agreements with third States and, by the early 1990s, it had become member of several regional fisheries management organisations (RFMOs). With regard to structural aspects, more attention was progressively given to the reduction of the fleets' excess capacity instead of modernising vessels.

However, a Commission report in 1991[74] stressed the need to improve the functioning of the new policy, as the fishing industry was, at that time, facing a major crisis. Critical aspects were identified, in particular, in overfishing of many stocks, lack of compliance with the EC's conservation measures, lack of social policy instruments, as well as insufficient coordination between the management of resources and structural and marketing policies[75]. On the state of

[72]On the structure of the Common Fisheries Policy arisen from the 1983 reform see T. TREVES, PINESCHI, *The Law of the Sea*: *the European Union and its Member States*, in *Ocean Development and International Law*, The Hague, Boston, London, 1997, p. 16.

[73] See E. PENAS LADO, op. cit. p. 31 – 33.

[74]See the Report of the Commission to the Council and the Parliament on the Common Fisheries Policy, SEC (91) 2288 of 18 December 1991.

[75]In more details, the Report listed the most significant critical aspects of the CFP as follows : "a resource management/conservation policy founded exclusively on the fixing of TACs and their allocation in the form of quotas, leading in the absence of any real control over fishing capacity to a race in terms of vessels and catches, with inevitable discards at sea; - failure to take into account certain constraints such as the particular characteristics of multispecies fisheries; - a complex resource management mode requiring major surveillance and control mechanisms, which have been unable to ensure compliance with the rules given the

fishing industries the Report recognized that 'European fisheries are in an extremely vulnerable position, both economically and socially, especially in terms of employment. The social situation is particularly worrying as the main impact of the sectorial crisis is felt in regions where fishing and fish farming are concentrated and play a major role in the maintenance of socio-economic life, creating a situation of close dependence in regions and/or areas where socio-economic alternatives are generally rare.'[76]. Furthermore, the 1976 structural policy appeared to be in contrast with the objectives of the 1983 conservation policy, resulting in increasing transfers of public funds to the fishing industry in order to modernise the Community's fishing fleet, instead of reducing over-fishing and reinforcing conservation measures. As for the balance between environmental and social aspects, the Report stressed that 'the purpose of the CFP must be to ensure the sustainability of the fishing industry, which depends on balanced and rational exploitation of the living resources of the sea. This is a *sine qua non condition* of its economic viability. But rebalancing fishing effort against resources will involve socio-economic upheavals for which the Community must find solutions, especially in the case of social problems, in order to safeguard the pursuit of social and economic cohesion throughout the Community'. Indeed, a new basic Regulation, Council Regulation (EEC) No 3760/92, establishing a Community system for fisheries and aquaculture, was adopted in 1992. In the new Regulation, although the structure of the policy, since 1983 articulated in four main pillars, was maintained, the new rules emphasized the implications of fishing to marine ecosystem and thus the need to develop a more sustainable management of marine living resources.

Once again, the evolution of the CFP reflected the major changes occurred in international law, being those advancements of the European fisheries policy undoubtedly related to the 1992 United Nations Conference on Environment and Development (UNCED), also known as Rio de Janeiro Earth Summit, in whose framework sustainable development and fair management of natural resources had been a central issue[77].

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inadequacy of coercive measures at Community level and the lack of political will; - insufficient heed for economic parameters and too much emphasis on the biological approach to resource management; - insufficient heed for social parameters and lack of a genuine social policy with instruments to organise the necessary restructuring (job losses, reconversion), while assuring the future of the industry (training);- compartmentalisation of CFP measures and lack of coherence between them, especially between market mechanisms and structural policy, aggravated by failure to apply sanctions against illegal practices'.

[76]See p. 4 of the Report.

[77] One of the main outcome of the Conference was the adoption of the Rio Declaration on Environment and Development (Rio Declaration) and of the so-called Agenda 21. In both documents, constant reference is made to the principle of sustainable development as well as to the precautionary approach. As far as marine environment is concerned, seas and oceans are described as an essential component of global life, whose protection is fundamental to ensure the achievement of sustainable development objectives. In this perspective, both international cooperation and coordination among States, as well as the development of 'new approaches to marine and coastal area management at the national, subregional, regional and global

Indeed, the Reform introduced several elements directly impacting on fisheries enterprises such as a reduction in the size of the Community's fishing fleets and incentive to more selective fishing together with structural measures to alleviate the socio-economic effects of such reduction (Article 4). It also introduced the concept of '*fishing efforts*', thus the principle to limit the time that vessels are allowed to spend at sea. Major changes, compared to the 1983 regime, were the inclusion of aquaculture in the Common Fisheries Policy, the obligation to introduce a system of fishing license (Article 5), the provision of conservation measures taken at national level and only applicable to fishermen of the Member State concerned (Article 10); immediate action of the Commission in case of resources at risk (Article 15). It finally provided that a review of the EC's fishery system of fisheries management would have taken place by the end of 2002.

In the years that followed, the Community system of fishery management expanded also to the Mediterranean Sea[78]. The importance of environmental protection in fishery management increased after the Treaty on European Union required the integration of environmental considerations into various Community policies (Article 6). New global and regional fisheries agreements concluded by the EC with third States, in particular developing countries, and regional organisations, provided a better framework for fishery management. Common rules on intra Community trade were extended to fishing trade between the Community and EFTA States and access for Community vessels to EFTA States' waters increased. The growing importance of the CFP is reflected in the fact that fisheries issues were decisive for the non – accession of Norway

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levels, approaches that are integrated in content and are precautionary and anticipatory in ambit' (Article 17.1) are strongly recommended.
On this issues, and notably on influence of the principles of international environmental law on the international regime of fisheries see, among others, T. SCOVAZZI, *Le norme internazionali in tema di pesca resposabile,* in *Osservatorio internzionale, in Rivista giuridica dell'ambiente*, 2012, n. 3 / 4, p. 447. For a comprehensive analysis of the development of the principles of International environmental law in the different regional systems and of their progressive integration in the different fields of International law see DEL VECCHIO and A. DAL RI JUNIOR*, Diritto internazionale dell'ambiente dopo il Vertice di Johannesburg*, Roma, 2005.

[78] For a full analysis of the several factors that influence the application of the CFP in the Mediterranean sea, with particular reference to the Regulation (EC) No 1626/94 of 27 June 1994 laying down certain technical measures for the conservation of fishery resources in the Mediterranean and Regulation (EC) No 1967/2006 of 21 December 2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea see R. CASADO RAIGÓN, *El regime jurìdico de la pesca en el Mediterraneo. La aplicacion de la Politica Pesquera de la Comunidad Europea*, Seville, 2008.
For an account of the legal regime applicable to Mediterranean sea before the adoption of 1626/94 Regulation see U. LEANZA, *Le regime juridique international de la mer Mediterranée,* in Recueil des Cours de l'Academie de droit de Droit International 1992-V, p. 145. On the same issue, with regard to the conclusion of bilateral agreements and delimitation of maritime zones in the Mediterranean sea in the period before the entering into force of the 1994 Regulation see P. FOIS, G. PONZEVERONI, A. BASSU, *La cooperazione transfontaliera nel Mediterraneo, Aspetti giuridici e politici*, in *Atti del Convegno di Studi organizzato dalla Facoltà di gurispridenza dell'Università di Sassari*, Sassari- Alghero, 18-20 Aprile 1991.

voted by referendum in 1994. Most of the Norwegian industry representatives, in fact, strongly opposed the accession. Firstly, the membership in the EC would have meant the acceptance of the *acquis communautaire*. Secondly, Norway would have had a limited power in the Council despite the relevance of its fishing industry.

With the adoption of a new basic Regulation on the Common Organisation of the Market in Fisheries Products (hereinafter: the Marketing Regulation)[79], covering both fisheries and aquaculture products, the role of organisation producers was strengthened. The rules provided measures to sustain producers and stabilize market through a regime fixing guide price and withdrawal price, including financial compensation, storage premium and flat-rate aid (Articles 9–21) as well as provisions implementing the Common Customs Tariff in the fisheries sector (Articles 22–28).

I.7. The 2002 Regulation and the starting of the 2011 reform process

AS we have seen, the 1992 Reform, went further than the 1983 Regulation on stressing the importance of conservation issues, but also added more non-conservation objectives to the CFP through its constant reference to producers and consumers and socio-economic measures. It could be argued that, from an environmental perspective, the measures introduced did not reach the degree of change which was needed to address the challenges facing the Community's fisheries management. As provided by the 1992 Regulation, a review of the fisheries policy was scheduled for 2002. A 2001 Green Paper on the Future of the Community Fisheries Policy[80] released by the European Commission, whose aim was to analyse the entire CFP functioning, concluded that the CFP had failed to ensure the sustainable exploitation of resources.

TACs had been set, in order to sustain the industry, at a level above that what scientists were recommending, hence they were compromising the sustainable exploitation of fish stocks. The lack of a good enforcement of quotas and conservative measures, as well as the inadequacy of the measures adopted to reduce fleets capacity, also contributed to this failure. Similarly to the 1991 Commission Report which had initiated the 1992 Reform, a decade later the Commission stressed the need of a comprehensive fisheries policy reform.

[79]Council Regulation (EEC) No 3687/91 of 28 November 1991establishing a Community system for fisheries and aquaculture.

[80]Green Paper on the future of the Common Fisheries Policy, presented by the Commission on 20 March 2001, COM(2001) 135 final.

Indeed, following a Roadmap on the Reform of the Common Fisheries Policy published in May 2002[81], Regulation (EC) No 2371/2002[82] was adopted by the Council. The scope of the Common Fisheries Policy was enlarged. As in Regulation 3760/92, it covered '*the conservation, management and exploitation of living aquatic resources, aquaculture, and the processing and marketing of* fisheries and aquaculture products' (Article 1.1.), but in the new Regulation it was specified which kind of measures were to undertake to achieve these objectives. Indeed Article 2.1. stated that 'The Common Fisheries Policy shall provide for coherent measures concerning: (a) conservation, management and exploitation of living aquatic resources, (b) limitation of the environmental impact of fishing, (c) conditions of access to waters and resources, (d) structural policy and the management of the fleet capacity, (e) control and enforcement, (f) aquaculture, (g) common organisation of the markets, and (h) international relations.'

The scope of Regulation was also extended with respect to whom the common fisheries policy was to apply, including not only the Community waters and the activities performed by Community fishing vessels, but also, in line with the UNCLOS provisions, 'nationals of Member States' that may be engaged in unreported, unregulated and illegal (IUU fishing) in waters of third States. The principles of precautionary approach, ecosystem approach to fisheries management, environmental protection, good governance and involvement of stakeholders, were expressly integrated and took a central role in the framework of the Policy. As a whole, the 2002 CFP Regulation reflected the intention to progress towards a more long term approach to fisheries management, based on multi-annual plans instead of the annual decision-making process. This Regulation reflected also the need to implement a new fleet policy to limit and gradually reduce structural fishing overcapacity, as well as the commitment to improve the governance of the CFP through Regional Advisory Councils (RACs)[83] and enhance the participation of stakeholders, especially the industries, to the decision-making process.

Despite the new setting of the policy improved significantly the way in which fisheries issues were addressed, the Commission decided to envisage a reviewing process earlier than scheduled[84]. There was, firstly, the need to align the CFP with the Maritime Framework Strategy

[81]Communication of the Commission of 28 May 2002, on the reform of the Common Fisheries Policy (Roadmap), COM(2002)181 final.

[82]Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

[83] For an overview of the involvement of stakeholders in the CFP, notably with regards to the functioning of RACs see F.J. CORREIA CARDOSO, *Conselhos consultivos regionais no sector das pescas: uma solução inovadora do direitocomunitário*, Évora, 2007.

[84] In December 2007, the Court of Auditors criticised the status of the CFP, with particular reference to the control and enforcement system. See the Report 7/2007 on the control, inspection and sanction systems

Directive adopted in 2008. There was, at the same time, the need to take into account major changes following the enlargement of EU to ten new Member States, most of them former Communist States from Eastern and Central Europe, that joined the European Union in 2004. Among them, Estonia, Latvia, Lithuania and Poland had significant fisheries industries and enterprises, all lying on the Baltic Sea, which in that way became part of the Community waters. The same applied to the Black Sea with the accession of Rumania and Bulgaria in 2007. Furthermore, the challenge of globalisation, climate change, degradation of marine environment, energy sustainability and maritime safety and security, stressed the need of a more coherent approach to maritime issues, based on a increased coordination between different policies areas[85].

I.8. The preparatory phase of the new reform: fishermen as stakeholders involved in decision making processes

The Commission published a second *Green Paper* on the Reform of the Common Fisheries Policy in 2009[86]. This document, identified several structural failures of the CFP. In particular, it stressed how the capacity of the European fishing fleets had not been reduced as much as necessary to be in balance with environmental standards. This fact, combined with the low level of fish stocks, deeply threatened and damaged, in a sort of vicious circle, the economic performance of the fishing enterprises[87]. In other words, five elements were identified as unsuccessful: - Fleet overcapacity; -

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relating to the rules on conservation of Community fisheries resources together with Commission replies, OJ C 317/1; 2007.

[85] It is worth to underline, in this respect, that the complexity of the Common Fisheries Policy and of its evolution stresses the need to establish a global and integrated governance which include all the sectorial policies which have impacts on seas and oceans. In this sense, see A. DEL VECCHIO, *Una politica marittima integrate per l'Unione europea*, in *La politica martitima comunitaria*, Rome, 2009, p. 20.

[86] Green Paper of 24 April 2009 on the reform of the Common Fisheries Policy, COM (2009) 163 final.

[87] According to the Commission Staff Working Document 'Reflections for further reform of the CFP' prepared to back up the Green Paper, overfished stocks and decline of the fishing industry create the conditions for further deterioration. Such vicious circle is described as follows '*Excessive subsidising, ineffective controls, technological development and also an insufficient political will to introduce effective instruments to adjust fleet capacity and neutralise incentives to overfishing have resulted in over investment and thus overcapacity relative to the resource base. Such overcapacity has led to political pressures for excessive quotas and to strong economic incentives for fishing practices which are unsustainable. Member State have focused on keeping their fleets busy rather than adopting proposals for sustainable fishing policies. Control and enforcement are inadequate and are insufficient to stop oversized fleets from overfishing the resources and fishing illegally. This enforcement weakness favours the maintenance of overcapacity. Many years of fishing at unsustainable rates have led to much reduced fish populations in the sea and thus reduced catch opportunities. This has had negative economic and social impacts and has also lead to high discard rates and high and unnecessary environmental impacts. The vicious circle is closed when reduced fishing opportunities and poor economic performance lead to even stronger pressures from*

Imprecise policy objectives resulting in insufficient guidance on decision-making and implementation processes; - short-term focus in management; - insufficient involvement of the industry; - Lack of Member States political will to ensure compliance with CFP rules[88].

On this basis, the Green Paper initiated a consultation process on the review of the CFP. A wide range of citizens, fishers associations, NGOs, Academia, Ministries, regional and local government, other EU Institutions and EU advisory bodies and third States submitted their statements[89] to the Commission. As a whole, contributions stressed a key concept that any forthcoming reform was expected to integrate: the protection of the environment and social - economical dimensions are closely interconnected, since ecological sustainability create the basis for viable fishing enterprises.

However, despite broad consensus on general principles, a great variety of point of views emerged on the ways to achieve these objectives[90]. As far as the interests of the fishery sector are concerned, industry representatives[91] (in particular the catching enterprises) expressed the view that Maximum Sustainable Yield (MSY) should be regarded more as a director rate than a specific target, but most of all that its correct implementation requires a flexible timeframe, especially in mixed fishery.

Several contributions, in particular from Member States, highlighted the need to make Producers Organisations (POs) and other fishermen's organizations more responsible for the implementation of conservation and control measures, leaving best technical solutions to the sector and stressing, at the same time, that self-management should be developed in accordance with assessment of risks and benefits, as well as taking into account national specificities (i.e. the national legal framework). On this point, however, the industry pointed out that self-management should not shift responsibility for the failure of fisheries management from administrations to the fishermen, while the large majority of NGOs, supported the option of introducing participatory governance or co-management but not self-management, since devolution of greater responsibility to the industry would require more rigorous control and enforcement.

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the industry to let short term concerns compromise the long term sustainability of fisheries even further. It has proven difficult for Member State governments to resist this pressure'.

[88] See on the point M.SALOMON, T. MARKUS, M. DROSS, *Masterstroke or paper tiger – The reform of the EU's Common Fisheries Policy*, in *Marine Policy* 47 (2014), 76 – 84.

[89] A total of 382 contributions were received during the consultation period. The deadline to submit observation was on 31 December 2009.

[90] See the Commission Staff Working Document *Synthesis of the Consultation on the Reform of the Common Fisheries Policy* of 16 April 2010, SEC (2010), 428 final.

[91] Industry was represented by fishers associations, angler associations, processor organisations, retailers, tourist bodies.

Incentives to the establishment of Producer's organisations, were advocated by all stakeholders, especially for fragmented industries. Several Member States and industry contributions underlined, in this respect, how POs may play a key role in production and resource management, market planning, innovation and concentration of supply.

The importance of small-scale fisheries was broadly recognized, with the majority of contributors underlining that the introduction of fishing opportunities regimes should not jeopardize the continued existence of the small-scale coastal fleets.

The alignment of the CFP with eco-system approach, Maritime Strategy Framework Directive and environmental legislation received a large support, despite visions were divided on the ways to implement it. The industry stressed how the development of integrated maritime approach might enhance the weight of fisheries sector towards other economic operators.

As for public financial support, several NGOs suggested elimination or phasing out of subsides in order to not maintain fishery dependence on public sector. On the other side, Member States and industry groups proposed the establishment of an industry support mechanisms for environmental crisis or emergencies. Aquaculture was also seen by many contributors as a potential beneficiary of public support, despite several environmental NGO and consumer representatives expressed concerns on its negative impacts on the environment.

On the basis of outcome emerged from the consultation process, the Commission issued a reform in July 2011, by adopting a new package of proposal much more ambitious of any previous initiative. The package included a proposal for a new Basic Regulation, a reformed market organisation and a communication on the perspectives of the CFP's external dimension. The most innovative part provided a ban on discards as well as an obligation to reach MSY levels for all commercial stock by 2015. For the first time, the concept of fish mortality and spawning stock biomass were mentioned. In December 2011, the Commission also published proposals for the European Maritime and Fisheries Fund (EMFF), the financial instrument to support delivery of the reformed CFP.

A political agreement between the European Institutions on the Basic Management Regulation and on the Fisheries Market Organisation was reached in May 2013, and both Regulations came into force in January 2014. The trilogue negociations for the financial Regulation began in October 2013, and the **European Maritime and Fisheries Fund (EMFF), was finally adopted on 15 May 2014.**

I.9. The 2013 reform of the CFP: a preliminary overview

The Common Fisheries Policy (CFP) reform 'package' will be examined in the present work with particular reference to opportunities, challenges and issues concerning EU fisheries enterprises. As a preliminary remark, it can be stressed that the package consists of three main texts: the basic Regulation for the Common Fisheries Policy[92], a Regulation on the Common Market Organisation (CMO)[93] and, last to be adopted, the Regulation for the **European Maritime and Fisheries Fund (EMFF)**[94]. Sustainability is at the heart of the reform, as the core objective of the new rules is to make fishing sustainable environmentally, economically and socially. But the essential question is how to reconcile and balance in an new way these three strands that are so often in contradiction.

Before entering into the analysis, it is worth to briefly recall here the main features of the legislative framework introduced by the reform, in order to give a general view of the issues which will be treated in depth in the following chapters.

Firstly, one of the major commitment of the reform is the engagement to ensure that fish stocks within the EU waters will be fished at levels below maximum sustainable yield by 2015, at the latest by 2020. The core idea is that if stocks are exploited in a sustainable way, stock sizes would increase significantly, which improves catch levels and revenues of the fishing industry. Sustainable fishing will also help to stabilise prices under transparent conditions, thus bringing benefits for consumers.

Discarding– the practice of throwing unwanted fish overboard – will be banned by the introduction of a landing obligation to be implemented progressively between 2015 and 2019. In this way, fishermen will be obliged to land all the commercial species that they catch and residual catches of under-sized fish that can generally not be sold for human consumption, will be used for

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[92]Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC.

[93]**Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products and repealing Council Regulations (EEC) No 922/72, (EEC) No 234/79, (EC) No 1037/2001 and (EC) No 1234/2007.**

[94]Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council.

the production of bone meal. The ban is supposed to be an incentive for fishermen to use more selective fishing gears.

Furthermore, ecosystem multi-annual plans will cover more fish stocks in fewer plans, moving from a single-stock approach to multi-species plans.

The reform also aims to make Member States more responsible in management of fishing fleet capacity. It provides that where a Member State identifies overcapacity in a fleet segment, it will develop an action plan to reduce this overcapacity.

Moreover, with the new rules, the decisions-making process is brought closer to the fishing ground. The reform is expected to end the monopole of decision-making at the EU level: EU legislators will define the general framework, the principles and standards, the overall targets, the performance indicators and the timeframes. But Member States and stakeholders will then co-operate at regional and sea-basin level to develop implementing measures targeted to their special needs and conditions. It is also provided the opportunity to introduce a system of transferable fishing concessions that should reward more efficient enterprises.

Furthermore, with regard to the new market policy, the aim of the reform is to reinforce market stability by making Producers' Organisations (POs) more responsible and involved in the decision-making process. Indeed, the Reform allows producer organisations to buy up fisheries products when prices fall under a certain level, and store the products for placing them on the market at a later stage. Moreover, POs are called to play a significant role in collective management, monitoring and control of fisheries. From the consumers' side, new marketing standards on labelling, quality and traceability of products have been introduced to give consumers clearer information and help them to support sustainable fisheries. On the one side, this create new obligations for the industries, on the other, it represent a valuable opportunity to strengthen the differentiation and added value of fisheries products.

Last, but not least, the reform is based on a broad, international perspective. As the EU is the world's largest importer of fisheries products in terms of value, the challenge is to deeply integrate the Common Fisheries in the broader external action and development policy of the European Union. In this regards, EU fisheries enterprises operating in external waters have an important role to play in both the bilateral and multilateral dimension.

IV.10. The Integrated Maritime Policy of the European Union: fisheries as a part of a broader maritime governance

When dealing with the today common fisheries policy it cannot be ignored that the CFP is inserted in the broader framework of the Integrated Maritime Policy (IMP) launched in 2007 by the European Union, whose aim is to promote a comprehensive and coordinated governance of all sea-related policies, including fisheries. This has a huge impacts on EU fisheries enterprises, since the IMP aims to create synergies across all maritime economic sectors.

In order to respond to current and urgent problems arising from globalisation, climate change, degradation of marine environment, maritime safety, security, worldwide transport of goods, energy sustainability[95], the European Commission has adopted a Green Paper on a future EU Maritime Policy[96], followed by wide consultation of Member States and socio-economic stakeholders, and subsequently a communication, the so called Blue Book[97], establishing an 'Integrated Maritime Policy' for the European Union, together with its accompanying Action Plan[98].

The Integrated Maritime Policy (IMP) aims at introducing coordination between the various (and often conflicting) uses of the sea, overcoming the traditional sectoral approach to maritime governance. This means to integrate different maritime sectors (i.e. shipping, oil and gas extraction, shipbuilding, seaports, coastal tourism, fisheries, aquaculture, maritime research), in an holistic and comprehensive strategy, with the objective of maximising the

[95] As highlighted by A. DEL VECCHIO and F. MARELLA ' There is no doubt that, at the dawn of the third millennium, the character of the sea is changing, especially in the Mediterranean area. From being an open space where freedom was the norm, the sea has become a *common good* to be shared by humanity [..] From economic relations to human rights, from security to safety, States and, today, even the European Union, share responsibilities for "their waters" however vast it might be. Meeting such responsibilities requires a span of maritime services capable of enforcing national and EU Law on the sea and contributing to the enforcement of International Law beyond them". See A. DEL VECCHIO, F. MARELLA, *International Law and Maritime Governance, Current issues and challenges for Regional Economic Integration Organisations,* Napoli, 2016, p. 17.

[96] See the communication of the European Commission, of 7 June 2006, *Towards a future Maritime Policy for the Union: a European vision for the oceans and the seas*, COM (2006) 275 final.

[97]See the communication of the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions*, An Integrated Maritime Policy for the European Union*, COM (2007) 575 final.

[98]**See the Commission staff working document accompanying the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - An Integrated Maritime Policy for the European Union,**SEC (2007) 1278/2.

economical potential of marine resources while ensuring, at the same time, their sustainable exploitation[99]**.**

Compared to the integrated maritime initiatives which have started to be developed by several countries (including Australia, Canada, Japan, Norway and the US but also some major emerging economic powers such as Brazil, China, India and Russia)[100], the EU Integrated Maritime Policy is the first-ever experimented maritime strategy governed by a supranational (and very peculiar) organisation[101]. This fact is a source of unprecedented opportunities and, simultaneously, of additional challenges.

In the context of maritime polices, firstly, the European Union does not operate as a federal State. Whereas in federal States usually many of the powers related to maritime issues are not delegated to sub-national governments but managed at the central level, the European Union, with the exception of its exclusive competence on conservation of fisheries resources, shares its competences with the Member States in all other maritime-related policy areas[102]**.**

This explains some special features of the integrated maritime policy developed by the European Union. Firstly, the IMP is a political initiative, not enacted through formal legal procedures. The Blue Book and the Action Plan draw up a set of political goals, namely: - An European Maritime Transport Space without barriers; – A European Strategy for Marine Research;– National integrated maritime policies to be developed by Member States;– A European network for maritime surveillance;– A Roadmap towards maritime spatial planning by Member States; – A Strategy to mitigate the effects of Climate Change on coastal regions;– Reduction of CO_2 emissions and pollution by shipping;– Elimination of pirate fishing and destructive high seas bottom trawling;– An European network of maritime clusters;– A review of EU labour law exemptions for the shipping and fishing sectors[103].

In order to achieve these objectives, the Action Plan requires, on the one hand, that the Commission adopts specific guidelines to support the Member States in developing their national

[99] For a full analysis of the issues and challenges related to the development and implementation of the EU Integrated Maritime Policy in key areas such as ports and infrastructures, scientific research, energy, maritime security, IUU fishing, transports and coastal management see A. DEL VECCHIO, *La politica marittima comunitaria*, Roma, 2009; R. CASADO RAIGÓN, *L'Europe et la mer (pêche, navigation et environment marin)*, Bruxelles, 2005.

[100] See the 'Blue Book' of the European Commission on the Integrated Maritime Policy*, op. cit*. p. 13.

[101] As stressed by T. KOIVUROVA in this respect ' the overwhelming challenge of coordinating the actions of 28 sovereign nations (of which five are landlocked) that exercise most of the powers pertaining to their sea areas clearly distinguishes the EU's formulation of an integrated maritime policy from the efforts of federal states to create such a regional policy' See *The Integrated Maritime Policy of the European Union: Challenges, Successes, and Lessons to Learn*, in Coastal Management, 40, 2012, p. 162.

[102] T. KOIVUROVA, op. cit. p. 161.

[103] See the 'Blue Book' on the Integrated Maritime Policy, op. cit. p. 3.

integrated maritime policies in accordance with their internal legal framework and their respective economic, social, political, cultural and environmental background[104], and on the other hand, that the European Commission shall report regularly to the Parliament, the Council, the European Economic and Social Committee and the Committee of Regions on the progress accomplished by the Member States[105], on the basis of the information received by national administrations.

The core idea is that the ambitious political objectives of the Integrated Maritime Policy cannot be achieved through individual maritime strategies of the various Member States or by means of voluntary agreements among them, but should be pursued in the framework of the common principles established at EU level, while allowing the Member States to adopt the most appropriate national (or even better regional) measures, in consistency with the EU constitutional principles of proportionality and subsidiarity[106].

This special approach of the Integrated Maritime Policy of the European Union moves away from the principle 21 of the 1972 Stockholm Declaration, under which States have, in accordance with the Charter of the United Nations and the principles of international law 'the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.

In the context of the EU maritime governance, conversely, oceans and seas are regarded as complex, interlinked ecosystems encompassing across administrative borders, and maritime activities are taken into account in their multi-dimensional and cross-borders nature, which requires the adoption of coordinated strategies and transnational cooperation among the States involved[107].

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[104] See the communication of the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, of 26 June 2008, *Guidelines for an Integrated Approach to Maritime Policy: Towards best practice in integrated maritime governance and stakeholder consultation*, COM (2008) 395 final, p. 9.

[105] See the last Progress Report, of 11 September 2012, on the EU's integrated maritime policy, COM (2012) 491 final.

[106] As stressed by M. MARCHEGIANI ' The absence of an expressed competence connotes and characterises all the EU Integrated Maritime Policy and profoundly affect the definition of the articulation of the relationship between national policies and EU policies. The action at the EU level stems from the cross-sectoral and trans-national nature of the activities involved and synergies among sectoral policies [..] in conformity with the subsidiarity principle set out in Article 5 TEU the Commissions explains that the added value of EU Action is first of all ensure and streamline Member States action on maritime spatial planning and integrated coastal management to guarantee consistent and coherent implementation across the EU, through a common legal framework and uniform references and legal standards'. See M. MARCHEGIANI, *National Politics and EU Politics: the Maritime Spatial Planning and Integrated Costal Zone Management in the Adriatic and Ionian region*, Working Paper available on the MaReMap-AIR website at the link: http://www.unimc.it/maremap/it/pubblicazioni/papers

[107] As highlighted by A. DEL VECCHIO in this respect 'La politica marittima dell'Unione europea rappresenta l'inizio di un modo di gestire il mare totalmente diverso e nuovo e indica la mutata prospettiva dalla quale

The ever more intense use of maritime resources has shown, in fact, that an action taken in a maritime sector can have (whether deliberate or not) effects in the same or adjacent maritime areas. This transnational perspective is undoubtedly enhanced by the fact that the Integrated Maritime Policy of the European Union is 'cross-borders' by definition, encompassing all the maritime policies of the Member States concerned[108]. The integrated maritime policy of the EU, in other words, is not a 'national projection' of a specific country, but a truly integrated strategy, built on the assumption that seas and oceans are common and shared resources[109].

Another important feature of the integrated maritime policy of the European Union is that the sharing of competences between the Union and the Member States can facilitate the development of a more open and participative governance. To be effective, an integrated maritime policy whose conceptualisation is placed at EU level, but whose operationalisation is devolved to Member States, would ideally need an high degree of consensus and widespread approval. This explains, in part, why the EU Integrated Maritime Policy has a pronounced consultative nature. A wide range of stakeholders (representatives of the maritime sectors, of non-governmental Organisations (NGOs), of the academic world and of civil society) have been the driving force for the initial conception of the EU integrated maritime policy and maintain a key role also in its implementation. Consequently, despite the practical development of maritime strategies is devolved to the Member States, the EU integrated maritime policy is actually a multi-level governance model where the Commission plays a central role in setting policies objectives and non-state actors have the possibility to negotiate and even change rules. This is a significant strength of the European

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l'Unione europea intende in futuro muoversi, per il raggiungimento dell'obiettivo di creare nel mare le condizioni che permettano di soddisfare i bisogni della generazione presente senza compromettere, attraverso uno sfruttamento indiscriminato delle risorse disponibili, la capacità di quelle future di soddisfare i propri'. See A. DEL VECCHIO, *Una politica marittima integrata per l'Unione europea*, in op. cit. p. 21.

[108] This transnational dimension can be observed in all the maritime sectors included in the common framework of the Integrated Maritime Policy (IMP). As for maritime transport, for instance, A. DEL VECCHIO stresses that 'L'un des objectifs principaux de la communauté internationale est sans aucune doute de garantir la sécurité des transports dans toutes les mers et dans tous les océans du monde. Il semble difficile de mener à bien cette tâche, qui dépasse, de par de son ampleur, les frontières des Etats, sans établir des règles pouvant être appliquées par tous les acteurs de la communauté internationale, qu'il s'agisse d'Etats, d'organisations internationales, ou de sociétés d'armateurs, etc. opérant dans ce secteur'. See A. DEL VECCHIO, *Protection et sécurité dans les transports maritimes : les mesures de l'Union européenne*, in *Sûreté maritime et violence en mer,* sous la direction de M. Sobrino Heredia, Bruxelles, 2011, pp. 357-379.

[109] As stressed by M.L. TUFANO, in recent years the governance approach to the sea has changed in line with the principle of sustainable development and with the importance of the regional and transnational dimensions. Territorialisation of the maritime spaces is progressively replaced by a more functional approach taking into account 'activities' on the sea rather than 'spaces' the sea. See M.L. TUFANO, *Oltre Montego Bay: La nuova governace del mare e la politica marittima integrata dell'UE*, in Atti del Convegno in memoria di Luigi Sico : il contributo di Luigi Sico agli studi di diritto internazionale e di diritto dell'Unione europea, Università degli studi di Napoli Federico II, 23 Aprile 2010.

integrated maritime policy, given that a broad stakeholders participation allows an in-depth understanding of the problems and challenges related to each specific maritime sector, raising the quality of the policy making as a whole[110].

There are, however, several critical aspects that should also be carefully taken into account, especially with regard to the co-existence of various legal and institutional frameworks related to different maritime policies in the single structure of the IMP. As far as fisheries are concerned, on could mention, for instance, that the EU integrated maritime policy embraces and incorporates both the Common Fisheries Policy and the Marine Strategy Framework Directive (MSFD)[111], which constitutes the environmental pillar of the EU maritime policy[112].

In terms of governing structure, however, the Common Fisheries Policy, the Marine Directive and the Integrated Maritime Policy are very different as regards the way in which they are organised, transposed and implemented.

The EU's Common Fisheries Policy is characterised by a governance structure that is at the same time supra-national (the European Commission has exclusive power on conservation of resources and plays a key role in setting general policy objectives), inter-governamental (TACs are allocated at the national level to solve conflicting interests among the Member States on the sharing of resources), and transnational (the principle of subsidiarity is at the core of the CFP implementation and enacted via several tools such as stakeholders consultations, CLLD strategies and regional approaches, which all encompass national borders). Furthermore, fisheries governance has traditionally a 'corporatist structure', where the institutional bodies share political decision-making with few organised groups (fisheries organisations)[113]. The political discourse is mainly focused on management of fisheries resources, while environmental sustainability is often perceived as instrumental to economic sustainability[114].

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[110] For an extended treatment of this topic, including some proposals on how to improve mechanisms for stakeholders consultation see J. S. FRITZ, J. HANUS, *The European Integrated Maritime Policy: The next five years*, in Marine Policy 53 (2015) p. 2.

[111]See the D**irective 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive).**

[112] For extended treatment see, among others, C. BERTRAM, K. REHDANZ, *On the environmental effectiveness of the EU Marine Strategy Framework Directive*, in Marine Policy, vol. 38. n. 1, 2013, 26.

[113]On this point see L. VAN HOOF, J. VAN TATENHOVE, *EU marine policy on the move: The tension between fisheries and maritime policy*, in Marine Policy 33 (2009) p. 728-729. This statement can be partially mitigated by the fact that the recent reform of the common fisheries policy promotes the involvement of various stakeholders at different levels, as stressed by the authors themselves. Nevertheless, the Regional Advisory Councils (RACs) are still mainly composed by representatives of the fisheries sector.

[114] L. VAN HOOF, J. VAN TATENHOVE, op. cit. p. 728.

The main objective of the Maritime Strategy Framework Directive (MSFD), differently, is to achieve a Good Environmental Status (GES) of the EU's marine waters by 2020, by protecting the natural resources on which all marine-related economic and social activities are based. The MSFD is a legislative instrument that is binding on the Member States and shall be integrated into domestic legislation. More precisely, in order to address the problems and challenges specific to each region and coastal area, Member States are required to develop their respective maritime strategies taking into account the regional and the sub-regional level, and are also expected to closely cooperate among each others in a transnational perspective. The identification of the regions concerned, of course, is done on the basis of environmental criteria, despite the fact that these decisions could affect commercial interests linked to exploitation of fish stocks. In terms of governance structure, furthermore, the MSFD, is not merely a'policy', but a directive, and reflects therefore an 'etatistic approach', where political authorities have a crucial role in determining planning and content of policies and other non-states actors are placed in the backseat. Additionally, political discourse is primarily focused on ecological objectives, rather than on social and economical concerns.

As for the Integrated Maritime Policy, it can be argued that, compared to the Marine Directive, the IMP has a broader scope, as it is not merely focused on environmental issues but aimed at maximising the economic benefits deriving from a sustainable exploitation of marine resources. Compared to the Common Fisheries Policy, the Integrated Maritime Policy has a broader area of application, not covering only the fisheries sector, but promoting coordination and synergies among all the maritime activities. In terms of governance structure, finally, the IMP is a policy (not a legislation, except for its forms of national implementation), based on less interventionism of authoritative powers and broader participation of stakeholders.

The coexistence of such different institutional frameworks raises specific issues. Firstly, **whereas at the beginning of the European integration process fisheries was the unique maritime competence of the EEC, in connection to agriculture,** in the context of the broader EU maritime policy it is just one of the aspects[115], and even a relatively small sector from the economic and political point of view. This means that fisheries, to not lose its primacy, need to incorporate, as far as possible, the dynamics, perspectives, challenges and tools which are common to other maritime policies. The growing importance of marine spatial planning and of environmental requirements, together with the progressive shift of the CFP from the traditional corporatist

[115] For an analysis of the weight of fisheries in the broader framework of the Integrated Maritime Policy see A. REY ANEIROS, *Las consecuencias de la PolíticaMarítimaIntegrada de la Unión Europea para el regimen jurídico de la pesca,* in Noticias de la Unión Europea, Política Común de Pesca, Año XXVIII, Marzo 2012.

structure towards a more participatory governance involving a wider range of stakeholders, are good examples of the efforts made in this direction. On the other side, some commentators[116]argue that the common fisheries policy is not sufficiently subjected to the objectives of the Integrated Maritime Policy, especially as far its environmental pillar is concerned. More specifically, it has been said that the fisheries regime is based on the concept of 'sustainable exploitation', while the environmental pillar of the EU Marine Policy (i.e. the Maritime Strategy Framework Directive) would require merely a 'use' of the marine resources on the basis of the precautionary approach, without any particular right to exploit.

Conversely, it should be stressed that the Marine Strategy Framework Directive has a greater potential to influence the development of maritime policy compared to other strands of the IMP. This statement is particularly true in relation to Maritime Spatial Planning (MSP), which is an essential tool for the implementation of the EU integrated maritime governance. Maritime Spatial Planning has been introduced in 2008 by the Communication of the European Commission 'Roadmap for Maritime Spatial Planning: Achieving Common Principles in the EU'[117] and it can be defined as a ' public process of analysing and allocating the spatial and temporal distribution of human activities in marine areas to achieve ecological, and social objectives'[118]. The Road map identifies, on the basis of the MSP practice and regulations already implemented in several Member States, a set of common principles which could facilitate further development of MSP in Europe[119]. The first of these principles, focuses on the need of 'Defining objectives to guide MSP'. More specifically, 'A strategic plan for the overall management of a given sea area should include detailed objectives. These objectives should allow arbitration in the case of conflicting sectoral interests'.

However, since the Maritime Strategy Framework Directive is a binding piece of legislation, Member States are obliged to create mechanisms for the management of maritime areas in order to comply with the Directive's mandatory requirements. This may lead to a prominence given to environmental protection to the detriment of other maritime issues and interests. A recent study

[116] See the analysis of J. WAKEFIELD, *Undermining the Integrated Maritime Policy*, in Marine Pollution Bulletin, 60 (2010) p. 332.

[117] See the communication of the Commission, of 25 November 2008, COM (2008) 791 final.

[118]See the communication of the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, of 17 December 2010, *Maritime Spatial Planning in the EU – Achievements and future developments*, COM (2010) 771 final p. 2.

[119] For a full analysis of the challenges, measures and tools linked to the practical implementation of these key principles see N. SCHAEFER, V. BARALE, *Maritime Spatial Planning, opportunities & challenges in the framework of the EU Integrated Maritime Policy*, in Journal of Coastal Conservation (2011), Vol. 15, Issue 2, p. 237 – 245. On the same topic see also A. MEINER, *Integrated Maritime Policy for the European Union – consolidating coastal and marine information to support maritime spatial planning,* in Journal of Costal Conservation (2010), Vol. 14, Issue 1, p. 1 -11.

carried out on the legal system of Spain[120], a country with a relevant geo-political and geo-economic maritime projection[121], has revealed that the coming into force of the Maritime Strategy Framework Directive has resulted in 'the planning of the marine environment (including spatial planning) being an offshoot of the environmental initiative: an instrument at the service of the [environmental] objectives'.

This is what arises from the reading of the 'Marine Environment Protection Law'[122]transposing the Maritime Strategy Framework Directive into Spanish law, which is the first piece of legislation in the Spanish system where maritime spatial planning is expressly mentioned, even a precise definition is not provided. As it can be noted, a first remark is that 'marine spatial planning' is included in a list of measures that can be adopted in order to 'achieve or maintain the good environmental status'.[123] Secondly, the Marine Environment Protection Law has the same sphere of application of that of the Marine Directive, i.e. all the waters under the jurisdiction of Spain with the exception of internal waters and one mile of territorial sea (the so called coastal waters), which fall within the Marine Environment Protection Law only where the Water Framework Directive[124]cannot guarantee a good environmental status in these areas. Thirdly, there is no reference to any 'hierarchal spatial scheme' to develop marine spatial planning objectives. The Spanish maritime space is merely divided into five areas (called *demarcaciones*) that exactly correspond to the 'sub-divisions' established under Article 4 (2) of the Marine Strategy Framework Directive.

As the analysis of Spanish domestic law demonstrates, the maritime spatial planning risks to become an instrument for the development of the (binding) Maritime Strategy Framework Directive, with a strong focus on the eco-logical dimension, rather than being the key instrument for the implementation of an integrated, cross-sectoral and joined-up maritime approach, in consistency with the (non binding) Integrated Maritime Policy.

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[120] See J. L. S. DE VIVERO, J. C. RODRIGUEZ MATEOS, *The Spanish approach to marine spatial planning. Marine Strategy Framework Directive vs. EU Integrated Maritime Policy*, in Marine Policy 36 (2012) pp. 18 – 27.

[121]As stressed by the authors in relation to the Spain strategic interests in maritime affairs 'The area of Spain maritime jurisdiction puts it among the top 35 countries in the world ranking [...] Given the country relative position and territorial make-up (Peninsula and Archipelagos) the projection of Spanish sovereignty over maritime space creates borders with France, the United Kingdom, Ireland, Portugal, Morocco, Algeria and Italy: five borders in the Atlantic Ocean and four in the Mediterranean Sea.' See J. L. S. de VIVERO, J. C. RODRIGUEZ MATEOS, op. cit. p. 21 – 22.

[122]Nome in spagnolo della legge (??) legge del 2010.

[123] See Table 5 of the Annex.

[124] See the Directive 2000/60/EC of the European Parliament and of the Council, of 23 October 2000, establishing a framework for Community action in the field of water policy.

It should be highlighted, in that regard, that the use of the term 'maritime', which refers to the all sea-related human activities, was preferred in the EU legislation to identify this tool instead of using the word 'marine', which principally recalls the protection of the 'marine' natural resources of the sea. As the former European Commissioner for Maritime Affairs and Fisheries Maria Damanaki stressed in this respect 'spatial planning of the sea was initially perceived in the EU as an environmental policy. However, it is now regarded as a sector-neutral approach with the objective not only to protect the marine environment but also to promote the economic growth of the maritime economy'[125]. This aspect should be carefully taken into account, especially in the context of the currently running EU Commission, where the previously separated portfolios of 'Environment' and 'Maritime Affairs & Fisheries' are now joined together in a single portfolio, held by the Commissioner Karmenu Vella.

In addition, in order to allow a proper and effective implementation of the Integrated Maritime Policy, some important key steps should be undertaken. On the one hand, direct confrontation and links between stakeholders from different maritime sectors has to be reinforced. On the other hand, more funding should be allocated for the development of integrated maritime strategies, possibly through *ad hoc* financial instruments.

As for the first aspect, it is worth to mention that stakeholders consultations in the framework of the IMP have been carried out, too often, following a highly sectoral approach. This is partially caused by the fact that the interest groups involved in the IMP are usually organised on the basis of sectoral needs. Initiatives aiming at developing cross-sectoral and interdisciplinary networks should therefore be enhanced at EU level[126].

Secondly, but not of secondary importance, at present there is no financial regulation specifically devoted to the Integrated Maritime Policy. Title VI of the European Maritime and Fisheries Fund (EMFF) is dedicated to measures related to the IMP implementation, but it is a relatively small budget line compared to the overall Fund. Over the total EMFF amount of 5 749 331 600 EUR, only 71 055 600 EUR are allocated to the IMP, while 4 340 800 000 EUR are reserved to the sustainable development of fisheries, aquaculture, fisheries areas, to marketing and processing-related measures and to technical assistance (Article 13 of the EMFF).

Although some key components of the IMP can be financed in the context of other EU programmes, such Horizon 2020, LIFE + and COSME, where marine and marine research, environmental management and maritime industries (shipbuilding and recreational craft) are taken, respectively, into account, one may wonder whether a such fragmented and scattered budgetary

[125] In Marine Ecosystems and Management (MEAM), Vol. 4, No. 4, February-March 2011.
[126] In this sense, see J.S. FRITZ, J. HANUS, op. cit. p. 2.

resources can effectively support the concrete realisation of the IMP objectives, which are expected to produce structural impacts on the use of seas and oceans and promote a shift towards a new model of maritime governance.

CHAPTER II

The conservation of marine biological resources in the reform of the Common Fisheries Policy (CFP): towards a new model of fisheries management

SUMMARY: 1. Introduction. – 2. The concept of fisheries management in the light of the general principles of international environmental law: the shift towards a modern, ecosystem-based approach and its relevance for the fisheries enterprises. – 3. Changes in primary EU Law brought about by the Treaty of Lisbon: a legal framework supporting the new approach of the CFP?. – 4. The CFP reform: at a crossroad between the environmental and the economic and social dimension. – 5. The TACs and quota system: fisheries enterprises between landing obligation and flexible management of fishing rights. – 6. Maximum Sustainable Yields (MSY) and its impacts on fisheries enterprises. – 7. Strategic planning and long-term goals: multiannual management and strengthen participation of fishermen in decision making processes. – 8. Sustainable fishing practices: the participation of EU operators in the establishment and implementation of technical conservation measures.

II.1. Introduction

Fisheries resources conservation and management is at the core of the Common Fisheries Policy of the European Union (hereinafter the CFP) and represents its primary objective. The other strands of the CFP, i.e. the markets, structural and external fisheries policies, are corollaries of the conservation policy[127], as they serve the objective of maintaining or restoring marine biological resources at a sustainable level, which is regarded as a prerequisite also for the economic and social development of the fishing sector[128]. Before entering into a detailed analysis of the main changes

[127]On this point see A. DEL VECCHIO, ***La pêche maritime – Politique commune de la pêche***, Fasc. 1351, *Lexis Nexis Juris Classeur – Traité européen*, 2015, p. 6.

[128] According to the *Impact assessment accompanying the Commission proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy*, of 13 July 2011, SEC(2011) 891, it is estimated that exploitation of fish stocks at the level that gives the highest yield would increase populations by 70% and catches by 19% in the long run. Rebuilding overfished stocks would result therefore in significant improvements also in the social and economic dimension.

On the emergence of the principle of sustainable development in international law see, among others, P. FOIS, *Il principio dello Sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente,* XI Convegno SIDI, Alghero, 16-17 giugno 2006, Napoli, 2007; S. MARCHISIO, *Il diritto internazionale ambientale da Rio a Johannesburg*, in *Il diritto internazionale dell'ambiente dopo il Vertice di Johannesburg* (under the supervision of A. DEL VECCHIO and A. DAL RI JUNIOR), Napoli, 2005 p. 19 ff.

As for the principle of sustainable development in the exploitation of marine biological resources see, among others, A. DEL VECCHIO, *Il principio dello sviluppo sostenibile nello sfruttamento delle risorse biologiche del Mediterraneo*, in *Il Mediterraneo: ancora mare nostrum?*, Roma, 2004, pp. 27-40; T. SCOVAZZI, *Le norme internazionali in tema di pesca responsabile*, in Rivista Giuridica dell'Ambiente*, n.* 3/4, *p.* 447. For an analysis of the issue as relates the European Union and especially the reform of the Common Fisheries

introduced by the recently adopted reform of the CFP and of their impacts on the EU fisheries enterprises, it is worth to examine what is meant by 'fisheries management' as there is not commonly accepted legal definition of that term, yet. The analysis will be conducted, in particular, taking into account the influence on fisheries management of the general principles of international environmental law, i.e. the principle No. 21 of the Stockholm Declaration, the principle of sustainable development and the precautionary approach, which paved the way towards the development of a modern concept of fisheries management based on a "ecosystem approach", that need to be integrated also in fisheries enterprises perspective (Section 2). It will be investigated, later on, the legal regime governing the European fisheries management in the light of the changes introduced by the Treaty of Lisbon, with particular regard to the general objectives of the CFP, the allocation of competences between the Union and the Member States, the consistency of CFP regulations with general principles of EU primary law and the legislative procedure applicable to the fisheries issues (Section 3). The analysis will be therefore concentrated on the new Basic Regulation[129], in order to assess whether and how far the recently adopted CFP reform will contribute to overcome the problems and challenges facing the European fisheries industries, ensuring in the meanwhile a better protection of the marine environment (Section 4). In this perspective, particular attention will be given to the main tools of the EU fisheries conservation policy[130] affecting the EU operators as they have been reformed by the new Basic Regulation, i.e. the system of TACs and national quotas (Section 5), the Maximum Sustainable Yield (Section 6), the Multiannual Plans (Section 7) and the Technical measures to protect the marine biodiversity (Section 8), stressing how through such instruments fisheries enterprises are expected to develop a better sustainable fisheries.

Policy see R. M. FERNANDEZ EGEA, *La reforma de la política de pesca común y sui incidencia en la cuenca mediterránea: el reto de una pesca sostenibile y resposabile,* in: *Derecho del mar y sostenibilidad ambientalen el Mediterráneo*, (under the supervision of J. JUSTE RUIZ, V.E. BOU FRANCH, J. M. SÁNCHEZ PATRÓN), Valencia, 2014, p. 200; European Commission, *Fisheries and Aquaculture in Europe*, No. 62 August 2013, p. 3–4; , D. CHARLES-LE BIHAN, *La politique commune de la pêche dans une Union européenneen mutation*, in *La politique européenne de la pêche : vers un développement durable*?, (under the supervision of C.F. MOUGIN, D. CHALES–LE BIHAN, C. LEQUESNE), Rennes, 2003, p. 21- 44.

[129] Regulation (EU) No. 1380/2013 of the European Parliament and of the Council, of 11 December 2013, on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC.

[130] For an extensive analysis of the evolution of the conservation policy in the broader framework of the international law of the sea, particularly with regard to the role of Regional Fisheries Organisations (RFOs) and the regime applicable to the territorial and the high seas see D. VIGNES, G. CATALDI, R. CASADO RAIGÓN, *Le droit international de la pêche maritime*, Bruxelles, 2000.

II.2. The concept of fisheries management in the light of the general principles of international environmental law: the shift towards a modern, ecosystem-based approach and its relevance for the fisheries enterprises

In recent years, the need to ensure a sustainable exploitation of marine living resources and the protection of marine environment has acquired a growing importance in the international community. The increased worldwide interactions and transactions in economics, finance and trade, combined with technological improvements and cross-borders communication, challenge the role of nation states and have a deep impact on international law[131]. As far as the environment is concerned, the process of globalisation involves a more accentuate impact of human activities[132] on the environment and therefore the need to regulate it through international cooperation[133]. This appears to be particularly evident for the conservation of marine ecosystems, which are threatened by the expansion of industrial fisheries, as a consequence of increased demand of seafood and advanced fishing technology[134]. In this respect, it is worth to note that international cooperation in fisheries management plays a crucial role in reconciling the general interest to protect the marine environment of the international community as a whole with the national interests of coastal States to exploit marine living resources under their jurisdiction and guarantee a sustainable use of resources by fishing fleets of other States in the high seas[135]. This is aspect is particularly important

[131] On the relations between globalisation and national powers see, among a broad literature: R. RUBENS, *A resiliência do Estado Nacional diante da globalização*, in *Estudos avançados*, Vol. 22, No. 62, 2008, p. 129 – 144; R. L. BRINKMAN, J. E. BRINKMAN, *Globalization and the Nation-State: Dead or Alive*, in *Journal of Economic Issue,* Vol. 42, No. 2, pp. 425-433; L.C. BRESSER-PEREIRA, *Globalization, nation-state and catching up*, in *Revista de economia política*, Vol. 48, No 4, 2008, p. 557-576.

[132]See J. HUWART, L. VERDIER, *What is the impact of globalisation on the environment?,* in *Economic Globalisation: Origins and consequences*, OECD Insights, 2013, Paris.

[133] On the increasing importance of international cooperation as a consequence of globalisation, particularly with reference to cooperation between the European Union and third States and within international organisations see A. DEL VECCHIO, *Politica commune della pesca e cooperazione internazionale in material ambientale*, in *Il Diritto dell'Unione europea*, Anno X Fasc. 3, Milano, 2005, p. 529-544.

[134] In this respect, it has been pointed out that 'since it was at the end of the Second World War, the exploitation of marine living resources went from being a small-scale activity involving small fishing boats operating in coastal waters to being an industrial activity with ever more sophisticated vessels, equipped with advanced technology and able to fish in the high seas', U. LEANZA, A. DEL VECCHIO, *Fifty years of international case law on fisheries,* Napoli, 1996, p. 8.

[135] For an extensive analysis of the different forms of international cooperation in fisheries management, with particular regard to multilateral treaties, international organisations and the common fisheries policy of the European Union see A. DEL VECCHIO, *La pescaen el marco de la cooperación internacionale in materia de medio ambiente*, in *La gestión de los recursos marinos y la cooperación internacional*: *actas del Seminario, Santiago de Chile, 22–23 de marzo de 2004* (under the supervision of A. DEL VECCHIO), Rome, 2006, p. 9 - 33. On the same subject, with particular reference to the impact of international agreements on the administration of fisheries resources in the EEZ and high seas, see F. ORREGO VICUNA, *El régimen de la pesca en alta mar y los derechos e intereses del Estado ribereno*, in *Prospettive del diritto del mare all'alba del XXI secolo, Convegno italo-latino americano, 12–13 novembre 1998*, Roma, 1999, p. 77.

for the fisheries enterprises that, especially when operate internationally and on intense industrial scale, are required to respect the general principles increasingly arising from the development of international cooperation and international law.

Over the last few years, in fact, several international *fora* have dealt with the conservation of marine biological resources, with a view to developing and implementing the principles contained in United Nations Convention on the Law of the Sea of 1982 (hereinafter the UNCLOS)[136], and specifically the duty of States to '*to take, or to cooperate with other States in taking, measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas*' (Art. 117), as well as the duty to '*cooperate with each other in the conservation and management of living resources in the areas of the high seas [..]enter into negotiations with a view to taking the measures necessary for the conservation of the living resources [..] cooperate to establish subregional or regional fisheries organizations to this end*' (Article 118). And, as for exclusive economic zones, the coastal States '*taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organisations, whether subregional, regional or global, shall cooperate to this end'* (Article 61).

Several important multilateral agreements and conventions have been therefore adopted, such as the 1992 Convention on Biological Diversity (CBD), the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas, the 1992 Declaration of the International Conference on Responsible Fishing (Cancún Declaration), the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks[137], the *1995 Code of*

[136]As highlighted by R. CASADO RAIGÓN, despite the United Nations Convention on the Law of the Sea constitutes '*una referencia normative básica y general en materia de pesca, medio ambiente, navegación o investigación scientífica marina o en relación, desde luego, al regimen jurídico de los espacios marinos*', its influence on the development of international law varies in the diverse fields to which the Convention is applied, since '*no todas las partes y secciones guardan la misma proporción*'. Therefore '*aunque la CNUDM constituya un tratado global que dota de undidad y coherencia al derecho del mar, no solo hay que considerarla como* un *point d'arrivée*, *sino también como* un point de départ *para su mejor acabado, desarrollo, aplicación y adaptación*'. R. CASADO RAIGÓN, *Derechointernacional*, Madrid, 2012, p. 312 – 313. Of the same author see also *La Convención de Naciones Unidas sobre el Derecho del Mar y su pretensión de universalidad y generalidad*', in J.M. SOBRINO ' La contribución de la Convención de Naciones Unidas sobre el Derecho del Mar a la buena gobernanza de los mares y océanos, Nápoles, 2014.

[137] For a further analysis of this agreement see, among others, R. CASADO-RAIGON, *El acuerdo de Nueva York de 1995 sobre espacies transzonales y altamente migratorias*, in Cuadernos de derecho pesquero, Nº2, 2003, págs. 49-60.

Conduct for Responsible Fisheries (CCRF), which all affect, in different areas, the activities performed by fisheries operators.

The preservation of the marine environment has been, moreover, a central topic in several global summits, such as the United Nations Conference on the Human Environment held in Stockholm in 1972, the Rio de Janeiro Earth Summit of 1992 as well as the World Summit on Sustainable Development of Johannesburg in 2002[138].

However, despite all the above mentioned examples of international cooperation demonstrate the importance of the issue, according to the Food and Agricultural Organization (FAO), i.e. is the most relevant international organisation dealing with fisheries '*there are no clear and generally accepted definitions of fisheries management*'[139]. As specified by the FAO Technical Guidelines for responsible fisheries only '*for the purpose of [this] document*'[140]a "*working definition*" of fisheries management is contained in the FAO Code of Conduct for responsible Fisheries, under which:

> 'Fisheries management is the integrated process of information gathering, analysis, planning, consultation, decision-making, allocation of resources and formulation and implementation, with enforcement as necessary, of **regulations or rules which govern fisheries activities** in order to ensure the continued productivity of the resources and accomplishment of other fisheries objectives'[141].

From a legal point of view[142], the core of the concept of fisheries management consists therefore in regulating the fishers' use of fisheries resources so that stocks are maintained at productive levels. This definition would matches, in addition, with the prospective of fisheries enterprises, that have a inherent interest in guarantying the productivity of stocks. However, it could be argued that, in a broader perspective, fisheries management is the set of rules and measures that,

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[138] As it has been stresses by R. CASADO RAIGON, the most important outcome of these international conferences lies in the fact that '*tanto los Estados como la mayor parte de las organizaciones interncionales, tanto de ámbito mundial como regional, hayan incorporado la varibile ambiental a todas sus activitades, on reflejo en los derechos internos de aquellos y en los tratados internacionales celebrados bajo sus auspicios de éstas*'. See R. CASADO RAIGON, *Derecho internacional*, op. cit. p. 366. For a full account of the main diplomatic and legal actions undertaken at international level aiming at the protection of marine resources see C. LERIA, *Breve análisis de los recientesinstrumentosinternacionalesrelativos a la pesca y el papel de la FAO*, in *Prospettive del diritto del mare all'alba del XXI secolo, Convegnoitalo-latinoamericano, 12 – 13 novembre 1998*, Roma, 1999, p. 127 - 139.

[139]See the *FAO Technical Guidelines for Responsible Fisheries No. 4: Fisheries Management,* Rome, 1997, p. 7.

[140] See the last edited version of FAO Technical Guidelines – Fisheries Management, Suppl. 4, Rome, 2011, p. 23.

[141]Article 7.1.1.of the FAO Code of Conduct for responsible Fisheries, Rome, 31 October 1995.

[142] As it has been stressed '*Fisheries management primarily involves matters of biology, economics, and politics rather than law*' see on the point R.CHURCHILL and D. OWEN, *The EC Common Fisheries Policy*, Oxford, 2010, p. 75.

due to the strong interaction between fisheries and the wider environment, are taken in order to maintain marine biodiversity and strengthen ecosystems resilience to human pressure.

In this respect, it is worth to mention that fisheries management, far from dealing only with conservation of target fish stocks, involves the general principles of environmental international law, such as Principle 21 of the 1972 *Stockholm Declaration*, the principle of sustainable development and the precautionary principle[143], aimed at the protection of habitats and marine ecosystems[144].

Indeed, according to P*rinciple 21* of the 1972 *Stockholm Declaration* '*States have, in accordance with the Charter of the United Nations and the principles of international law, ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.* In this line, the UNCLOS provides that in their respective exclusive economic zones coastal States '*shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation*'. Moreover, to this aim '*[a]vailable scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone'* (Article 61, UNCLOS).

Furthermore, sustainable development, as a major principle of international environmental law, has a deep influence on fisheries management. According to the Brundland report of 1987, which gave the first definition of this principle, sustainable development is '*the development that meets the needs of the present without compromising the ability of future generations to meet their own needs*'[145]. In other words, sustainability implies a rational use of natural resources, with a view to preserving the needs of future generations and taking into account, at the same time, the

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[143] For a full analysis of the development of the fundamental principles of international environmental law, of their impacts on the general framework of international law both at a regional and universal level and of their effectiveness see A. DEL VECCHIO, *Diritto internazionale dell'ambiente: riflessioni dopo il Vertice di Johannesburg*, op. cit. p. 15 – 18; BOISSON DE CHAZOURNES, DESGAGNE, ROMANO, *Protection internationale de l'environmment: recueil d'instruments juridiques,* Paris, 1998; P. SANDAS, *Principles of International Environmental Law*, 2ndEd., Cambridge, 2003.

[144] In this respect it has been highlighted that in the framework of the international law of the sea '*Il costante incremento delle regole positive avrebbe avuto la conseguenza di impedire nel tempo un uso inopportuno dell'alto mare, inteso come res communis omnium, e di indirizzarlo invece verso forme e modi di utilizzazione previsti e determinati da specifiche norme internazionali*',See A. DEL VECCHIO, *La disciplina della pesca negli spazi di alto mare, in particolare nel Mediterraneo*, in *Prospettive del diritto del mare all'alba del XXI secolo,* op. cit. p. 118.

[145]See the Report of the World Commission on the Environment and Development, Brundland Report, *Our Common Future*, Oxford, 1987.

complementarity between the social, economic and environmental dimension. The concept, applied to fisheries resources, involves the purpose '*to plan, develop and manage fisheries in a manner that addresses the multiple needs and desires of societies, without jeopardizing the options for future generations to benefit from the full range of goods and services provided by the aquatic ecosystems*'[146]. Sustainable development, therefore, embraces a range of objectives, including satisfaction of both present and future human needs, conservation of the natural resource and fulfilment of social and economic demands, such as the fair and equitable distribution of benefits derived from the fishery[147].

In addition, because of the inherent scientific uncertainty involved in defining biomass development and, consequently, the sustainable levels of fishing stocks, the precautionary approach plays an important role in fisheries management, particularly evident in filling political and legislative gaps[148]. In this respect, the FAO Code of Conduct for Responsible Fisheries underlines that '*absence of adequate scientific information should not be used as a reason for postponing or failing to take measures to conserve target species, associated or dependent species and non-target species and their environment*' (Article 6.5). Moreover, the 1995 United Nations Fish Stocks Agreements (UNFSA, 1995) establishes, in a similar way, a general obligation of coastal States to '*apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment'* (Art. 6.1 UNFSA). And more precisely '*States shall be more cautious when information is uncertain, unreliable or inadequate. The absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures'* (Art. 6.2 UNFSA)[149].

The States of the international community have therefore committed themselves, both by means of international cooperation (through the conclusion of international agreements and within

[146] FAO Technical Guidelines for Responsible Fisheries, Fisheries Management: Marine Protected Areas and fisheries, Suppl. 4, 2011, p. 25 – 26.
[147]FAO Report, *Introduction to the Sustainable Development Concept in Fisheries*, Rome, 2011.
[148] Due to the inherent scientific uncertainty in establishing sustainable fishing level (and the consequent need of continuous examination of scientific evidence in fisheries management), the role of the precautionary principle is ensure to that States would not ignore conservation policy while pursuing economic and social objectives. See on this point A. PROLESS, K. HOUGHTON, *The EU Common Fisheries Policy in light of the Precautionary principle*, Ocean and Coastal Management, 70 (2012) p. 22 -30.
[149] It has been noted that, in general, the precautionary 'principle' has a negative connotation in fisheries, leading to prohibition of practices and/or technologies which are inconsistent with sustainable development, while the reference to a 'precautionary criterion' has been used to promote a more accentuate sustainability perspective in fisheries management. See R. CASADO-RAIGON, *El acuerdo de Nueva York de 1995 sobre espacies transzonales y altamente migratorias, op. cit. p. 54 ff.*

international organisations) and under their domestic laws[150], to broaden the scope of traditional fisheries resources management towards a more holistic approach, which takes into account the wide range of ecological, environmental and human factors involved in the exploitation of resources[151].

From the ecological point of view, the so called ecosystem-based management (or ecosystem-based approach[152]), considers therefore the various components of an ecosystem and the several processes that connect them, instead of focusing on a particular human intervention or species of fish. This more comprehensive approach has several implications for the fisheries enterprises. When are engaged in their fisheries, fishermen should in fact act in accordance with the ecosystem model of fisheries management, on the one side by adopting appropriate technical measures when addressing their target-species, on the other, by reducing as much as possible the damages to non-target species, and, more generally, to the surrounding marine environment.

The new common fisheries policy of the European Union is seen in this respect as a great opportunity to internalise and incorporate the ecosystem-based approach in the activities of EU operators[153]. In particular, the new Basic Regulation defines the ecosystem-based approach as 'an integrated approach to managing fisheries within ecologically meaningful boundaries which seeks to manage the use of natural resources, taking account of fishing and other human activities, while preserving both the biological wealth and the biological processes necessary to safeguard the composition, structure and functioning of the habitats of the ecosystem affected, by taking into account the knowledge and uncertainties regarding biotic, abiotic and human components of ecosystems' (Recital 9). Hence, as it will be seen in further detail[154], the EU fisheries enterprises

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[150] As highlighted by A. DEL VECCHIO coastal States, as a consequence of the lack of effective international enforcement instruments, are recognized 'as having a special role in the establishment and implementation of international principles and rules, mostly in the environmental field, and as representing the privileged "agent" by which the international community may achieve its goals", see A. DEL VECCHIO, *In Maiore Stat Minus: a Note on the EEZ and the Zones of Ecological Protection in the Mediterranean Sea*, Ocean Development & International Law, 2008, p.294.

[151] For an analysis of the concept of ecosystem based management, why is this needed and how it could be implemented for both fisheries and all other marine uses see R. CURTIN, R. PRELLEZO, *Understanding marine ecosystem based management: A literature review*, in Marine Policy 34, 2010, p. 821 – 830. On the relevance of the Port State role in monitoring fisheries activities to protect marine environment see R. CASADO RAIGÓN, *El Estado rector del puerto: medidas contra la pesca IUU*, in Estudios de Derecho internacional y Derecho europeo en homenaje al professor Manuel Pérez Gonzáles, Valencia, 2012, p. 323 ff.

[152] It has been suggested that the concept of "approach" implies a more accentuate focus on environmental issues in traditional fisheries management while "based" would give a pre-eminence to the environment over economic and social dimensions. R. PRELLEZO, R. CURTIN, *Confronting the implementation of the marine ecosystem-based management within the Common Fisheries Policy reform*, in Ocean and Coastal Development,117, 2015, p. 43.

[153][153] R. PRELLEZO, R. CURTIN, *op. cit*, p. 43.

[154] See Chapter IV, dedicated to the financial dimension of the CFP.

have at their disposal through the European Maritime and Fisheries Fund (EMFF) a wide range of measures aimed at reducing the impacts of fisheries on the environment, such as investments in vessels equipments and new fishing gears and methods that, without increasing the overall fishing capacity of the EU fleets, can improve selectivity of catches, eliminate discards, avoid and reduce unwanted catches of commercial stocks, limit and, where possible, eliminate the physical and biological impacts of fishing on the marine ecosystem.

The eco-system based approach in the CFP implies in fact the need of taking into account the multitude of human actions[155] and their cumulative impacts on ecosystem structures as well as environmental factors (for instance climate change[156]) that influence the marine environment, in order to prevent its future deterioration[157]. In contrast with the rigid structure of traditional fisheries governance, modern management should therefore be based on a broader scientific basis, investigating the connections between several marine species, several marine environments and interdependence between the land and the sea[158]. In accordance with the precautionary principle, furthermore, it should be more flexible and adapting, since scientific knowledge is provisional and seas conditions are subjected to continuous changes. The involvement of fishermen' and other stakeholders' knowledge, opinions and responsibility in managing resources is moreover perceived as crucial, because human and nature are increasingly seen, by the majority of both analysts and policy makers, and in the light of the principle of sustainable development, as integrating parts of a unique 'socioecological system'[159]. Last, but not least, in the CFP reform special attention is paid to process of regionalisation at level of sea basins, since as it is suggested also by Principle 21 of the Stockholm Declaration, the protection of marine environment (even when deployed within national jurisdiction) has a trans-boundary dimension. This implies redefining territorial spaces so that the location of marine ecosystems determine borders and areas of cooperation.

[155] According to S.M. GARCÍA, A. ZERBI, C. ALIAUME, T. DO CHI, G. LASSERRE, humans have to be regarded as an integral part of the ecosystem, since both ecosystem well-being and human well-being repose on the conservation of habitats and on their conservation for future generations. See: *The ecosystem approach to fisheries. Issues, terminology, principles, institutional foundations, implementation an outlook*.FAO Fisheries technical paper, n. 433, Rome, 2003, p. 77.

[156] In more details, see R. ARNASON, *Global warming: New challenges for the common fisheries policy?* in *Ocean & Coastal Management*, 70 (2012), p. 4 – 9.

[157] For a fuller account, N. HERVE'-FOURNEREAU, *La reforme de la politique de la pêche et la protection de l'environnent : du conditionnel au présent imparfait*, in MOUGIN, D. CHALES–LE BIHAN, C. LEQUESNE. Op. cit. p. 111 ff.

[158] R. CURTIN, R. PRELLEZO, *Understanding marine ecosystem based management: a literature review*, Marine Policy 34, 2010, p. 823.

[159]Ibidem, p. 823 footnote above.

II. 3. Changes in primary EU Law brought about by the Treaty of Lisbon: a legal framework supporting the new approach of the CFP?

Before entering into the analysis of the main aspects of the conservation policy which directly concern the EU fisheries enterprises it is worth to briefly recall here some elements of the EU legal framework related to the fisheries policy, and notably: the legal basis of the common fisheries policy within the Treaty of Lisbon, with particular reference to the objectives of the fisheries policy itself; the allocation of competence between the Union and the Member States; the legislative procedures that apply to fisheries issues. All these elements are of a huge importance for the EU fisheries enterprises, since they constitute the general legal background that apply to them.

As a preliminary remark in this respect, it can be noted that, despite the European Union has an exclusive competence in the conservation and management of living marine resources, in the legal basis established under the Treaty of Lisbon the objectives of the CFP are primarily focused on the economic and market dimension. It is our opinion that the provisions of the Treaty do not reflect, in this sense, the new approach of the CFP and the change of mindset on the side of EU operators that the new policy requires.

In addition, some elements having a profound impact on fisheries management, such as the interpretation of the Treaty provisions on allocation of competence between the Union and Member States, as well as the consistency of certain measures of the CFP with the requirements of EU primary law, are still unclear aspects of the CFP's legal framework.

With regards to the objectives of the policy, according to Article 11 of the Treaty on the Functioning of the European Union (TFEU) 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development.'[160]In this perspective, numerous recent EU Directives and policy initiatives have been developed in order to restore the integrity and quality of the marine environment[161]. Besides the Common Fisheries Policy, the Integrated Maritime Policy,

[160] Already the changes brought about by the Treaty of Amsterdam in 1997 required the integration of the environmental dimension in all the European strategies and policies actions. See B. STEFANI, R.A. KRAEMER, H.N. SMITH, *An Analysis of the Treaty of Amsterdam and its effects on the Environmental Policy of the European Union and its Member States*, Centre for International and European Environmental Research, Berlin, 1998.

[161] The most relevant initiatives adopted at EU level are: the Marine Strategy Framework Directive (2008/56/EC), the Water Framework Directive (2000/60/EC), the Public Participation Directives (2003/35/EC), the Habitat Directive within Natura 2000(92/43/EEC), the Bird Directive within Natura 2000 (79/409/EEC), the Renewable Energy Directive (2009/28/EC), the Maritime Spatial Planning Directive (2014/89/EU), the Integrated Maritime Policy C(2012) 1447 final, the Integrated Coastal Zone Management 2002/413/EC, the Common Fisheries Policy reform COM (2011) 417 final; the Maritime Transport Strategy

the Blue Growth Strategy, the Maritime Spatial Planning, the Integrated Coastal Zone Management, the Marine Strategy Framework Directive, the EU Energy and Transports policies, the Habitat and Birds Directives are all interlinked initiatives aiming at incorporating and implementing the ecosystem based approach in maritime governance.

Due to the relevance of fisheries activities on seas and oceans, the Common Fisheries Policy is expected to play a crucial role in this field. However, it is worth to mention that the last changes occurred in the nature of the CFP, namely its strong commitment to environmental protection and towards an ecosystem-based approach, are not fully reflected in the provisions of the TFEU related to fisheries[162].

On the one hand, differently from **Title III of the** Treaty establishing the European Economic Community **of 1957 (EEC Treaty) which referred only to 'Agriculture', Title III of the TFEU contains a reference to both 'Agriculture and Fisheries'. Fishery has been recognised, therefore, as an autonomous, independent policy, separated from agriculture. On the other hand, despite this specific reference to** a CFP, the TFEU does not provide differentiated objectives for the two policies. Indeed, according to Article 39 of the TFEU, the EU's Agriculture and Fisheries policies have the same economic and market based objectives (increase productivity, optimum utilisation of factors of production, stabilise market, ensure availability of supplies, ensure that supplies reach consumers at available price), which do not include a reference to the environmental dimension.

Nevertheless, the absence of an environmental perspective in the Treaty provisions dedicated to fisheries seems not to be in conformity with the wide body of rules, legislation, policy documents adopted at EU level over the last few years in order to improve the protection of marine environment and to promote its integration in maritime strategies[163]. Furthermore, as regards the identification of common objectives for the PAC and the CFP, it should be stressed that the CFP, born **formerly as a special part of the PAC in the original EEC Treaty**[164]**, has acquired, over**

COM (2009) 8; the Motorways of the Sea initiative Decision 884/2004/EC; the Blue Growth initiative COM (2014) 254 final/2.

[162] This may be explained by the fact that when the Treaty of Lisbon entered into force on 1st December 2009, the last reform of the CFP was still not in place. The process leading to it initiated in July 2011 and was finalised only in December 2013, with the official adoption of the Basic Regulation (EU) No. 1380/2013 of … December 2013.

[163] It has been noted that in recent years the development of the European environmental law, especially as far as the protection of natural resources is concerned, has been characterised by the progressive reduction of legally binding acts such as directives and regulations, while 'soft law', not legally binding commitments and policies initiatives are proliferating. For an analysis of this topic as pertaining the 2005 *Thematic Strategy on the sustainable use of natural resources* of the European Union and the following 'Strategy Europa 2020' see L. ECCHER, *La strategia europea per la gestione delle risorse naturali quale esempio dei nuovi sviluppi nel diritto ambientale europeo*, in Rivista giuridica dell'ambiente, 2012, p. 485 – 491.

[164] See Chapter I.

the last few decades, and mostly with the recent reform, its own specific and sometime opposite objectives. Therefore, while the principal aim of the PAC still remains to increase productivity in the agricultural sector, the core objective of the Fisheries Policy is to reduce fishing effort and production. In other words, the conservation of marine resources has acquired a prominent role, representing the core challenge of the current CFP, in the view of guarantee the renewability of resources and by this, also the continuity of fishing activities in the future.

As regard the concrete implementation of those policies, moreover, the common agricultural policy is characterised by payments of subsidies for crops and lands to be cultivated and price support mechanisms, which reflect a perspective linked to the cultivation of land, whose allocation to States and individuals is made on the basis of national boundaries[165]. But fisheries policy is based on an international, transnational perspective, due to the mobility of resources and the transnational dimension of maritime governance[166]. Therefore, joining the respective objectives of the two policies does not sufficiently take into account the structural differences among them.

A second point arising from the analysis of the Treaty, moreover, is whether the power to adopt conservation measures for the waters under the jurisdiction of Member States falls within the competence of the European Union or within the competence of the Member States. The matter concerns, more specifically, the interpretation of the exact meaning of Art. 38–44 in combination with Art.2(1) and Art. 3(1)(d),and Art. 4(1) and (2)(d) of the TFEU[167].

The post-Lisbon Treaty provisions address the issue by providing an exclusive competence of the European Union in '*the conservation of marine biological resources under the common fisheries policy*' [Art. 3(1)(d) of the TFEU]. Thus, the Treaty confirms the approach held by the European Court of Justice of the European Communities in the case *Commission v. United Kingdom* of 1981[168], according to which '*since the expiration on 1 January 1979 of the transitional period laid down by Article 102 of the Act of Accession, the power to adopt, as part of the common*

[165] S. KHALILIAN, R. FROESE, A. PROELSS, T. REQUATE, *Designed for failure: A critique of the Common Fisheries Policy of the European Union*, in Marine Policy 34, 2010, p. 1180.

[166] R. CASADO- RAIGÓN, *Protección transfronteriza de los recursos marinos vivos,* in Papeles y memorias de la Real Academia de Ciencias Morales y Políticas, Nº. 10, 2001, p. 134 – 137.

[167] M. SALOMON, T. MARKUS, M. DROSS, *Masterstroke or paper tiger – The reform of the EU's Common Fisheries Policy*, in Marine Policy 47, 2014, p. 80.

[168] Case 804/79 Commission v. United Kingdom [1981] ECR 1045.

fisheries policy, measures relating to the conservation of the resources of the sea has belonged fully and definitively to the Community" (Par. 17)[169].

In the same perspective, the Commission has recently argued[170] that as far as the EU environmental law provides the adoption of measures to regulate fisheries, it is up to the Union to adopt them and Member States wishing to restrict their fisheries in order to protect marine environment, shall therefore require the Commission to initiate a formal legislative procedure.

However, such interpretation might not be consistent with the principle of conferral of powers and, moreover, with the fact that environmental law is a field where competence is shared between the Union and Member States[171].

It is also worth considering to what extent the Union exercises its exclusive power under Art. 3(1)(d) of the TFEU and the precise content such power. As for the first aspect, the exclusive competence of the EU relates legislative powers (i.e. the competence to prescribe rules giving effect to the CFP objectives in the field of conservation of marine biological resources), but the power to enforce these rules in the waters under national jurisdiction, falls within the responsibility of

[169] The allocation of competencies between the EU and Member States has been controversial issue for a long time. During the 1970s and the early 1980s, the Commission was trying to establish a common system of fisheries management for Community waters, and several Member States, among which the UK, opposed the exclusive competence of the Community to adopt conservation measures. The Court, in several judgments, based its statements on the '*state of law in question'*, and namely on Article 102 of the 1972 Act of Accession and relevant provision of the EEC Treaty.
In a first phase, which runs from the adoption of Regulation (EU) n. 2141/70 (hereinafter the Structural Regulation) to the extension of Community fishing limits to 200 miles in 1977, there was no adoption of conservation measures by the Community, although Article 5 of the Structural Regulation empowered the Council to adopt the necessary measures for the conservation of stocks in the maritime waters of Member States. With regard to the permission to adopt national measures, at that time the European Court stated in the *Krämer case* '*...the reply to the national courts should be that a Member State does not jeopardize the objectives or the proper functioning of the system established by Regulations No 2141/70 and 2142/70 if it adopts measures involving a limitation of fishing activities with a view to conserving the resources of the sea.*'.
However, after the extension of the EU fishing limits to 200 miles in 1977, the Community started to take measures by its own. Furthermore, pursuant to Article 102 of the 1972 Act of Accession, since 1978 '*the Council, acting on a proposal from the Commission, shall determine conditions for fishing with a view to ensuring protection of the fishing grounds and conservation of the biological resources of the sea*'. The expiration of the time-limit in Article 102 of the Act of Accession, according to the above mentioned European Court ruling in *Commission v. United Kingdom,* resulted in the definitive loss of that competence by Member States. See on this point R.R. CHURCHILL, *EEC Fisheries Law*, Cardiff, 1986, p. 86–88.
[170] See the communication from the Commission to the Council and the European Parliament, *Elements of a strategy for the integration of environmental protection requirements into the Common Fisheries Policy*, of 16 March 2001, COM (2011) 143, final, p.7.
[171] T. MARKUS, *European fisheries law: from promotion to management*, in Europa Law Publishing, 2009, p. 51 -61.

Member States[172]. Moreover, Member States may legislate and adopt legally binding acts '*if so empowered by the Union or for the implementation of Union acts'* (Art. 2(1) TFEU).

Furthermore, with the regard to the content of the exclusive competence, the EU legislative power is restricted to the adoption of '*conservation of marine biological resources*'[173] under the CFP, while, more broadly, '*agriculture and fisheries'* are subjected to shared competence between the EU and Member States (Art. 4(2)(d) TFEU). Both the Union and the Member States can therefore legislate and adopt legally binding acts in the area of fisheries (except when the issue falls within the exclusive competence of the Union), but Member States, in accordance with the principle of subisidiarity, exercise their competence to the extent that the Union has not exercised its own or cease to do it (Art. 2(2) TFUE).

However, the regime of allocation of competences between the Union and the Member States established by Lisbon Treaty, has a great impact on the implementation of several aspects of the reformed CFP, particularly as far as the application of the principle of subsidiarity in the fisheries sector, the benefits of the regionalisation approach, the incentives to increase industries representatives' participation in decision making processes, the potential reduction of the number of technical measures and of micro-management are concerned[174]. The allocation of competence also affects the role and responsibility of Member States in both international environmental law and fisheries law[175].

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[172] R. CHURCHILL, D. OWEN, op. cit. p. ; A. BERG, *Implementing and enforcing European Fisheries Law*, The Hague, 1999, p. 32.

[173]For an analysis of what is meant by 'conservation measures' in the new CFP see Section 8 in this Chapter.

[174] Taking account, for instance, the enforcement of the CFP, it is worth to mention that the control of the policy is a competence of the Member States. More specifically, the Commission is not empowered to control directly the activities performed by fishermen but to monitor the way in which Member States fulfil their own obligation to enforce the CFP. As an exception to this rule, distant fisheries are subjected to direct control of the Commission, through *ad hoc* inspectors. The last Regulation in the field of control has been adopted in 2009, before the entering into force of the new CFP. However, Regulation 1224/2009 can be considered as a sort of 'anticipation' of the reform itself, since introduces new mechanisms that reflect the most recent policy developments. More specifically, the Regulation: - has gathered all the provisions on control in a unique, comprehensive legal basis; - has enlarged the field of application of control activities, including transport, market and traceability; - has established harmonised inspection procedures and the concept of ' risk assessment'; - has reinforced the means of application at the disposal of the Commission, including punitive instruments (financial sanctions) and cooperative instruments (action plans). This framework has been reinforced, as it will be seen in Chapter IV, by the European Maritime and Fisheries Fund (EMFF). In particular, the EMFF establishes a minimum amount (€ 580 million) that Member States should spend on control and enforcement procedures and, in addition, makes the adoption of adequate control measures as a precondition for the deliverance of funds. For further details in this respect see E.PENAS LADO, *The Common Fisheries Policy: the quest for sustainability*, Brussels, 2016, p. 188 – 210.

[175]Clienthheart, *The impact of the Lisbon Treaty on EU fisheries policy – an environmental perspective*, 2010.

The new Basic Regulation has addressed the issue in an innovative way, essentially by confirming the exclusivity of the powers of adoption at EU level as argued by the Commission, but clarifying at the same time the role of Member States and extending their instruments.

Firstly, as far as fisheries conservation measures are necessary to comply with obligations under Union environmental law and do not affect fishing vessels of other Member States, Member States can restrict fisheries activities in waters under their national jurisdiction.

In addition, in order to solve potential conflicts among Member States whether unilateral measures adopted for the purpose of protecting the marine environment would affect fisheries interests of other Member States, a mechanism involving the Commission is provided.

More specifically, where a Member State 'considers that measures need to be adopted for the purpose of complying with the obligations referred to in paragraph 1 and other Member States have a direct management interest in the fishery to be affected by such measures, the Commission shall be empowered to adopt such measures, upon request, by means of delegated acts in accordance with Article 46.' [Art. 11 (2)].

To this purpose, the initiating Member State 'shall provide the Commission and the other Member States having a direct management interest with relevant information on the measures required, including their rationale, scientific evidence in support and details on their practical implementation and enforcement. The initiating Member State and the other Member States having a direct management interest may submit a joint recommendation, as referred to in Article 18(1), within six months from the provision of sufficient information' (Art. 11 (3)).

The option of a full legislative procedure, however, remains in place when a joint recommendation is not agreed by Member States or it is not compatible with environmental requirements. Moreover, in case of urgency and when achievement of objectives is at risk, the Commission is allowed to adopt the measures also in absence of the joint recommendation (Art. 11(4)).

Overall, the mechanism is conceived to speed up the legislative procedure, ensure the adoption of the conservation measures which are needed and guarantee, at the same time, the allocation of powers and competences as established by the Lisbon Treaty.

The powers of Member States were, however, considered to be restricted[176]. For instance, from the one side Member States shall, under the Habitats Directive, establish marine protected areas to contribute to a network of protected sites (Natura 2000) in the waters under their jurisdiction, but on the other side they cannot directly limit fishing activities in those areas under the CFP Regulation.

[176]M. SALOMON, T. MARKUS, M. DROSS, *op. cit.* p. 81.

Another controversial issue, which is left open in the general EU fisheries legislative framework, is the consistency of certain CFP measures with primary EU law and namely with the precautionary principle as laid down in Article 191 of the TFEU. In this respect, it should be stressed that through Article 11 TFEU environmental protection, including the precautionary principle, shall be integrated into the formulation and implementation of all the European policies, and undoubtedly also in the CFP. However, various EU legislative regulations adopted over the years seem not to meet the requirements of the precautionary principle[177], since both fishermen and Member States have opposed the adoption of more severe actions arguing that there was not enough scientific evidence to justify it. The 2009 Green Paper of the European Commission, which paved the way towards the recent reform of the CFP, does not make, however, any reference to the compatibility of the CFP measures with the precautionary principle.

The Treaty of Lisbon, finally, introduced some innovations also in relation to the legislative procedures that shall be applied to fisheries. According to Article 43(2)TFEU, the common organisation of agricultural markets (in which fisheries is included on the basis of Art. 38(1)) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy, are subjected to the ordinary legislative procedure set out in Article 294, which involves the Commission, the Council and the European Parliament. This marks the beginning of a real legislative power also for the Parliament in fisheries issues, while in the previous system the Council had the prominent role. Thus the shaping of the policy in the past was characterised by a permanent tension between the Commission, seeking scientifically rational solutions, and the Council of the Ministers, whose Members were determined to protect their national fisheries industries. In this sense, the introduction of the co-decision procedure in the fisheries policy might overcome the weaknesses of the preceding procedural framework[178].

The specificity of the fisheries sector is further underlined in Art. 43(3), providing that the Council alone (and not in co-decision with the European Parliament), on a proposal from the Commission, could adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities. This special procedure emphasizes the need to effectively guarantee the applicability of competition rules in the sector[179], and the need to promote the access to natural resources in a controlled manner.

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[177]S. KHALILIAN and others, *op. cit.* p. 1108-1181.

[178]See D. SYMES, *The European Community's Common Fisheries Policy*, in Ocean and Coastal Management, Vol. 35, 1997, p. 146.

[179] C. FIORAVANTI, *La politica comune della pesca nel Trattato sul funzionamento dell'Unione europea,* in Studi sull'integrazione europea, Vol. 3. Fasc. 3, 2010, p. 510 – 511.

II.4. The CFP reform: at a crossroad between the environmental and the economic and social dimension

The 2013 Basic Regulation introduced a new system for the conservation and management of marine biological resources which included several instruments and measures of a paramount importance for the EU fisheries enterprises such as such as TACs and quotas, Maximum Sustainable Yield (MSY), Multiannual Plans and Technical Measures. The general objective of the policy is to 'To promote a fishery sector that is environmentally, economically and socially sustainable and integrated in the maritime context'[180].

From a legal point of view, the three dimensions of sustainability (environmental, economical and social) are equally important, and none of them can be achieved in separation from the others. However, the ecological sustainability, not only intended as protection of fish stocks but also as protection of the marine ecosystem, plays a central role in the reformed CFP, since it is seen as 'a basic premise for the economic and social future of the European fisheries'. The basic idea, in other words, is that fisheries enterprises rely on good environmental conditions because 'without more marked improvements in stock status, economic and social sustainability will remain limited'[181].

The primary, core objective of the CFP reform is therefore to achieve mortality level of fish stocks which does not prejudge their future exploitation. This requires specific actions aimed at: (a) Eliminating overfishing in the short term; (b) Reducing overcapacity and discards as much as possible; (c) Putting in place a decision-making system consistent with long term sustainability, flexible and adaptable to local conditions; (d) Improving responsibility and compliance by the industry; (e) Improving the availability of scientific advice and economic data[182].

At the same time, the environmental challenge is seen as crucial for the improvement of the conditions of fishermen and fishing industries.

Economic sustainability, therefore, can be reached in particular by:(a) Increasing the long-term resilience of the fisheries sector; (b) Reorienting the public financial support at the EU level and the CMO towards green/smart innovation, added value activities and marketing. In this

[180] See the Impact Assessment Accompanying Commission proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy, of 13 July 2011, SEC (2011) 891, p. 33.
[181] See the Report of the European Commission on the Environmental, Economic, Social and Governance impacts of the STATUS QUO scenario for the 2012 revision of the Common Fisheries Policy. Executive Summary, March 2010, p. 8.
[182] See the Impact Assessment quoted in note 52 above, p. 28.

perspective the reform incentives fishermen to opt for more specialised equipment and innovative techniques in order to prevent unwanted catches.

As regards to social sustainability, the aim is to increase the quality of working conditions in the fisheries sector and to make it an attractive source of employment, especially for the young, primarily by guarantying living conditions and improving standards for fishermen (in terms of wages, contracts, safety on board etc.). At the same time, a purpose of the reform is to give alternative development options to coastal communities dependent on fisheries by promoting economic diversification into several maritime activities related to fisheries.

Last, but not least, the reform aims to simplify the legal framework and the administrative procedures, especially with regards to aquaculture which is increasingly seen as an alternative source of fish products to satisfy EU consumers' demand. This entails, in particular, the reduction of the number and of the complexity of regulations, as well as the integration of the financial aspects of the CFP into a unique budgetary fund.

II.5 – The TACs and quota system: fisheries enterprises between landing obligation and flexible management of fishing rights

An ancient conservation and management tool which is of a paramount importance for the EU fisheries enterprises since the origin of the CFP [183], is the regular setting of Total Allowance Catches (TACs). TACs (also known as fishing opportunities), are quantitative limits (expressed in tonnes or numbers) which indicate the maximum weight of fish of a given stock or of a group of stocks which can be *caught* in a given period or, when fish is not subject to a landing obligation[184], the maximal amount of a given fish stock or of group of fish stocks which can be *landed* in a given period[185]. TACs are fixed every year by the Council of Fisheries Ministers through a special legislative procedure, without involvement of the European Parliament[186]. The European Commission, on the basis of scientific advice provided by the ICES and STECF, submits a proposal of Regulation fixing TACs to the Council, which votes by qualified majority. TACs are then divided into 'national quotas' and allocated among Member States in accordance with the principle

[183]The TACs management system dates from 1977, when Member States of the European Community declared an Exclusive Economic Zone on their Atlantic coasts (See Chapter I par).
[184] On the link between the TACs and discarding see R.R. CHURCHILL, D. OWEN, *op. cit.* p. 162–164.
[185] See Article 4(15) of Regulation (EU) No 1380/2013.
[186] According to Article 43(3). of the TFEU: 'The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities'. Before the entry into force of the Lisbon Treaty, the legal basis for the adoption of TACs was the 2002 Basic Regulation (its Article 20).

of 'relative stability'[187], the aim of which is to ensure that each Member State receives a quota of TACs 'on the basis of the catches from which traditional fishing activities, the local populations dependent on fisheries and related industries of that Member State benefited before the quota system was established[188]'. In this way, the principle of relative stability operates as a factor of social and economic stabilisation for fisheries enterprises, by maintaining substantially unchanged over time the percentage of TACs attributed to each Member State.

In this respect it should be noted, however, that the system of quotas based on the principle of relative stability has been conceived in the 1970s, when fisheries resources in the waters of the Community were still relatively abundant. The primary objective of the CFP at the time was to allocate fishing opportunities among Member States in an equitable and balanced manner, rather than manage shared resources in a sustainable way. In addition, despite the progressive enlargement to new Member States, which extended the Community waters and increased the weight of stocks to be shared, the original system based on relative stability was kept in place, given the Member States difficulties to re-negotiate on a new basis their historically acquired fishing rights.

As it has been pointed out[189], however, such rigidity in terms of space and time of the TACs system, does not appear appropriate, especially nowadays, to regulate an activity such as fishery, which is deeply influenced by evolving factors arising both from the nature, such as the quality of ecosystem, the evolution of species and biodiversity, climate change, and from humans, such evolving economic and social needs, advances in technological and scientific development. Moreover, since the system was in place, TACs have been fixed by the Council in most cases at

[187] The principle was affirmed for the first time in Article 4(1), of Regulation (EEC) No 170/83 and then repeated in Regulation (EEC)No 3760/92 [Article 8(4)], and finally inserted in Article 16 of Regulation No. 1380/2013. Its main scope is to ensure that each Member State will receive a part of the European TACs which should be proportionate to the importance of its fishing sector, with particular regard to the influence of small-scales and artisanal fisheries. On this point see A. DEL VECCHIO, ***La pêche maritime – Politique commune de la pêche***, op. cit. p. 7.

[188] See judgements of the European Court of Justice: in Case C-3/87 of 17 November 1992, *The Queen* v *Ministry of Agriculture, Fisheries and Food,* ex parte *Agega*, paragraph 24, and Case C-216/87. of 14 December 1989, *The Queen* v *Ministry of Agriculture, Fisheries and Food,* ex parte *Jaderow,* paragraph 23.

[189] See the Commission Staff Working Document, *A diagnosis of the EU fishing sector*, prepared to back up and clarify the Green Paper on the Reform of the Common Fisheries Policy [COM(2009) 163 final], p. 129–138.

levels generally well higher as recommended by scientific advice[190] in order to accommodate the interests of fisheries industries on the basis of short-term political considerations[191].

In this perspective, the 2013 CFP reform assumes that 'The TAC and Quota system has proven inadequate to ensure sustainability, which constitutes a fundamental objective of the CFP'[192]. Several changes have been introduced therefore in order to improve the model of fisheries management and make it more consistent with modern needs[193], although this could entail economic and social disadvantages for fisheries enterprises, and therefore for fishermen working on behalf of them.

In this sense, a first element introduced by the new Basic Regulation is the obligation for each fishing vessel to land all catches, in view of gradually implementing a discard ban for the majority of fish stocks (Article 15). Discarding is the practice of fishermen to dump into the sea unwanted fish, such as juveniles, individuals of species other than the target one, dead or damaged fish.

The amount of fish discarded is influenced by many factors, such as the catch area, the target species, the fishing gears, the trawling speed, the fishing time at sea. In some areas, e.g. the North Sea, the phenomenon has a large scale for certain species of fish, as the cod and the flatfish, whose 50% and 55-70%of amounts caught respectively have been discarded in 2008[194].

Since the waste of living marine resources is harmful from both the economy and the environment, eliminating discard constitutes a major challenge for the CFP.

It could be argued, however, that the several factors leading to discard derive in large part from the TACs and quota system[195]. It should be noted, in this regard, that fishermen do not have

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[190] The figures on catch and fishing activities show that after the 1992 reform of the CFP (1992–2001) TACs set by the Council were 19% above the levels recommended by ICES, and after the 2002 this difference increased to 21%. See on the point S. VILLASANTE, M. GARCIA-NEGRO, F. GONZALES-LAXE, G. RODRRIGUEZ, *Overfishing and the Common Fisheries Policy: (un)successful results from TACs regulations?*, in Fish and Fisheries, 2011, 12, p. 34–50.

[191]As stressed by D. SYMES 'The dominant position occupied by TACs and quotas in the Community's conservation strategy is indicative of the ascendancy of relative stability as the *modus operandi*, whereas the outcomes of the annual negotiations have tended to demonstrate a rejection of the scientific imperative'. See D. SYMES, op. cit. p. 147.

[192]See the Commission Staff Working Document entitled *A diagnosis of the EU fishing sector*, *op. cit.* p. 131.

[193] As highlighted by G. CATALDI, ' Le système du TAC et des quotas est critiqué car il n'a pas réussi à limiter le taux d'exploitation des stocks. Cependant tout le monde est d'accord sur le fait qu'il n'existe pas d'alternatives valable à ce système. Il est donc nécessaire d'améliorer son efficacité par le renforcement de la surveillance, l'utilisation d'engins de pêche plus sélectifs, la réduction du rejet en mer, l'adoption de nouveaux plans de contrôle de l'effort de pêche', See G. CATALDI, *Les principes généraux de la politique commune de la pêche à l'aube du troisième millénaire*, in La Méditerranée et le droit de la mer à l'aube du 21e siècle, Naples 22 et 23 Mars 2001, p. 429.

[194] International Council for the Exploration of the Sea, *Ecoregion North Sea*. ICES Advice, Book 6, Copenhagen, 2013.

[195] R.R. CHURCHILL, D. OWEN, *op. cit.* p. 132 ff.

interest in keeping onboard species and sizes which have no (or have little) market value, because the market price at which this fish would be sold would not cover the overall costs of landing operations. Therefore, as TACs represent landings and not catches, fishermen discard lower-valuable fish in order to make more space onboard for fish with higher market value and to save, at the same time, a part of their quota for further utilisation (a phenomenon known as 'highgrading').

Another reason for which discard takes place steams from legislation, and especially from application of minimum landing sizes, of catch composition rules (i.e. the establishment of maximum or minimum percentages in the catch of mixed–species fisheries) and of landing limitations. Firstly, a direct effect is that all fish caught surplus to quota is discarded, as it cannot be lawfully landed. In mixed-species fisheries this mechanism is particularly evident and linked to the quotas system. Indeed, if two species, say A and B, are 'mixed' (i.e. found together in the sea), and the quota of a fishing vessel for the species A is still available but that of specie B is almost exhausted, the fisher will discard all fish of species B caught surplus to quota. If a third species for which the vessel has no quota is accidentally caught during the operation, this fish will be discarded as well. And once the vessel's quotas for both species A and B are exhausted, individuals of these species accidentally caught in future fishing operations will be discarded. In a similar way, minimum landing size obligations in mixed fisheries leads to discards, since selective gears normally select individuals above the minimum size for their target species, but not also for the other species which are accidentally caught in mixed fisheries.

However, despite the practice of discard could be motivated, at least in the perspective of a fisherman, with valuable market considerations, it constitutes at the same time a major long-term cost, not only in environmental terms, but also economically. Indeed, discard leads to a large loss of living resources, which is also a loss of fishing opportunities for the industries in the future. From an ecological point of view, it alters the functioning of the food chain and represents a big threat for marine ecosystem. Furthermore, discard contributes to the mortality of the stock, but as the amount of fish discarded is never accounted, fisheries data, and therefore our scientific knowledge on the *status* of marine environment remain incomplete.

To face the issue, the new 2013 Basic Regulation provides an obligation for fishermen to land all fish caught. More specifically, all the fish, of whatever species, which is caught, shall be 'brought and retained on board the fishing vessels, recorded, landed and counted against the quotas where applicable' (Article 15).

However, such landing obligation is submitted to a number of limitations. Firstly, it concerns exclusively the fish caught 'during fishing activities in Union waters' and 'by Union fishing vessels outside Union waters in waters not subject to third countries sovereignty or

jurisdiction'. It is also restricted to 'species which are subject to catch limits and, in the Mediterranean, also catches of species which are subject to minimum sizes'[196] . Furthermore, in order to allow fishermen to adapt to the new rules, Article 15 provides a progressive implementation of the discard ban, between 2015 and 2019 for all commercial fisheries.

The new regime foresees also three exceptions from the landing obligation, which is not applicable to: species in respect of which fishing is prohibited; species which, according to the best scientific advice and taking into account also the characteristics of the gear and fisheries practice, have high survival rates (also after they are being discarded); and to catches falling under *de minimis* exemptions[197].

Moving to catch quotas (instead of landing quotas) by introducing a discard ban confirms, from one side, the setting of TACs as a core tool of the CFP, for the other side, represents an important change to make this tool more consistent with the objectives of the reform.

In environmental terms, undoubtedly discard ban would result in significant improvements. Firstly, the landing obligation is a strong incentive for fishermen to increase the selectivity of their fishing activities, for instance by using more selective gears and nets. Secondly, discard ban is an effective way to prevent overfishing, since it would result in the reduction of the amount of juvenile fish and over-quota fish discarded. Thirdly, and in terms of fisheries management, the overall catches are registered instead of being partially discarded, by this contributing to the collection of more reliable data on fishing mortality.

However, from the ecological point of view, a first weakness of the new rules is that the landing obligation is restricted to the most important commercial species. The ecosystem based approach requires taking into account the ecosystem as an entity composed of many different parts dynamically interacting, and not just a single activity or species of fish[198]. Or, if the landing obligation would apply to all fish species except those under special protection, the selectivity of the fishing gears would be enhanced also in relation to species which are commercially irrelevant but

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[196]Where Member States having a direct management interest in a particular fishery agree that the landing obligation should apply to species other than those listed in paragraph 1, they may submit a joint recommendation for the purpose of extending the application of the landing obligation to such other species [Article 15(3)].

[197] The *de minims* exception occurs where scientific evidence indicates that increases in selectivity are very difficult to achieve or / and to avoid disproportionate costs of handling unwanted catches [points i) and ii)of Article 15(5)(c)]. In this respect, it is worth mentioning that unwanted catches falling into the *de minims* exception are not counted in the quotas but shall be fully recorded. See M. SALOMON, M. TILL, M. DROSS, *op. cit.* p.79.

[198] M. SALOMON, K. HOLM-MULLER, *Towards a sustainable fisheries policy in Europe*, in Fish and Fisheries, Volume 14, Issue 4, Dec. 2013, p. 625–638.

important for the ecosystem[199]. Furthermore, a general landing obligation would facilitate the enforcement control, while the gradual implementation of the discard ban, together with the regime of exceptions, makes difficult monitoring activities in concrete terms[200].

However, the effects of the discard ban are to be evaluated also with regard to the commercial and economic interests of the EU fishing industries. Landing obligation may have, in particular, two main economic consequences for the sector. Firstly, it may increase the costs linked to the fishing activity, especially in the short term. Secondly, but not of a secondary importance, a policy against discards may reduce the total income of the industry by affecting sales prices[201].

As far as the first aspect is concerned, landing obligation entails additional costs for fishermen as far as it reduces the space available onboard for target species (since all the catches shall be retained onboard and transported to land). In addition, it requires the adoption of selective, technologically advanced, and therefore costly, techniques. Fishermen will be obliged to perform more frequent journeys to ports, as well as to change their fishing zones, with a consequent increase of fuel costs that, not differently from overfishing, is environmentally damaging.

Moreover, increased selectivity is expected to reduce commercial catches and therefore to increase prices of fish in the short term (as far as less fish is caught, prices go up). However, the reduction of quantities of fish caught might be proportionally more important than the sales price increase. Markets and activities based on the fish discarded should therefore be developed and become big enough to compensate this loss of the industry.

Furthermore, in social terms, in fisheries with high discard rates many vessels will probably leave the sector, with a subsequent loss of employment opportunities which is expected to be particularly accentuated in coastal communities, but partially compensated by the creation of new jobs in ports due to the implementation of the landing obligation and utilisation of fish discarded.

In this respect, it is worth to recall the need to introduce a differentiated regime for the industrial and the small-scale fleets, in order to promote the capacity reduction and the economic efficiency of the firsts, and the achievement of social objectives of the latter.

It has been argued, in addition, that the success of a discard ban policy is based on the existence of an efficient monitoring system, from one side, but also, and more importantly, on the

[199] M. SALOMON, M. TILL, M. DROSS, *op. cit.* p. 79.
[200] On the issues emerging in relation to the enforcement of the CFP see J.M. DA ROCHA, S. CERVINO, S. VILLASANTE, *The Common Fisheries Policy: An enforcement problem*, in Marine Policy 36, 2012, p. 1309–1314.
[201] Informe 01/2013, *La reforma de la política pesquera común*, Sesión ordinaria del Pleno de 23 de enero de 2013, Consejo Económico y Social, España, p. 54. ff.

good faith and willingness of fishers to implement it[202]. Hence, it is crucial to consider that fishers would recognise the environmental and economic potential of the more selective fishing techniques and of the landing obligation only if two conditions at least are meet: firstly, if fishers will have economic incentives to do so, secondly, if there will be an effective involvement of them in the decision making process at regional level as envisaged by the reform.

Another important element which, beyond the landing obligation, the reform has introduced in order to address the weaknesses and rigidity of the TACs and quota system, is the increased flexibility in the rules governing allocation of fishing opportunities. As it has been previously pointed out in this Chapter, in mixed fisheries discard is due also to the inconsistency between quotas that fishermen hold for different species and the catches they effectively realise. Therefore, the reform acknowledges that a more flexible regime governing the transferability of fishing rights among fisheries operators could indirectly contribute to reduction of discard. Through this mechanism, a fisherman whose quotas have been exhausted for some species but not for others, could adjust his quotas holdings to fit his real catches by buying or leasing fishing rights retroactively.

In this perspective, the new Basic Regulation allows Member States to introduce a system of transferable fishing concessions (hereinafter TFCs)[203]. TFCs are user rights to exploit fisheries resources[204] conferred by Member States to vessels owners for a limited period of time (and for a minimum of 15 years). More specifically, they represent a fixed proportion of the national fishing quota annually allocated to a Member States, which can be transferred by his holder to anyone else that meets the eligibility requirements[205].

As a further mechanism to improve flexibility, Member States are also allowed to derogate from their annual quota by authorising additional landings (not exceeding 10% of the quota) which will be then deducted from the national quotas in the following years [Art. 15 (9)]).

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[202] R. CURTIN, R. PRELLEZO, *Confronting the implementation of marine ecosystem based management within the Common Fisheries Policy,* in Ocean and Coastal Management 117, 2015, p. 47.

[203]For a detailed account on the functioning of the transferable fishing concessions scheme established by the reform, as well as of the regime which apply to Member States which decide to not implement it see G. GALLIZIOLI, *Osservazioni sulla nuova riforma della politica commune della pesca*, in Rivista di diritto agrario, Agricoltura, Alimantazione, Ambiente, Ottobre–dicembre 2013, p. 711 – 712.

[204] It is worth to mention that transferable fishing rights do not give any property rights over fishing an marine resources, but only the right to exploit them for a limited time.

[205] TFCs can be conferred by the Member State only to owners of fishing vessels flying the flag of this Member State or to physical or juridical persons to be employed on such vessels. Moreover, TFCs can be hand over totally or partially. See on the point CATALDI, *Gestione e protezione delle risorse marine biologiche e cooperazione internazionale nel Mediterraneo*, in Derecho del mar y sostenibilidad ambiental en el Mediterráneo, Valencia, 2014, p. 188 – 189.

The Basic Regulation, also offers Member States the possibility to derogate to a certain extent from the obligation to count catches against the relevant quotas. In this way, catches of species that are subject to the landing obligation and that are caught in excess of quotas, or catches of species in respect of which the Member States have no quota, may be deducted from the quota of the target species provided that they do not exceed 9 % of the quota of the target species, and that the stock of the non-target species is within safe biological limits [Art. 15(8)].

The aim of such derogatory provisions is to avoid that Member States lose the possibility to use a quota of a target species which is still available due to the missing of the quota related to a typical bycatch species of the target one, a situation which may steam from the implementation of the landing obligation.

As regard TFCs and its impact on the fisheries enterprises, it should be noted that the reform moves from the following assumption: through such a system inefficient operators able to sell their fishing rights would be incentivised to leave the market, while efficient operators able to buy fishing rights would increase and optimise their activities. Overall, the number of vessels would be reduced without the need of any top-down regulatory action, but making the sector itself fully responsible of its business.

However, it should be pointed out that TFCs may have some important negative impacts. Firstly, such a system is likely to become operative once that national quotas are about to exhausting or are already exhausted, but this situation would be common to numerous, or most probably to the overall operators. Therefore, the transferability of rights in such a situation would not really allow a significant increase of quotas rights for every single small efficient operator, but rather than it would lead to the concentration of those rights in the hands of few major enterprises[206].

The reduction of fleet capacity in terms of number of vessels, hence, would not be without social costs, certain vessels owners benefiting from the system, but not the majority of them, and, in any case, not all their employees, many of which would risk to lose their job. In this sense, it worth to stress that whenever the Basic Regulation refers to 'fishermen', it does not make any distinction between the different figures that operate in the fishing sector. A distinction in the fisheries legal

[206] It should be noted, however, that as stated by the Impact Assessment of the European Commission Accompanying Commission proposal for a Regulation of the European Parliament and of the Council on the Common Fisheries Policy, *op. cit.* p. 31: 'TFCs are normally assorted with safeguards that limit the concentration of quota (e.g.; by setting a ceiling on the quota any given operator may hold). Further safeguards are commonly used that reserve part of the quota to given type of vessels or communities and/or to limit transfers of quota between regions within a country, between countries or between types of vessels. In addition, economic efficiency (and hence the effectiveness of ITR against overcapacity) would be maximised if limitations to the transfer of quotas were lifted'.

framework is however necessary, since the owner of a vessel and the employee(s) working onboard are both 'fishermen' in a technical way, but undoubtedly in different situations in a social way[207].

Overall, from an economic perspective TFCs system may therefore result in a concentration in ownership, barriers to entry the fisheries sector for new operators and damages to the economy of coastal communities and small-scale fisheries. Further, from the ecological point of view, TFCs are economic tools based on a single species approach. If they may result in ecological improvements in relation to exploitation of one single species, there is no evidence of their positive effects on the overall ecosystem. Therefore, they do not appear at the most adequate tools through which integrate in the CFP the ecosystem based approach, which would require, at least, a multispecies perspective.

II. 6. Maximum Sustainable Yield (MSY) and its impacts on fisheries enterprises

One of the most important step forwards of the 2013 reform of the Common Fisheries Policy is to have consolidated the concept of Maximum Sustainable Yield (MSY) as the core objective of fisheries management. This is of huge importance for EU fisheries operators, since in the new policy framework annual TACs, long term management plans and fishing effort are decided on the basis of the reaching of this objective[208].

[207] However, in certain TFCs system already in place, vessels owners have shared with the crew part of the income received through fishing concession. In this sense, the added value generated for the most efficient fisheries enterprises can be used not only to remunerate the owners through profit but also the labour through payment of the crew.

[208] For a fuller account on the new elements provided by the 2013 reform with regards to TACs and quotas and long term management plans see Section 5 and 7 in this Chapter respectively. As for effort management, it should be said that this instrument was introduced progressively in the CFP as a management tool, in particular within the scheme proposed in 2002 for cod recovery. While TACs and national quotas are tools of the CFP conceived to regulate the amount of fish caught (output management tools), fishing effort management is conceived to reduce the vessels' pressure on stocks (input management tools). More specifically, the new Basic Regulation defines 'fishing effort' as 'the product of the capacity and of the activity of a fishing vessel'. For a group of fishing vessels (fleet) it is 'the sum of the fishing efforts of all vessels in the group'. Regulating fishing effort includes therefore two dimensions: vessels' fishing capacity and fishing activity. Fishing capacity can be defined as the vessel's tonnage in GT and its power in kW or, for certain types of fishing, the amount and/or the size of a vessel's fishing gear[208] .With regard to the concept of vessel's fishing activity, although a formal definition cannot be found in EU regulations, it is commonly accepted that it shall be evaluated in relation with time at sea, expressed either in kw days or in days of absence from port. According to the new Basic Regulation, it is up to Member States 'to put in place measures to adjust the fishing capacity of their fleet to their fishing opportunities over time, taking into account trends and best scientific advice, with the objective of achieving a stable and enduring balance between them' [Article 22(1)]. The Commission shall be informed about the measures undertaken at national level through a report on the balance between the fishing capacity of national fleets and national fishing opportunities, which is submitted by each Member State every year.

The Basic Regulation defines MSY as 'the highest theoretical equilibrium yield that can be continuously taken on average from a stock under existing average environmental conditions without significantly affecting the reproduction process' [Article 4 (7)]. In other words, MSY is the largest amount of fish which can be caught from a fish stock year after year without compromising its capacity to regenerate in the future.

Over the years several international conventions, starting from the United Nations Convention on the Law of the Sea (UNCLOS), have incorporated the principle of MSY as a key step to implement a more sustainable fisheries management[209]. EU Member States, with many other States across the world, committed themselves[210] at the World Summit on Sustainable Development held in Johannesburg in 2002 to reach this objective by 2015[211]. This commitment is contained in both the 1995 United Nations Fish Stocks Agreement[212] and the FAO Code of Conduct for Responsible Fisheries[213] and it has been reiterated in the third United Nations Conference on Sustainable Development (Rio + 20) in 2012.

As for EU law, the Biodiversity Strategy to 2020[214] includes the principle by stating the following: 'Fisheries: Achieve Maximum Sustainable Yield (MSY) by 2015. Achieve a population age and size distribution indicative of a healthy stock, through fisheries management with no significant adverse impacts on other stocks, species and ecosystems, in support of achieving good environmental status by 2020, as required under the Marine Strategy Framework Directive'.

[209] Article 61(3) of the United Nations Convention on the Law of the Sea states: 'Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield...'.

[210] In the EU Basic Regulation the achievement of the target is postponed at the latest to 2020 [Art. 2 (2)].

[211] In the Plan of Implementation of the World Summit on Sustainable Development MSY obligation is mentioned as follows: 'to achieve sustainable fisheries, the following actions are required at all levels: a) Maintain or restore stocks to levels that can produce the maximum sustainable yield with the aim of achieving these goals for depleted stocks on an urgent basis and where possible not later than 2015'.

[212] Article 5(b) of the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks states *'*... such measures are based on the best scientific evidence available and are designed to maintain or restore stocks at levels capable of producing maximum sustainable yield.'

[213] Article 7(2.1) of the Food and Agricultural Organisation (FAO) Code of Conduct for Responsible Fisheries, Rome, 1995, states: 'Recognising that long-term sustainable use of fisheries resources is the overriding objective of conservation and management... to maintain or restore stocks at levels capable of producing maximum sustainable yield...'

[214] See Target 4 of the Communication of the Commission to the Council and the European Parliament '*Our life insurance, our natural capital: an EU biodiversity strategy to 2020*', COM(2011) 224 final.

The Marine Strategy Framework Directive (MSFD), in addition, requires that by 2020 at the latest' populations of all commercially exploited fish and shellfish are within safe biological limits, exhibiting a population age and size structure that is indicative of a healthy stock'[215].

Up until the last reform of the CFP, however, that objective was not expressly mentioned in fisheries regulations. The former EU system for fisheries management aimed, less ambitiously, at maintaining stocks at a minimum level which, in line with the precautionary approach, was expected to prevent fish stocks collapse. For instance, the International Council for the Exploration of the Sea (ICES) established a 'precautionary reference point' for stock biomasses (known as target B_{pa}) to prevent the real fish biomass to go below a biomass lower limit (B_{lim}), under which a stock is considered at immediate risk and recovery would be slow[216].

However, the B_{pa} was not considered by itself a target, and therefore a positive, specific goal for fisheries management, but only as an 'operational reference point set by taking into account biomass and fishing mortality roughly estimated, in order to keep low the risk for stocks to fall down the most dangerous level'[217]. In addition, limit references points as outlined by ICES were seen as conflicting with FAO/UN approach, based on target reference points.

Therefore, the explicit inclusion of the MSY in the CFP, compared to the previous scheme, is an important development towards a more efficient sustainable fisheries management in the EU waters. The target is formulated, in particular, as the exploration rate (amount of fish whose mortality is caused by fishing) which leads the stock biomass above level that can produce the MSY[218].

In order to achieve this objective, Member States shall adopt 'conservation and management measures designed to maintain or restore marine resources at a level which can produce the MSY, both within sea areas under national jurisdiction and on the high seas, and to cooperate with other States to that end' (Recital 6 of the new Basic Regulation).

Putting MSY as a target and as a legal obligation, constitutes undoubtedly a positive change, since the EU fisheries management is shifting from merely avoiding the stock collapse to maximisation of yields. In addition, by committing to MSY, the EU fulfils its obligations under

[215] Annex Part B, Descriptor 3, of Commission Decision of 1 September 2010 on criteria and methodological standards on good environmental status of marine waters (2010/477/EU).
[216] P. HARREMOES, D. GEE, M. MacGARVIN, A. STRIRLING, J. KEYS, S. WYNNE, S. GUEDES VAS, *The Precautionary Principle in the 20th Century: Late Lessons from Early Warnings*, London, 2002.
[217] N. DE SADELEER, *Implementing the precautionary principle: approaches from Nordic countries, EU and USA*, London, 2007, p. 162.
[218] See Article 2(2) of the Basic Regulation: 'the CFP shall aim to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield".

international law and under the European Union law, thus strengthening the rule of law in international fisheries management.

From the viewpoint of fisheries enterprises, MSY can be seen as driver for increasing stability and productivity of the stocks, and therefore a benefit not only in environmental terms, but also for both the industries and consumers.

Nevertheless, although all the above mentioned advantages are widely recognised, several questions related to the way to achieve the MSY remain controversial.

Firstly, correct estimation of MSY is hard, due to the lack of complete and reliable data on the status of fish stocks. In this respect, the reform introduces two elements whose scope is, among others, to improve catch data collection, and thereby the basic knowledge to determine MSY. The two elements are both dependent on fisheries enterprises, and are: the obligation of fishing vessels to land all catches, which is expected to improve knowledge about the real amount of fish caught; and the promotion of partnerships between fishermen and scientists, which is expected, in the context of regionalisation, to foster the integration of scientific advice in policy decisions.

In addition, MSY has been criticised for ignoring the multidimensional nature of fisheries issues[219]. The only dimension expressly included in MSY is in fact the ecological one, but its application deeply affects also the economic and social aspects. In particular, MSY can be particularly harmful to fisheries enterprises, since its implementation may imply significant reduction of fishing possibilities in the short term. For this reason, the new Basic Regulation postpones the achievement of the MSY until 2020, despite the obligation contracted by the EU under international conventional law set the deadline by 2015. This postponement is motivated by the need to take into account the possible social and economic negative impacts of MSY on the fishing fleets involved, especially in relation to those stocks which are still far from reaching the level attained under MSY. However, in order to meet the 2020 objective, it has been suggested that it would be appropriate to provide a rigorous time-schedule, which includes the achievement of intermediate targets and follow-up procedures[220].

Furthermore, with regard to particular stocks, such as mixed fisheries stocks, as well as with regards to specific zone, such as the Mediterranean Sea, a specific implementation method is necessary. It is obvious that MSY is a tool designed for the management of mono-species stocks. In mixed fisheries, the reform addresses the inadequacy of the MSY by stating that it is the most vulnerable stock that determines the limits of exploitation for all other fishes taken in the same

[219] See R. PRELLEZO, R. CURTIN, op. cit. p. 46–47.
[220] Informe 01/2013, *La reforma de la política pesquera común*, Sesión ordinaria del Pleno de 23 de enero de 2013, Consejo Económico y Social, España, p. 50 ff.

fishery. However, as far as such limit of exploitation is reached and catching shall therefore stop, fishermen whose activities are highly dependent on other stocks may suffer heavy losses. This problem is particularly evident in the Mediterranean Sea[221], where many fisheries are mixed and where the application of the MSY must be therefore considered in the light of the consequences it may have on the economic performance of fisheries enterprises. In addition, also the pressure on stocks by third States vessels in the Mediterranean[222] should be taken into account.

Last, but not least, the reform of the CFP is promoting MSY, that is a mono-species tool, in the context of an ecosystem-based management approach, which sounds quite contradictory. As far as the reform will be implemented, efforts to overcome such contradiction should be made through major involvement of both stakeholders and scientific community in the formulation of management plans[223]. The reform offers this opportunity, especially in the context of regionalisation (see par. II.7 and II.8).

II.7. Strategic planning and long-term goals: multiannual management and strengthen participation of fishermen in decision making processes

Short-term and long-term considerations are important dimensions of fisheries management affecting the activities of fishing enterprises: short-term disadvantage of a lower quota is compensated by the long-term advantage of a bigger fish stock. Since the 2002 reform of the CFP, multiannual strategy to achieve long-terms goals has been recognised as a fundamental component of the EU fisheries policy. Several long-term plans establishing the general framework for the activities of EU fishing vessels have therefore been established, covering about 33% of the catches of pelagic fish and 45% of the catches of demersal fish in the North Atlantic and the Baltic Sea in 2009[224]. Most of these plans have been successful in reducing fishing mortality for several

[221] For an analysis of the specificities of the fisheries in the Mediterranean sea, with reference to the geostrategic, social and environmental factors which influence the application of the Common Fisheries Policy in this sea basin see R. CASADO RAIGON, *El régimen jurídico de la pesca en el Mediterráneo. La aplicación de la Política Pesquera de la Comunidad Europea*, Sevilla, 2008, p. 17 ff.

[222] For the implications of bilateral treaties in the Mediterranean area, with particular regard to the formation of joint ventures by national companies in conformity with legislation of the host country see A. DEL VECCHIO, *Joint Ventures in Fisheries Established by Mediterranean States, with special reference to Italy*, in *The Continental Shelf and the Esclusive Economic Zone (delimitation and legal regime)*, (under the supervision of Pharand e Leanza), 1993, p. 287 ff.; Of the same author see also *La cooperazione trasfrontaliera, con particolare riferimento ai rapport tra Italia e Malta*, in La cooperazione trasfrontaliera nel Mediterraneo, Aspetti giuridici e politici (under the supervision of P. FOIS, G. PONZEVERONI, A. BASSU) Sassari – Alghero, 18-20 April 1991, p. 109 ff.

[223] See R. PRELLEZO, R. CURTIN, *op. cit.* p. 47.

[224] See the Commission Staff Working Document, *A diagnosis of the EU fishing sector, p.152.*

important fish stocks, since the Council, on the basis of them, fixed TACs in line with scientific advice.

The Basic Regulation of the new CFP introduces four main changes in the management system already in place. Firstly, the multiannual approach has been generalised, having now priority on the regular annual management for all fish stocks. However, annual management is still possible for certain stocks not covered by multiannual plans. Secondly, multiannual plans covers multiple species, meaning that EU fisheries enterprises are facilitated in addressing stocks composed by different species (mixed fisheries). Thirdly, the Maximum Sustainable Yield (and related deadlines to achieve it) must be integrated in the plans as an objective, since conservation measures contained therein are expected to 'restore and maintain fish stocks above levels capable of producing maximum sustainable yield' [Article 9(1)]. Finally, beside fisheries management objectives expressed in terms of fishing mortality and/or targeted stock size, fishing efforts restrictions and control rules, multiannual plans will contain also measures for the implementation of the landing obligation, safeguards for remedial actions where needed and a review clauses in order to guarantee more flexibility and facilitate their adaptation to evolving scientific recommendations. In line with the ecosystem approach, multiannual plans may also contain technical measures to minimise the negative impacts of fishing activities on the ecosystem [Article 10(2)] and shall be based on scientific, technical and economic advice [Article 9(1)]. In case of uncertainty of data and scientific knowledge, measures should reflect the precautionary approach [Article 9(2)].

The importance of multiannual plans lies also in the fact that, in the framework of the reform, these plans are seen, together with technical conservation measures, as the proper tool to implement regionalisation. The aim of regionalisation is, on the one hand, moving away from top-down management at EU level and enhancing the direct participation of fishermen, enterprises and other stakeholders in decision-making processes, and on the other hand, ensuring that rules are adapted to the specificities of fisheries and regions where they are applied. In view of putting the decision-making process at the appropriate scale taking into account local and regional dimensions, the reform provides a specific procedural framework to formulate multiannual plans.

Under such procedure, the Council and the Parliament, on proposal of the Commission, establish long-term plans which set the goals to be achieved as well as timeframe and modalities of their achievement (i.e. Maximum Sustainable Yield (MSY), lower fishing mortality or higher biomass levels). Plans could also prescribe selective gears, measures to avoid discarding and include a flexibility clause. They represent, therefore, a sort of comprehensive framework regulating the activities of fisheries operators.

These general goals and instruments apply uniformly to fisheries enterprises of all Member States fishing on the stocks covered by each plan. However, through the plan itself the EU Legislator empowers Member States to cooperate at regional level in conjunction with stakeholders in order to set the concrete measures of implementation. Member States shall therefore meet industry representatives and NGOs at the level of sea basins in Advisory Councils (ACs), in order to formulate the measures implementing the general objectives set by the EU Institutions in the common plan. Fishermen and other stakeholders in this context can therefore propose specific gears, area or seasonal closures, control measures, measures concerning fishing vessels, measures implementing the discard ban or whatever other measure they consider more appropriate to their fishing activities. Each Member State is hence responsible to enact the measures agreed at supernational, regional level in the waters under its national jurisdiction.

If Member States and stakeholders are unable to reach an agreement through Advisory Councils (ACs), the necessary conservation measures are set by the Commission via delegated acts or by the European Parliament and Council through the ordinary-legislative procedure.

As for the impact of the new provisions on the EU fisheries industries, it can be argued that multiannual plans, as tools of regionalisation, are an important element to bring fishers closer to the main decision making centre and, at the same time, they represent an opportunity to enhance the sector compliance with regulations.

Under the CFP reform the seven RACs established within the 2002 Regulation have been replaced by 11 Advisory Councils (ACs) distributed in seven geographical areas and by the following themes: outermost regions, aquaculture, market, Black Sea. As far their composition is concerned, the reform has maintained the fisheries sector as the main component of the RACs membership (60%), while other stakeholders, especially NGOs, account only for the 40%.

This might be explained by the fact that in most cases agree compromise between fishers and environmental NGOs in the context of RACs has proven to be difficult, but, at the same time, several RACs faced problems in filling all the seats provided for the non-fishing sector stakeholders.

An important issue is however ensuring a stronger voice for small-scale fishers in RACs[225]. Given the geography and fragmentation of this part of the fisheries industry, the objective is in fact not easy to achieve. Some initiatives such as greater involvement of small-scale fisheries in RAC

[225]The UK National Federation of Fishermen's Organisations, *The Future of RACs*, 5th October 2012, available on the website: http://nffo.org.uk/news/the-future-of-racs.html. Of the same author, see also: *Multiannual Management Plans in the Common Fisheries Policy, A briefing note for Co-Legislator*, January 2016; *Self-Regulation: an alternative to fisheries micro-management*, 2nd March 2009; *Regionalisation of the CFP taking stock*, 24th March 2015.

working and focus groups, use of modern communications technologies and development of outreach strategies might be put in place in order to promote their organisation and association.

Several analysts point out the weakness that RACs recommendations are not necessarily reflected in multiannual plans[226]. It can be argued, however, that despite the RACs' role is limited to advise Member States and their recommendations are not legally binding, the real final objective of the reform is to shift the role fishery industry from *advice* into the area of *policy formulation. Compared to the precedent legal framework of the CFP, an important change is that advice is now delivered to* regionally cooperating member states rather than to the Commission. This would allow to take into account in a more concrete and effective way the economic and social needs emerging at regional level, as well as to shape multiannual plans on the basis of the effective locations of marine ecosystems.

Another aspect that can be appreciated in the view of the industry, is that multiannual management plans clearly indicate their long-term objectives in the form of quantificables indicators and specify, at the same time, the means by which these objectives are to be achieved. The rules are therefore designed to increase the predictability of the fisheries management system, enhancing conservation policy and creating more stability for the industry. Moreover, the long-term perspective has replaced, for the large majority of stocks, the last-minute TAC-cuts, which were established on the basis of short term considerations.

However, some elements provides reasons for cautious optimism as well. Indeed, multiannual plans, as tools of fisheries management, are focused on conservation objectives but do not include also the socio-economic dimension of sustainability, which might be subject to general planning scheme as well. Moreover, in a context unfortunately characterized by weak compliance with CFP rules, effective implementation of multiannual management plans would require to set a clear timetable for the industry, as well as the establishment of a centralized inspection regime designed to monitor the management tools adopted in each region and ensure their proper enforcement[227].

II. 8. Sustainable fishing practices: the participation of EU operators in the establishment and implementation of technical conservation measures

[226]R. PRELLEZO, R. CURTIN, op. cit. p. 45.
[227]Informe 01/2013, *La reforma del la politica pesquera comun*, op. cit. p. 53 ff.

It has been pointed out[228] that TACs system is an output management tool, while fishing effort management is an input tool. However, none of them addresses the manner in which fisheries activities are carried out by fishing enterprises. The concrete conduct of fisheries operations is governed by other conservation instruments of the CFP which pertain detailed elements of the fishing practices put in place by the vessels: the technical conservation measures.

In particular, the new Basic Regulation provides a list of conservation measures which shall be adopted by the Union and implemented through the activities of fisheries enterprises 'for the purpose of achieving the objectives of the CFP in respect of the conservation and sustainable exploitation of marine biological resources' (Article 6.1). Conservation measures are adopted by the Commission by means of delegated act, under request of a Member State (the initiating Member State) and after the submission of a joint recommendation of the initiating Member States and of those Member States whose industries have a direct management interest in the fishery to be affected by such measures (Article 11 (2) and (3)).

Although the general rules concerning conservation measures are valid for all the EU sea basins, the measures adopted may differ considerably from a region to another[229]. Moreover, as they form an heterogeneous group of diverse instruments, it is not easy to establish their characteristic features and classification criteria.

Providing a definition of ' conservation measure' is however important, because what falls within the exclusive competence of the Union and what within the shared competence of the Union and Member States depends in concrete terms from what is meant by the wording of Article 3.1.(d) TFUE[230]. In addition, a clear definition of the notion is essential to determine what part of the activities performed by EU fishing vessels fall within the scope of provisions dedicated to conservation measures.

By opting for a narrow interpretation of '*conservation measures'*, the exclusive competence of the Union seems to be restricted to measures regarding fish stock conservation, i.e. related to the conservation of commercial fish stocks and other commercially harvested species. Otherwise, in a broader view, and in accordance with the eco-system based management approach, '*conservation measures'*, may include a wide range of technical measures related, more generally, to the protection of marine environment.

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[228] Par. II.2. above.

[229] Technical measures are currently provided in separate regulations covering different regions.

[230] For an analysis of the allocation of competence between the EU and Member States as pertaining the adoption of fisheries conservation measures as arsing from Arts. 38 – 44 in combination with Art. 2 (1) and 3 (1) lit. d) and Art. 4 (1) and (2) of the TFEU see par. II. 3.

Or, it has been argued[231] that Regulation EU No. 2371/2002 (hereinafter the 2002 Basic Regulation) left the point opened. According to Article 2.1., the main objective of the Common Fisheries Policy was '*to ensure* ***exploitation of living aquatic resources*** *that provides sustainable economic, environmental and social conditions*'. Living aquatic resources, moreover, were identified as '*available and accessible living marine aquatic species, including anadromous and catadromous species during their marine life'* (Article 3 (b). In this sense, the 2002 Basic Regulation seemed to consider the '*marine biological resources under the common fisheries policy'* to whom Article 3(1)(d) of the Lisbon Treaty referred, as exploitable (in economic terms), living (not including in the notion the non–living components of marine eco-system), aquatic (by this excluding non-aquatic species, such as seabirds), resources (potentially subjected to a valuable use for human beings). From the other side, however, since Article 2(1) required the Community '*for the purpose'* established under Article 2(1) '*to 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, aim[ing] at a progressive implementation of an eco-system-based approach to fisheries management*.', there was space also for a different interpretation, under which '*marine biological resources'* are those whose role in the eco-system is crucial to preserve, indirectly, also the maintenance of fish species. In this sense, conservation of marine biological resources under the exclusive competence of the Union would include all the conservation measures listed in Chapter II of the 2002 Basic Regulation, and therefore also specific measures to reduce the impact of fishing activities on marine eco-systems and non target species.

In this respect, the new 2013 Basic Regulation maintains the definition of '*marine biological resources*' [Article 4(2)]. However, the primary objective of the CFP is not anymore expressed in terms of 'exploitation' of fisheries resources by fisheries enterprises for human needs. The primary objective of the CFP it is described as the need to '*ensure that fishing and aquaculture activities are environmentally sustainable in the long-term'* [Article 2(1)].

In this sense, '*The CFP shall apply the precautionary approach to fisheries management, and shall aim* ***to ensure that exploitation of living marine biological resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable*** **yield'**(Article 2(2))**.** The change of wording is evident, since the 2002 Regulation linked the 'exploitation' of living aquatic resources to the development of sustainable economic, environmental and social conditions and therefore to the improvement of human conditions, while

[231]Clienthheart, *The impact of the Lisbon Treaty on EU fisheries policy – an environmental perspective*, 2010.

the new Regulation connects the term of exploitation with the restoring and maintaining of populations of harvested species. In this perspective, in the framework of the new CFP, fisheries enterprises are encouraged to develop '*measures to minimise the impact of fishing on the marine environment*', and '*measures necessary for compliance with obligations under Union environmental legislation*' or can receive '*incentives, including those of economic nature, to promote a lower impact on marine eco-system*' whose scope goes beyond the simple management of fish stocks (Article 7 (b) (d) (i)).

As for classification criteria and taking account their purpose[232], technical measures can be therefore grouped in those which limit catch of small fish (intra-species selectivity), of unwanted fish species (inter-species selectivity), of protected species (inter-species selectivity) and measures whose aim is to limit or prevent (irreversible) damage to parts of the ecosystems, such as marine habitats.

Another criterion consists in taking into account what is required to fishing vessels or prohibited by these measures. In this perspective, there are measures that regulate characteristics of what can be caught and landed by fishermen (i.e. fish above some minimum sizes, catch composition of mixed fisheries); several technical aspects of fishing activities (for instance design and technical features of gears, such as mesh size and netting, target species etc); the use of gears during fishing operations (for example prohibited gears, length limitations); or the access to fishing areas or periods (spatial or temporal fishing closures).

Following the last reform of the CFP, the Commission has recently undertaken a process of review of the existing body of law related to conservation measures. In January 2014 a consultation process has been launched in order to seek the views of stakeholders and the public in general, with the aim to provide inputs for development of legislative proposals[233].

One of the main challenge identified by the Commission in this respect, is the need to rethink technical measures in relation to two main aspects introduced by the reform: regionalisation and more stakeholders involvement, especially on the side of the EU fishing industry.

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[232] For analysis of several criteria of classification of technical measures see the Study of European Parliament, *Workshop on a technical measures framework for the new common fisheries policy*, Directorate-General for Internal Policies, 2015, p. 12 ff.

[233] At present, a Proposal for a Regulation has been adopted, on the basis of the outcome of the consultation process. See the Communication of the European Commission, *Proposal for a Regulation on the conservation of fishery resources and the protection of marine ecosystems through technical measures,* of 11 March 2016, COM (2016) 134 final. The Communication stresses, in particular, that the 'current regulatory structure for technical measures [is] sub-optimal' and that 'Technical measures sit within this framework as tools for contributing to the achievement of the overall objectives of the CFP, as follows: (1) The attainment of maximum sustainable yield (MSY); (2) The gradual elimination of discards and minimisation of unwanted catches; (3) Ensuring fishing activities are consistent with wider ecological considerations'.

As recognized in the Commission 2009 Green Paper, a shift towards a more flexible and responsive decentralised approach is needed in the CFP. The reform acknowledges that the overly centralised, top-down CFP decision-making lacked adaptation to local and regional needs and failed during the implementation phase, since same identical rules were applied to fisheries which were profoundly diverse and in widely diverse conditions. The purpose of the reform is therefore to promote subsidiarity at level of seas basins in order to increase fishermen participation and to improve their efficiency and compliance with regulations.

Such as for long term management plans[234], the reform introduces therefore a legal and procedural framework to implement technical measures in the light of the seas basins approach.

This will take place within Advisory Councils, where Member State meet at level of seas basins with fishermen and other stakeholders in order to design the best suited and concrete management conservation tools. In a such context, stakeholders, and especially representatives of the fisheries industries, may propose alternative gears, which can achieve equivalent selectivity results to the baseline standards in the general framework regulation or other technical measures they consider more commensurate and appropriate for their specific fisheries. In this phase, moreover, research institutes can be involved to support stakeholders in developing their proposals, hence enhancing collaboration and partnership between fishermen and scientists.

Once the measures have been exchanged and agreed uniformly at regional level, they must be implemented autonomously by each Member State[235]. In this context, the sector itself should receive more management responsibilities, with Producer Organisations (POs) and associations of fishermen entrusted with managing the quota of their members and with developing marketing plans. This is expected to lead to better planning of sales as well as better prices for producers, enhancing at the same time the culture of compliance by EU operators[236].

Undoubtedly, regionalisation constitutes a positive development and an improvement towards the CFP objectives. However, the development of the new technical measures in this

[234] See par above par. II. 7.

[235] The implementation of the general principles of the CFP set at the EU level may vary across Member States. This depends on differences in political, geographical, economical and cultural factors, as it can be seen, for instance, with regard to France and United Kingdom. In France, fisheries corporate groups are closer to political power, and the national fisheries strategy has been therefore oriented toward fleet restructuring and socio-economic objectives (*approche structurelle*). In United Kingdom, where fishers' groups are more independent from public power, the preferred instrument for the effective implementation of the CFP is fishing license scheme, and the policy objectives focus mainly on conservation of marine biological resources. For a full account on this topic see G.CHAIGNEAU, *La mise en ouvre différenciée de la politique commune de la pêche dans les Etats membres: les exemples de la France et du Royaume-Uni, in La politique européenne de la pêche : vers un développement durable ?* ,op. cit. p. 223 ff.

[236] For a fuller account on this topics see Chapter III.

framework, i.e. the first step to initiate the regionalization process as described above, raises several questions which reflect the diverse views of stakeholders, and primarily of the EU fisheries industries.

In the Consultation Document 'Development of a new framework for technical measures in the reformed CFP'[237] the Commission outlines, in fact, the main challenges related to the implementation of a regionalised approach to technical measures.

A first question is to understand whether, in the view of stakeholders, there should be a unique common regulatory framework for technical measures established at the EU level or various framework regulations already conceived for different seas basins.

The Commission points outs, moreover, that since now 'technical innovation emanating from the industry has been more focused on mitigating potential losses of commercial catch, rather than to conservation orientated industry initiatives. For instance in some cases this has resulted in displacement of efforts into fisheries where the rules are perceived to be less restrictive, or use of gears which have similarly negative ecosystem impacts to the gears they have replaced.'[238]. In this respect, therefore, one may wonder whether the enhanced role of the fisheries sector in policy decision making which is promoted by the CFP reform would result, in the end, in reducing the weight of conservation objectives.

Furthermore, over the last few decades, technical measures have become more numerous and their regulatory framework more complex[239]. Simplification in order to make them easier to understand and apply is therefore a crucial objective. A field in which compliance and effectiveness need to be strengthen is in particular discarding of unwanted catches. In this context, the Commission in the above mentioned document stresses that some legal gears are unselective and that current catching rules composition prescribe what is to be retained on board, not what is caught,

[237]See the consultation document: Development of a new framework for technical measures in the reformed PCP, launched by the European Commission on January 2014 in order to collect relevant evidence and information from stakeholders.

[238]See the Consultation document, p. 2.

[239]As stressed in Study of the European Parliament, *Workshop on a technical measures framework for the new common fisheries policy, op. cit,* p. 1 Executive Summary*:* 'The existing set of technical measures in the Union is a complex, heterogeneous and disorganized system of provisions. They are frequently inconsistent and even contradictory. They have often been criticised as over prescriptive and too complex, as they contain numerous exceptions and derogations. This is due in part to their origin and evolution. Some of them, for example, have been transposed into EU law from the provision of Regional Fisheries Management Organisations (RFMOs).Other measures were adopted by the Council as part of the annual negotiations in the context of setting Total Allowable Catches (TACs) and quotas. Some of the technical measures are, thus, the fruit of negotiation. This weakens their scientific basis and can generate unjustified differences among sea basins. All the legal texts containing technical measures have been subject to a number of modifications. These have increased their complexity, and sometimes even resulted in deviation from the original aim of the measure itself'.

hence encouraging discard. Finally, despite the introduction of mitigation measures, the impacts of fishing on ecosystem remains still high in many areas.

In the view of the stakeholders which submitted their contribution to the Commission[240], the development of technical measures at regional level in the framework of multiannual plans is the best way to introduce the simplification and flexibility of rules that is needed to reinforce the effectiveness of such measures. With regards to the structure of the legislative framework for technical measures, the majority of industry groups (including small-scale fisheries) are in favour of a 'minimalistic approach' with few rules established at Union level under co-decision and detailed rules set-out at regional level. Some industry representatives argue, in particular, that starting by establishing a common framework would be illogical, since work should be carried out firstly at regional level, and from this stage should evaluated whether general rules are needed. Others, however, recognize that a common framework would be useful to fix high-level (as long as realistic) objectives valid for all sea basins.

In this respect, the majority of NGOs express a different view, supporting a common Regulation covering all sea basins, which would include overarching objectives, common baseline measures as well as governance rules defining how technical measures should be designed and implemented regionally. A common framework is seen in this perspective as a tool proving the commitment of the CFP towards low-impact fishing approach and towards the achievement of Good Environmental Status under the Marine Strategy Framework Directive.

With regards to discard practice, the industry representatives have also stressed that the landing obligation is a driver for selectivity, in a context which promotes involvement of stakeholders in the decision making process on a spontaneous basis, differently from the past imposition of over-prescriptive rules. In this view, implementing the landing obligation would require, accordingly, to give fishermen the maximum possible autonomy to decide on selective measures. Several NGOs underline however that such flexibility must be compensated at the same time by effective incentives for fishermen to act responsibly through the establishment of control mechanisms.

Multiannual plans are seen by the majority of contributors as a promising tool for development of specific technical measure at regional level. The industry in particular stresses the need to be involved in the development of multiannual plans as far as implementation of the landing

[240] See the Consultation Summary, *Reporting on the results of the public consultation on the development of a new framework for technical measures in the new CFP*. The public consultation took place between 24 January and 16 May 2014, with a total of 59 written contributions received. Industry interest groups and stakeholder organisations accounted for the 37% of contributors with 22 contributions out of 59. The majority of these were from fishermen's representative bodies (sixteen).

obligation is concerned. Multiannual plans are equally seen as important instruments to avoid or reduce unwanted catches.

Furthermore, the majority of contributors agree on the fact that minimum landing size, catch composition rules and by-catch provisions prevent fishermen from fishing selectively and even induce discards. In terms of ecosystem approach, there is a common view on the fact that measures to protect ecosystem should be developed at regional level and only prohibitions of destructive practices or measures to protect rare or vulnerable species and sensitive habitats should be set under co-decision. NGOs propose to introduce impact assessments of any fishing activities, in order to identify potential concerns and related mitigation measures.

Cooperation between fishermen and NGOs has been moreover highlighted as a fruitful opportunity by small-scale fishermen representatives, in particular with regard to Marine Protected Areas, since they pointed out that there have been several examples of collaboration and partnership established by NGOs and fishermen in such zones in order to pursue environmental objectives without damaging, at the same time, the economic interests of the local fishermen.

CHAPTER III

The Common Organisation of the Markets in fisheries and aquaculture products

III.1. Introduction

The marketing and trade aspects of the Common Fisheries Policy (CFP) are of a vital importance to the fishery and aquaculture enterprises. Even before the creation of the European Economic Community (EEC), the markets of fisheries and agriculture products were usually controlled and managed at national level, rather than left to be driven by competition and uncontrolled market forces. The Community (and the Union as its successor since 2009), has maintained this policy of regulated markets, although at the origin its main purpose was the creation of a free market among the Member States. The reasons justifying this "special treatment"[241] reserved to fisheries and agriculture, are twofold. Firstly, fisheries and agricultural markets are both characterised by seasonal fluctuations in supplies and by the perishable nature of many products. Secondly, there is a large number of operators (farmers and fishermen) employed in small scale enterprises, who cannot, on their own, secure the prices and consequently the incomes necessary for them to stay in business. A common organisation of the markets has been therefore conceived as the core instrument to improve the socio-economic conditions of workers and producers and provide consumers with secure food supplies at a reasonable price[242].

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[241]On this point see, among others, R.R. Churchill, *EEC Fisheries Law*, Cardiff, 1986, p. 231–232; A. KARAGIANNAKOS, *Fisheries Management in the European Union*, Hants, 1995, p. 147.

[242] According to Article 40 of the Treaty on the functioning of the European Union (TFEU) a common organisation of the market can take various forms, depending on the products concerned. As for the common agricultural policy (CAP), initially 21 common market organisations (CMOs) have been progressively established by the Council. The market organisation of each agricultural product (or group of products) was therefore governed by a single Basic Regulation, usually accompanied by a set of complementary regulations. Despite each CMO used its own mechanisms and rules, some common features applied to all of them, such as the internal market measures relating to price setting and support and the trade regime with third countries, which was adjusted in conformity with the Agreement on agriculture concluded in the context of the GATT Uruguay Round. In 2007, pursuing the aim of simplifying the regulatory framework governing the CAP and of increasing EU competitiveness in the world market, a single Regulation establishing a common organisation of the markets **in agricultural products (Single CMO Regulation) was adopted.** All the products listed in Annex I to the Treaties *(*with the exception of the fishery and aquaculture products) are therefore now submitted to **Regulation (EU) No 1308/2013. With regard to the Common Fisheries Policy (CFP), due to the homogeneity of the products and of their commercialisation practices, as well as to the relatively smaller weight of the sector if compared with agriculture, a single, Basic Regulation establishing a unique common market (instead of various CMOs) was introduced since the beginning, with the adoption on 20 October 1970 of the Regulation (EEC) No. 2142/70 (the first Markets Regulation). For a comprehensive analysis on the historical development of the CAP and on its current framework see, among many others, H. BERKELEY, S. DAVIDOVA, *Understanding the Common Agricultural Policy*, London, 2012;** A. SWINBANK, *The*

The tools used by the European Union to achieve these objectives in the fisheries sector had been traditionally the following: producer organisations, a common price system, common marketing standards and rules governing trade with third countries. The recent reform of the CFP has developed further this reference framework by enlarging the scope of the common organisation of the markets and focusing on environmental sustainability, marketing-oriented practices, consumer information[243].

Therefore, as far as the fisheries and aquaculture industries are concerned, there is a close connection between the various pillars of the Common Fisheries Policy. The measures adopted within the conservation policy (analysed in Chapter II), have a strong impact on production, since they affect the amount of fish which can be caught, landed, and the way in which is caught. In other words, they regulate human pressure on stocks by limiting the industry's production capacity. The measures adopted within the reform of the Common Market Organisation (CMO), are designed to integrate the principles and objectives of the conservation policy into the supply chain. Market rules can, among other actions, offer preferential access to products which comply with the standards, help consumers to identify more easily sustainable products, secure that fishermen receive fair earnings to compensate the reduction of their fishing opportunities, make producers more involved in management of resources through premiums on their sustainable methods of production, support the development of coastal communities and rural areas for fresh water aquaculture[244].

The assessment of the elements introduced by the 2013 reform will be made first by analysing the legal framework governing the common organisation of markets for fisheries and aquaculture products, with special regard to its connection with the CFP Basic Regulation, since the general objectives of the Common Fisheries Policy are increasingly incorporated into market policies (paragraph 2). The changes brought about by the reform concerning producers' organisations and the common price system will be assessed subsequently in paragraph 3, and those related to common marketing standards in paragraph 4. The analysis will be therefore concentrated

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reform of the EU's Common Agricultural Policy, in R. MELENDEZ-ORTIZ, C. BELLMANN, J. HEPBURN, *Agricultural subsidies in the WTO green box : ensuring coherence with sustainable development goals,* Cambridge, 2009 p. 70 - 85; **R. FENNEL, *The common agricultural policy, Continuity and Change*, New York, 1997; J.C. BUREAU and oth., *The Common Agricultural Policy after 2013*, in *Intereconomics*,** Volume 47, Issue 6, Nov. 2012, p. 316-342; I. GARZON, *Reforming the Common Agricultural reform, History of a paradigm change*, New York, 2006; J. IANNARELLI, *Le regole sulla concorrenza nella PAC*, in L. COSTATO, *Trattato breve di diritto agrario italiano e comunitario*, Padova, 2003.

[243]For a comprehensive analysis of the objectives of the common organisation of the markets in fisheries and aquaculture products in the context of the CFP reform, with particular regard to the economical, environmental and social aspects see A. DEL VECCHIO, ***La pêche maritime – Politique commune de la pêche***, Fasc. 1351, *LexisNexis Juris Classeur – Traité européen*, 2015, p. 13 – 14.

[244] For a fuller account on these issues see the study of the European Commission, *Fisheries and Aquaculture in Europe*, No. 61 May 2013, p. 4–5.

on the concept of fisheries and aquaculture 'product' stemming from the Markets Regulation in paragraph 5. Afterwards, the legal framework governing inter-branch organisations, consumer information and protection as well as the social dimension of the CFP will be taken into account in paragraphs 6, 7 and 8 respectively.

III. 2. The legal framework and the objectives: how the common organisation of the markets in fisheries and aquaculture products has changed over time

Article 40 of the Treaty on the Functioning of the European Union (TFEU) requires the establishment of '*a common organisation of the agricultural markets*' in order to attain the objectives set out in Article 39, namely: - increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour; - ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture; - stabilise markets; - assure the availability of supplies; - ensure that supplies reach consumers at reasonable prices[245].

Since Article 38(1) TFEU provides that *'agricultural products'* are '*the products of the soil, of stockfarming and of fisheries'* and that *'references [in the Treaty] to the common agricultural policy or to agriculture, and the use of the term agricultural'* shall be understood as *'also referring to fisheries, having regard to the specific characteristics of this sector'*, Article 40 TFEU undoubtedly[246] apply also to fisheries, thus requiring the creation of '*a common organisation of the agricultural market'* also for fisheries and aquaculture products.

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[245] As highlighted by O. CURTIL 'en matière agricole, la plupart de ces objectifs pouvaient être atteints par la mise en place d'une politique des marches et des prix fondée sur la création d'une organisation commune des marchés agricoles. Dans le domaine de la pêche, en revanche, la politique de marché ne pouvait suffire à combler ces objectifs eu égard à la spécificité de la production halieutique, et on peut légitimement douter de l'efficacité d'une politique commune qui eut été fondée sur la seule organisation du marché. Il était indispensable d'inclure dans celle-ci, a cote du 'marché' un volet 'structures' qui tienne particulièrement compte des conditions de production d'une ressource commune [..] et notamment: a) le caractère particulière découlant de la structure sociale de la pêche et des disparités structurelles et naturelles entre les diverses régions de pêche ; b) de la nécessité d'opérer graduellement les ajustements opportuns.', see *La politique commune de la pêche ou le résistible abandon du nationalisme maritime,* in *La politique commune de la pêche : vers un développement durable ?*, Rennes, 2003, p. 209.

[246] On the assimilation between fisheries and aquaculture see, among a broad literature, L. COSTATO, *La molteplicità delle definizioni legali in agricoltura*, in *Trattato breve di diritto agrario italiano e comunitario*, Padova, 2003, p. 5; A. DEL VECCHIO, *La politique commune de la pêche: axes de développement*, in *Revue du marché unique européen*, 1995, pp. 27-37; C. FIORAVANTI, *La politica comune della pesca nel Trattato sul funzionamento dell'Unione europea*, in *Studi sull'integrazione europea*, n. 3, 2011, p. 505 ff; G. GALLIZIOLI, *Il settore della pesca nel Trattato di Roma. Punti in comune e differenze sostanziali con la politica agricola comune*, in *I quarant'anni di diritto agrario comunitario. Atti del Convegno di Martina*

On this basis[247], a first CMO Regulation for fisheries products was adopted by the Council on 20 October 1970[248], subsequently amended following the enlargement of the Community in 1973. That Regulation was replaced[249] in 1976[250], in 1881[251], 1991[252] and 2000[253], and finally in 2013[254] in the broader framework of the recent CFP reform.

The new provisions must therefore be read in the light of the Basic Regulation of the CFP[255] whose Chapter VIII is dedicated to the common organisation of the markets. In this context, a first point to be stressed is that Article 35 (1) of the Basic Regulation indicates among the core objectives of the CMO its contribution to '*the sustainable exploitation of living marine biological resources'*.

This provision is particularly significant, since it reflects the new approach of the CFP to market management. When the CMO was introduced for the first time in the 1970s, fisheries resources were not yet deeply affected by problems related to over-exploitation. The primary objective of the CFP at the time was the allocation of fishing opportunities among Member States in an equitable and balanced manner, rather than manage shared resources in a sustainable way. In this context, the contribution given by the CMO to the conservation objectives was essentially limited to measures for fish waste management, without any mechanism affecting the production aimed at reducing overexploitation of stocks[256].

Franca, 12 -13 giugno 1998, Milano, 1999, p. 86 ff.; G. OLMI, *Politique agricole commune, 2, Commentaire Mégret*, Bruxelles, 1991 p. 6 ff. The issue is treated also in Chapter I paragraph 2.

[247] See articles 39–43 of the Treaty establishing the European Economic Community (EEC) now replaced by the TFEU.

[248] Council Regulation (EEC) No 2142/70 of 20 October 1970 on the Common Organisation of the Market in Fisheries Products [1970] OJ L236/5.

[249]The changes introduced over time mainly concerned the inclusion of new products in the scope of the CMO or adjustments to percentages for intervention mechanisms. For a detailed analysis on the evolution of the legislative framework of the CMO over the years see W. VISCARDINI DONA', *La politica comune della pesca*, in L. COSTATO, *Trattato breve di diritto agrario italiano e comunitario*, op. cit, Padova, 1994.

[250]Council Regulation (EEC) No. 100/76 of 19 January 1976 on the common organisation of the market in fisheries products, OJ 1976 L20/1.

[251]Council Regulation (EEC) No. 3796/81 of 29 December 1981, OJ (1981) L379/1. The main purpose of the 1881 reform was to overcome the weaknesses of the 1976 Regulation and to adjust the CMO legal framework to the changes occurred in the international law of the sea after the introduction of the 200 miles EEZ. For a fuller account, A. KARAGIANNAKOS, op. cit. p. 146.

[252] Council Regulation (EEC) No. 3759/92 of 17 December 1992, O.J. L388/1.

[253]Council Regulation (EC) No. 104/2000, of 17 December 1999, on the common organisation of the markets in fisheries and aquaculture products, OJ 2002 L 358/59. Whereas the previous Regulations refer to 'market' as singular in their title, Regulation No. 104/2000 refers to 'markets' as plural. Apparently, such difference is purely terminological, as suggested by R.R. CHURCHILL and D. OWEN, in *The EC Common Fisheries Policy*, Oxford, 2010, p. 403.

[254]Regulation (EU) No 1379/2013 of the European Parliament and of the Council, of 11 December 2013, on the common organisation of the markets in fishery and aquaculture products.

[255] Regulation (EU) No. 1380/2013 of the European Parliament and of the Council, of 11 December 2013, on the Common Fisheries Policy.

[256]In this sense, C. FIORAVANTI, *Il diritto comunitario della pesca*, Padova, 2007, p. 228.

However, over the last few years, as a consequence of the impoverishment of fish stocks and of the progressive degradation of marine environment[257], the need to ensure a rational use of resources, primarily of fish, has become a core principle of governance in maritime policies, both at national, European and international level[258].

The European Commission has therefore acknowledged in recent times that the optimum functioning of the market in fisheries products requires' *in addition to the traditional role [of the CMO] of regulating the conditions of competition and supporting producers' incomes, a key contribution to efficient stock management*'[259]. The CMO's 'traditional' instruments and mechanisms have therefore been revised and applied '*with this two-fold aim in view'* aimed at promoting '*sustainability-supportive fishing marketing activities*'[260].

However, despite the efforts made in this direction, the Commission in its proposal to support the 2013 reform of the common organisation of the markets has identified failures in several areas, such as the limited use of market premiums on production for sustainable practices adopted by operators, as well as the lack of market sanctions for unsustainable behaviours[261]. The

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[257] It has been estimated that the EU fish stocks could increase and generate not only environmental and ecosystems improvements but also more economic output and profitability for the fisheries sector if they were left only few years under less fishing pressure. See in this respect the communication of the European Commission to the Council, of 7 June 2012, concerning a consultation on fishing opportunities for 2013, COM (2012) 278 final, Brussels, p.4 and the analysis of the *World Bank, The Sunken Billions: The Economic Justification for Fisheries Reform*, Washington D.C., p. 130, as stressed by S. VILLASANTE, D. GASCUEL. RAINER FROESE, *Rebuilding fish stocks and changing fisheries management, a major challenge for the Common Fisheries Policy reform in Europe*, in Ocean & Coastal Management 70 (2012) p. 1 - 2.

[258] As highlighted by A. DEL VECCHIO 'Il problema dello sfruttamento delle risorse biologiche marine razionale e attento ai bisogni delle future generazioni [..] interessa l'intera comunità internazionale, in quanto è bisognoso di soluzioni globali, che non possono essere perseguite senza forme di cooperazione, volte al conseguimento di obiettivi comuni attraverso azioni coordinate.' In this context, the European Union plays a crucial role, on the one hand, by establishing a close cooperation among its Member States through the common fisheries policy (CFP), and by strengthening international cooperation with third countries both in a multilateral and bilateral frameworks (especially through the creation of joint ventures in the fisheries sector), on the other. For extended treatment of these topics see A. DEL VECCHIO, *Politica comune della pesca e cooperazione internazionale in materia ambientale*, in *Il diritto dell'Unione Europea*, 2005, pp. 529-544.

[259] See the Communication from the Commission to the Council and the European Parliament, of 16 December 1997, *The future for the Market in Fisheries Products in the European Union: Responsibility, Partnership and Competiveness*, COM (97) 719 final, p. 5. The same principle was taken up in Regulation 104/2000 and repeated in Regulation (EU) No 1379/2013.

[260] See the Report from the Commission to the Council and the European Parliament, of 29 September 2006, on the implementation of the Council Regulation (EC) No. 104/2000 on the common organisation of the markets in fisheries and aquaculture products, COM (2006) 558, section 1, p. 2.

[261] See the Proposal for a Regulation of the European Parliament and of the Council on the common organisation of the markets in fishery and aquaculture products, of 13 July 2011, COM (2011) 416 final, p. 1.

idea behind this statement is that the previous legal framework for CMO has not contributed significantly to sustainable production, as it did not provide the expected policy signals. The choice of placing the 'sustainable exploitation of marine living resources' at the top of the CMO objectives listed in Article 35 of the Basic Regulation indicates the will to reverse this trend and to integrate the environmental dimension into the concrete functioning of the CMO[262].

Furthermore, in the framework of the 2013 reform a fundamental aim of the CMO has been to improve the market position of EU producers. The main structural weaknesses affecting the EU fisheries and aquaculture sector are, in particular, the decrease of business opportunities in both fisheries and aquaculture, the fragmentation of the production side and the strong concentration of demand, as well as the lack of competitiveness in an increasingly globalised market[263]. The goal of the Commission related those weaknesses is to improve the EU supply predictability in terms of volume and quality requested by the consumers (demand side), enhancing the producers' ability to anticipate and manage market fluctuations. Article 35(1) of the Basic Regulation underlines in this respect the need to '*strengthen the competitiveness of the Union fishery and aquaculture industry*' (point d), and to '*improve the transparency and stability of the markets, in particular as regards economic knowledge and understanding of the Union markets...*' (point e).

This means to make fishermen, by enhancing the role of producers organisations and improved access to market data, more familiar with market mechanisms (i.e. the commercial side of their activity), in order to promote their ability to develop commercial tactics and strategies in connection with market demand.

This objective is linked with the attention devoted to consumers. In this field, the aim of reforming the common organisation of markets is, on the one side, to raise awareness and facilitate responsible choice by providing buyers with a more complete, accurate and verifiable information and traceability of products, and to secure diversified supply of fisheries and aquaculture products on the other (Article 35 point f) and g)).

As a whole, the new Markets Regulation falls therefore within the objectives outlined in Article 39 of the TFEU, i.e. the 'traditional' objectives of the CMO, but in a modern perspective.

The strengthening of fishery producer organisations, with a view to improve producers' modes of operating (and notably the conditions of small-scale producers)[264] serves the objective

[262] For an analysis of the relationships between fisheries and environmental issues in the EU legal framework see J.O. SANZ, *L'intégration des exigences environnementales dans la PCP*, in RAFAEL CASADO RAIGÓN, *L'Europe et la mer, pêche navigation et environment marin*, Bruxelles, 2005, p. 289 – 298.

[263] See the Summary of the Impact assessment accompanying the Proposal for a Regulation of the European Parliament and of the Council on the common organisation of the markets in fishery and aquaculture products, COM (2011) 416 final, p. 1 – 2.

[264] The participation of small-producers to producer organisations it is highly reccomended (Recital 9).

outlined in Article 39 of the TFEU of *ensur[ing] a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture,* as well the objective of *stabilis[ing] markets*. At the same time, measures aimed at promoting consumer protection, contribute to the purpose of *assur[ing] the availability of supplies* and to guarantee that *supplies reach consumers at reasonable prices.* These objectives are however conceived in the light of the recent developments in the Union and world markets, and taking into account the evolution of fishing and aquaculture activities. The focus on environmental (and social) concerns means, in this perspective, a full consistency of the new CMO rules with the fundamental principles of international environmental law[265], and notably with the principle of sustainable development[266].

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[265] The general principles of environmental law have developed gradually, through both international case law and State practice. In an initial phase, the protection of the environment was mainly linked to disputes connected with trans-boundary pollution (see, for instance, the Trail Smelter Arbitration of 1941 between Canada and the United States). Subsequently, general environmental principles have progressively emerged, until finally being clearly stated within the Global environmental conferences (such as the United Nations *Conference* on the Human Environment held in *Stockholm in1972, the* Rio de Janeiro Earth Summit of 1992, the World Summit on Sustainable Development held in Johannesburg in 2002) and incorporated in numerous international agreements. Furthermore, according to several authors, the general principles of environmental law have become customary international law, gradually losing their nature of 'soft law'. For an extensive analysis on the development of international environmental law in various regional legal systems and in different areas across the world see A. DEL VECCHIO e A. DAL RI JUNIOR, *Diritto internazionale dell'ambiente dopo il Vertice di Johannesburg,* Roma, 2005. As far as the implementation of environmental international law is concerned see also T.SCOVAZZI, *Principi di diritto internazionale e protezione dell'ambiente*, in *Studi in onore di Vincenzo Starace*, Napoli, 2008, p. 783 ff. In general, on the environmental law and the role of the environmental principles in the broader framework of international law see, among a wide literature, BOISSON DE CHAZOURNES, DESGAGNE, ROMANO, *Protection internationale de l'environmment: recueil d'instruments juridiques,* Paris, 1998; P. SANDAS, *Principles of International Environmental Law*, Cambridge, 2003.

[266] In this respect it should be noted that the principles of international environmental law have become effective in the EU legal system, through their inclusion into the Treaties (Article 3(3) and 5 TEU) and into the EU policies linked to the environment, including the EU fisheries and maritime policy. For an extended treatment of these issues see, *ex plurimis,* P. FOIS, *Il principio dello Sviluppo sostenibile nel diritto internazionale ed europeo dell'ambiente,* XI Convegno SIDI, Alghero, 16-17 giugno 2006, Napoli, 2007. On the relations between International environmental law and European environmental law see P. FOIS, *La protezione dell'ambiente nei sistemi internazionali regionali*, in A. DEL VECCHIO, *Il diritto internazionale dell'ambiente dopo il Vertice di* Johannesburg, op. cit. p. 353 ff.; See also CORDINI, *Diritto ambientale comparato*, Padova, 2002, p. 42; F. CHALTIEL, *l'Union européenne et le développement durable,*in Revue du marche commun et de l'Union Européenne, n. 464, 2003, p. 24 – 28. On the principle of sustainable development as applied to marine resources see A. DEL VECCHIO, *Il principio dello sviluppo sostenibile nello sfruttamento delle risorse biologiche del Mediterraneo*, in *Il Mediterraneo ancora mare nostrum?,* Roma, 2004, p. 27 – 40; E.J. MARTÍNEZ PÉREZ, *El desarrollo sostenibile como justificación de las acciones unilaterales para la conservación de los recursos marinos*, in *Ministero de Agricultura, Pesca y Alimentación*, 2004, p- 103 – 107. For a comprehensive analysis of the legal framework developed at international level to prevent unsustainable fishing practices in the high seas, with special regard to driftner fisheries and their impacts on non-target species see R. CASADO RAIGÓN, *La conservation et la coopération pour la conservation et la gestion*, in D. VIGNES, G. CATALDI, R. CASADO RAIGÓN, *Le droit international de la pêche maritime*, Bruxelles, 2000, p. 158 – 206.

The concept of 'sustainable development' which was defined for the first time in the Brundtland Declaration[267], implies that economic development based on exploitation of finite natural resources (including fisheries) must '*meet the needs of the present without compromising the ability of future generations to meet their own needs*'. The principle should be understood in its 'multidimensional' nature, which is underpinned by both environmental, economic and social aspects. Depending on different contexts, one of those different 'components' of the same concept prevail over the others. In ecology, the protection and conservation of natural resources has a prominent role. In economy, profit is more important, while from the social point of view, improvement of human and working living conditions is the main purpose.

As far as fisheries is concerned, the conservation policy (analysed in Chapter II) is clearly focused on the environmental aspects of sustainability, in the light of the ecosystem-based approach. However, strategies to achieve a sustainable development, in its broader sense, require to simultaneously ensure also social welfare and economic growth, together with environmental protection. The Common Markets Organisation, focusing on both environment in connection with conservation policy, and economy in connection with markets, is therefore the pillar of the CFP in which the interrelationship between the various dimensions of sustainability is more evident.

Regarded from an economic perspective, the CMO rules aim at producing the maximum profit for fishermen, but achieving simultaneously also the other components of sustainability: the environmental one by preserving the natural capital which marine and biological resources represent, and the social capital by increasing welfare, better working and living conditions for fishermen and coastal fishing communities. In this respect, it is worth mentioning, however, that the 2013 reform takes into account to a much greater extent the environmental dimension compared with the social one (see par 8). By adding rules on consumer protection, moreover, the CMO Regulation underlies the idea according to which whenever a society's economic, health, food security and social living standards are high, its contribution to environment protection is also higher.

A strong focus on sustainable development in line with general CFP objectives[268] is therefore a key element of the common organisation of the markets, and a specific attention should be given to this in analysing the new elements which have been introduced by the 2013 reform.

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[267] See the Report of the United Nations World Commission on Environment and Development (WCED), *Our Common Future*, Oxford, 1987.

[268] As stressed by R.M. FERNÁNDEZ EGEA 'Es necesario, restablecer la productividad de los recursos pesqueros para garantizar la viabilidad económica y social del sector [...] Sin embargo, la propuesta de la Comisión enfatiza lo que es la questión clave: la sostenibilidad ecológica es una premisa fundamental para el futuro económico y social de la pesca in Europa' in *La reforma de la política de pesca común y su incidencia*

II.3. An enhanced role of producer organisations in achieving the objectives of the CFP

Producer organisations (hereinafter POs)[269]are groups of fishermen or fish farmers who voluntarily associate each other in a formally recognised organisation, for the purpose of taking the measures ensuring the best marketing conditions for their products[270]. Such organisations play an essential role in the framework of the common fishery market policy since the 1970s, when the common organisation of the markets in fisheries products was established[271]. Traditional tasks of POs include implementation of catch plans, concentration of supply and regularisation of prices through intervention mechanism, all measures intended to 'ensure that fishing is to be carried out along rational lines and that conditions for the sale of the products are improved'[272].

On the one hand, in the 2013 reform the POs' classical tasks of stabilising the market and guarantying fair income for fisheries products are maintained, but adjusted to the main changes occurred on the Union and world markets, as well as in the development of fisheries and

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en la cuenca mediterránea: el reto de una pesca sostenible y resposable, in *Derecho del mar y sostenibilidad ambiental en el Mediterráneo*, Valencia, 2014, p.205-206.

[269] In 2011, there were 228 producers' organisations in 17 EU Member States. In Bulgaria, Chech Republic, Luxemburg, Hungary, Malta, Austria, Slovenia, Finland and Slovakia there are no POs. 185 PO are active in small-scale, coastal, offshore fishing and deep sea fishing sectors and 43 PO's in aquaculture and other types of fishing sector. See Eurofish, *The role of Producer organisations*, 2012, available online at the link: http://www.eurofish.dk/pdfs/Zadar/14-AA.pdf . Spain and Italy are among the Member States accounting the largest number of POs. See the interactive map 'European Atlas of the Seas' available on the European Commision website:http://ec.europa.eu/fisheries/cfp/market/producer_organisations/index_en.htm.

[270]Such definition was contained in Article 5 of Regulation (EU) No. 104/2000, as well as in previous Markets Regulations. Regulation 1379/2013 does not provide a definition of POs, drawing the attention on their contribution to achieve a viable and sustainable fishing in compliance with conservation policy and environmental law, as it will be further analysed. For a critique of the definition of producers' organisations as arising from previous Regulations see A. KARAGIANNAKOS, op. cit. p. 157.

[271] As highlighted by J.A. YOUNG, A.P. SMITH and J.F. MUIR 'it could be argued that the image of the individual fisherman as an autonomous actor in the system [..] is becoming increasingly dated. Particularly over the past 20 years, the international extension of exclusive economic zones (EEZs) to 200 miles and the emergent views for even greater coastal State jurisdiction have encouraged fishermen, if not necessitated them, to formalise organisational structures to oversee their interests and representation. The contemporary fish industry environment demands a greater degree of unification and collective political representation than hitherto, especially in the light of the continuing politicization of fisheries management.' in *Representing the individual fishermen: an attitudinal perspective on one PO's membership*, in *Marine Policy,* 1996, Vol. 20, No. 2, p. 157.

[272] Article 5 of Council Regulation (EEC) No. 3796/81of 29 December 1981.

aquaculture activities. On the other hand, POs responsibilities and functions are extended, with the purpose of including in their action also the pursuit of sustainable development objectives[273].

As far as the first aspect is concerned, the 2008 fuel crisis, the fall in first-sale prices, the increased EU dependence on imports, the growing power of the distribution industry, the changes in consumer demands, all contributed to worsen the EU producers' market position and showed at the same time the need of stronger and properly funded POs, with more clout in dealing with wholesaler and retailers.

According to the impact assessment on the functioning of the CMO[274], the challenges affecting the sector may be addressed, primarily, by increasing the profits that fishermen make on their catches. An important obstacle, though, is that fishermen think and behave essentially as producers, fishing what the sea offer to them, instead of planning their activity in terms of what is requested by buyers. The objective of the 2013 reform in this respect is therefore to make producers, through a stronger role of their organisational structures, more focused on the commercial side of their activity and able to anticipate market needs, in order to avoid fish catches for which there is low or no demand and confer added value to the products more requested (and therefore get better price)[275]. The tools provided to achieve these objectives are, on the one hand, the production and marketing plans, and the European Market Observatory for fisheries and aquaculture products, on the other.

Production and marketing plans (PMPs) are regulated by Article 28 of the Markets Regulation. In terms of production, PMPs can be considered as business plans, through which each PO establishes the fishing season or production cycle for its members, depending on several economic and regulatory factors. In this respect, the main objective of the reform is to promote the establishment of PMPs which are in line with market fluctuations. Fish supply should be therefore organised by producers taking into account demand for different species, i.e. coming to the market

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[273] As highlighted by A. DEL VECCHIO 'allorché la pesca svolta con piccole imbarcazioni e con tecniche artigianali non è stata più in grado di soddisfare il fabbisogno interno degli Stati e le flotte pescherecce [..] hanno iniziato ad esercitare la loro attività negli spazi marini dell'alto mare, dove, come è ben noto, esiste da sempre la libertà di pesca, si è giunti ad un sovra sfruttamento delle risorse biologiche [..] talmente intenso da minacciare ogni possibilità di pesca da parte delle future generazioni, rendendo urgente la necessità di dare applicazione al principio di sviluppo sostenibile'. In *Il principio dello sviluppo sostenibile nello sfruttamento delle risorse biologiche del Mediterraneo*, op. cit. p. 36.

[274] See the Impact assessment of the European Commission accompanying the Proposal for a Regulation of the European Parliament and of the Council on the common organisation of the markets in fishery and aquaculture products, COM(2011) 416, p. 23 ff.

[275] The consumers' behaviours towards the marketing aspect of fisheries products can be investigated in order to understand the social and cultural factors influencing consumers' choices. For the outcome of such study carried out on consumers in Greece see E. KAIMAKOUDI, K. POLYMEROS, M.G. SCHINARAKI, C. BATZIOS, *Consumers' attitudes towards fisheries products*, in Procedia Technology 8, 2013, p. 90 – 96.

with a product when the consumer request of such product is high, and avoiding catches of species whose market demand is low. Furthermore, matching supply to demand is expected to reduce fish waste, in line with the policy on discards and landing obligation adopted in the framework of conservation objectives.

In terms of marketing strategies, PMPs are expected to help producers in developing better knowledge of market mechanisms, in increasing the value of products by anticipating expectations of operators in the downstream stages of the supply chain (such as processors and distributors) and in identifying new sales outlets and customers (including fishmongers, restaurants and consumers). It must be stressed, however, that actions undertaken by producers organisation to match supply with demand through production and marketing plans can also - when market demand is high and/or rightly foreseen - increase the pressure on stocks. It is therefore essential to avoid fish waste by matching supply to demand but, at the same time, also reduce pressure on stock by maximising the value of catches. Consumer information (especially eco-labelling), inter-branch organisations, a more recognised role of processing activities are all tools which can contribute to improve products added –value and that will be further analysed in this Chapter.

As a whole, PMPs should therefore contain production programme for caught or farmed species, marketing strategies to make the quantity, quality and presentation of supply matching with market requirements, anticipatory measures to adjust the supply of species which habitually present marketing difficulties during the year, as well as penalties applicable to members who infringe decisions adopted to implement the plan concerned. These elements were partially already present in the previous CMO Regulation[276]. However, as highlighted by the Commission in its 2006 report on the implementation of Regulation 104/2000[277], although the operational programmes (i.e. the former production and marketing plans) had worked in a quite satisfactory manner, several factors still remain outside the control of POs, such as climatic and biological fluctuations[278], conservation measures and unpredictability of fishing activities, with a consequent difficulty in matching supply to demand[279].

Article 28 of the Regulation provides therefore that PMPs should contain also "measures to be taken [by producer organisations] in order to contribute to the objectives laid down in Article 7".

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[276] See Chapter III of Regulation (EC) n. 104/2000.

[277] See the R**eport from the Commission to the Council and the European Parliament, of 29 September 2006, on the implementation of the Council Regulation (EC) No 104/2000 on the common organisation of the markets in fishery and aquaculture products, COM (2006) 558 final.**

[278] On the impacts of global warming on marine ecosystems and notably on the size, yield, location and range of commercial fish stocks see R. ARNASTON, *Global warming: new challenges for the common fisheries policy?,* in Ocean & Coastal Management 70 (2012), p. 4 – 9.

[279] See R.R. CHURCHILL, D. OWEN, op. cit. p. 424.

In this respect it is worth to mention that the CMO over the years has moved away from being a mere system of price intervention, to be more focused on sustainable-supporting fishing activities[280]. This change in perspective has occurred, in particular, with the adoption of the 2002 reform of the conservation policy, due to its focus on the ecosystem-based approach in fisheries management.

The role of POs since then has been therefore strengthened and their operational field enlarged, to include measures aimed at preserving fisheries resources. Whereas the 104/2000 Regulation was mainly focused on avoiding the incompatibility of CMO rules with EU fisheries conservation legislation[281], the new Markets Regulation seeks to maximise the market contribution to sustainability goals, by requiring POs to undertake several actions, such as avoiding and reducing as far as possible unwanted catches of commercial stocks and making the best use of accidental catches, improving the selectivity of fishing gears, promoting the fishing activities of the members in compliance with the conservation policy and the environmental law, contributing to the traceability of fishery products and to the elimination of illegal, unreported and unregulated fishing, collecting environmental information, promoting sustainable development of aquaculture activities, notably in terms of environmental protection, animal health and animal welfare (Article 7).

As further specified by the Commission in its Recommendations on the establishment and implementation of the Production and Marketing Plans[282], specific measures to be inserted in the PMPs in order to meet these objectives may include, for instance: coordinating dialogue and cooperation with relevant scientific organisations in fisheries; preparation and management of scientific and technical campaigns aimed at improving the knowledge of resources, ecosystem impacts and the development of sustainable fishing techniques; conducting impact studies for the application of new management measures; identification and collective prevention of risks related to safety at work and safety at sea; identification and promotion of fishing practices which help avoid and reduce unwanted catches; improving techniques for traceability, product labelling, certification processes; communication and consumer information actions; control of producer organisation members' activity (in the context of IUU); designing and developing new methods and new marketing tools; practical support to producers in information sharing with customers and other

[280]See R**eport from the Commission to the Council and the European Parliament on the implementation of Council Regulation (EC) No 104/2000, cit. p. 2.**

[281]In this light shall be regarded the provisions setting minimum markets sizes in line with minimum biological sizes, as well as the consistency between financial aid to withdrawal and quotas as derived from total allowable catches. In details, R.R. CHURCHILL, D. OWEN, op. cit. p. 458-459.

[282]**See the Commission Recommendation, of 3 March 2014, on the establishment and implementation of the Production and Marketing Plans pursuant to Regulation (EU) No 1379/2013 of the European Parliament and of the Council on the common organisation of the markets in fishery and aquaculture products, (2014/117/EU), Part A, paragraph 3.**

actors (processors, retailers); preparing and running campaigns to promote marketing standards, new processes and products; scientific surveys and experimental programmes to assess and limit the environmental impacts of fishing practices (especially as regards fishing gears); developing certification schemes on animal feed sustainability (in aquaculture)[283].

Furthermore, as the adoption of such measures requires a complete and transparent access to market data, in the framework of the reform the European Market Observatory for Fisheries and Aquaculture Products (EUMOFA) was set up. In concrete terms, the EUMOFA is a website managed by the European Commission through a team of specialists, offering three types of services: statistical information on European market and macroeconomic backgrounds through monthly and annual publications; predefined searches (for instance by species or by Member States) with percentage changes shown and comparison of data collected in previous periods; Ad-hoc queries, providing access of users to several possible search combinations.

The main purpose of this tool is to harmonise collection and management of data in order to improve market transparency and support producers' organisations in their decision-making processes. For instance, as far as production and marketing plans are concerned, information provided by the EUMOFA can support POs in identifying fluctuations in products' demand or in developing marketing strategies on the basis of new marketing opportunities. The challenge is to avoid scattering of data, multiple formats, availability in only few languages and difficult access, and conversely to provide an open and harmonised collecting system, which can be activated from a single point of access and offering information in several languages (English, French, German, Spanish).

In addition to the enhancement of the role of POs in fisheries and aquaculture management plans through the improvement of market transparency, another innovative aspect introduced by the reform is the possible extension of the duration of such plans. While under Regulation No. 104/2000 POs' operational programmes were to be drawn up 'at the beginning of each fishing year'(Article 9), under the new Markets Regulation they are set up 'ideally on a multiannual basis', in line with the conservation objectives of the CFP, which promotes a model of fisheries long-term management[284].

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[283]Particular attention is given in this context to professional training. The production and marketing plans can set-out training activity provided by producer organisations to their members in several areas, such as fisheries regulation, promotion of sustainable fishing practices, board security, fight against IUU fishing, business fishing management, implementation of technical measures, sustainable aquaculture practice, marketing techniques. The focus on professional training is particularly relevant since it enable workers to develop additional skills, thus facilitating their employability in other sectors related to fisheries (such as aquaculture or processing industry) or, more broadly, in the maritime sector. This issue will be taken into account more extensively in paragraph 8 of this Chapter, dedicated to the social dimension of the CFP.

[284] For a fuller account on this point see Chapter II, paragraph 7.

Besides production and marketing plans, the reform has also significantly changed the **price support system based on intervention mechanisms**, i.e. the pillar of the CMO where POs have traditionally played a central role. Instead of leaving the prices of fish to be determined by the free interaction between demand and supply, the Community system (differently from some sector of agriculture, such cereals, where a guaranteed price was fixed), provided that when prices fall below a certain level, fish is to be withdrawn from the market, thus leading to the prices rising again. Interventionism approach in this field can be explained by the need of ensuring certain CFP policy objectives, such as the achievement of fair standards of living for fishermen and stabilisation of the market[285].

Until the 2013 reform, four different types of price support mechanism were in place: (a) 'permanent withdrawal', consisting in definitive withdrawal of products from the market; (b) 'carry-over', whereby product were taken off the market, stabilised and preserved, and later reintroduced; (c) 'private storage', applicable only to frozen products; (d) 'compensatory allowance' for tuna producers. [286]

With a view to simplifying the regulatory framework of the CMO, from all intervention mechanisms only private storage has been kept under the current Regulation. As a matter of fact, keeping several forms of financial support to withdrawal, is seen as inconsistent with the modern approach to conservation objectives, whose aim is to reduce pressure on stocks by rationalisation of catches.

Products eligible to the storage mechanism are those listed in Annex II to the Regulation. Compared to the previous system, where a Community selling price (guide price) was established by the Council, each fishery producer organisation can now individually make a proposal[287] for a price triggering[288] the storage mechanism, taking into account several factors such as markets trends, members' incomes and interest of consumers (Article 31). Member States' authorities examine POs proposals and then establish trigger prices. Several conditions for granting financial support to the storage mechanism under the European Maritime and Fisheries Fund (EMFF),

[285] See R.R. CHURCHILL and D. OWEN, op. cit. p. 435.
[286] All the actions involved in the functioning of these interventions instruments were implemented by POs.
[287] POs are not obliged but may make a proposal for trigger prices. It is up to the competent national authorities to take a final decision on the price triggering the storage aid (Article 31 (4)).
[288] The maximum level of trigger price is fixed at 80% of the weighted average price recorded for each product in the PO's area of activity. The trigger price set by national authorities determines the price level starting from which the storage mechanism can be resorted to, but the PO can activate the mechanism also when price is lower than the trigger price. This means that POs can use the mechanism also after unsuccessful attempts to sell their products, provided that their market prices are equal or below the trigger prices. In this respect, see the 'Questions & Answers' section in the website of the European Commission, available at the link: http://ec.europa.eu/fisheries/cfp/market/faq/index_en.htm .

moreover, are outlined in Article 30[289]. It is worth to mention, in this respect, that Member States are free to set trigger price without granting financial support from the EMFF, and the POs themselves can finance storage with their own resources. After storage, in addition, POs are free to sell the products reintroduced on the market at whatever price (also below the trigger price).

The Markets Regulation also contains detailed rules concerning the recognition of producers' organisations by Member States. POs shall, in particular, be 'sufficiently economically active in the territory of the Member State concerned or a part thereof, in particular as regards the number of members or the volume of marketable production', and have 'legal personality under the national law of the Member State concerned [being] established there and have their official headquarters in its territory'. It is also required that a recognised PO is capable of pursuing the objectives laid down in Article 7, complies with competition rules and does not abuse of a dominant position on a given market[290]. Differently from the 2000 Markets Regulation, the non-compliance by a producer organisation with the obligations provided in relation to production and marketing plans may result in the withdrawal of the recognition by the Member State (Article 28).

Member States may also make, under certain circumstances, rules agreed within a producer organisation binding also on producers who are not members of the organisation and who market the concerned products in the area where the organisation is representative of the production and marketing of such products, in order to ensure a better stability of the market and avoid that measures adopted by a major PO would be made useless by non-members' behaviours. The extension of rules can be applied under formal request of the organisation concerned, whose 'representativeness' is met when it accounts for at least 55 % of the quantities marketed of the relevant products during the previous year in the area in which it is proposed to extend the rules (Article 22.2).

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[289]Financial aid can be granted provided that:

(a) the conditions for storage aid, laid down in a future Union legal act establishing the conditions for the financial support for maritime and fisheries policy for the period 2014-2020, are complied with;

(b) the products have been placed on the market by fishery producer organisations and no buyer for them has been found at the trigger price referred to in Article 31;

(c) the products meet the common marketing standards established in accordance with Article 33 and are of adequate quality for human consumption;

(d) the products are stabilised or processed and stored in tanks or cages, by way of freezing, either on board vessels or in land facilities, salting, drying, marinating or, where relevant, boiling and pasteurisation, whether or not filleted, cut-up or, where appropriate, headed;

(e) the products are reintroduced from storage into the market for human consumption at a later stage;

(f) the products remain in storage for at least five days.

[290] Exceptions to the application of general competition rules, especially Article 101 (1) TFEU, are set-out in order to allow the POs' establishment and concrete functioning (see Article 41 of the Markets Regulation). These exceptions, however, shall not restrict or eliminate competition in ways which are not essential to the achievement of the CFP objectives (Article 41 point e and f).

The creation of transnational and transregional POs, i.e. partnerships among producers established with a view to draw up common rules legally binding across national borders, is moreover encouraged (Recital 12).

As it can be noted the Markets Regulation provides a general framework establishing common rules on POs applicable in all Member States. The legal status of these organisations in terms of company law, however, is to be established under national law. The EU Regulation only requires in this respect 'the legal personality', as a prerequisite for recognition. In Italy the issue is regulated by the Legislative Decree of 27 May 2005 No 102, whose Article 3 indicates the various legal forms through which a PO can be established, varying from limited companies, to cooperative societies, to limited liability consortium.

Finally, as far as the internal functioning of POs is concerned, some important principles are indicated in the Regulation, such as compliance by members with the rules adopted by the organisation in terms of fisheries exploitation, production and marketing; non-discrimination; democratic functioning; provision of effective, dissuasive and proportionate penalties for infringements; definition of rules for the admission and withdrawal of members, accounting and budgetary rules (Article 17).

In this respect, it is worth pointing out that the POs' internal functioning is of a crucial importance to encourage the members' 'social learning', and therefore the adaptability of POs to new challenges. Since the POs traditional functions related to regulation of market price have been gradually eroded and the reform plans to progressively reduce financial aid to withdrawing mechanisms because that aid is not in consistent with the sustainable approach, POs need to change not only their production and marketing activities, but also their internal structure. The way in which fishers perceive and make sense of their membership experience is therefore essential to develop that 'change in understanding' that should accompany the transfer of new responsibilities and objectives[291].

[291]It should be noted that membership of POs generally include the owners of fishing vessels and not their crews, unless the latter bear part of the financial risk involved in fishing operations and the marketing of catches. On this point see A.C. HATCHER, *Producers' organizations and devolved fisheries management in the United Kingdom: collective and individual quota system*, in Marine Policy, Vol. 21 No. 6, 1997, p. 523 and Appenix A. As for the formation of voluntary associations among fishermen other than producers' organisations and the impacts of the CMO established at EU level on such groups see EVA Ma VÁZQUEZ GÓMEZ, *Organización común de Mercados en el sector de los productos de la pesca*, in *Administración de Andalucía – Revista Andaluza de Administración Pública,* N° 32, 1997, p. 288–289, with special reference to the phenomenon of 'cofradías de Pescadores' in Spain.

According to recent studies concerning the internal development of POs[292], economic power is seen by fishers as the most important incentive to enter a PO as a member. Quota management, the use of intervention mechanisms, the possibility of making contracts, better working conditions are those benefits deriving from membership which are particularly appreciated by fisheries operators. Furthermore, the homogeneity of membership's activities and business is seen as a positive factor, that creates conditions for internal control, good communication and respect of common rules. In this regard, it has been noticed that the level of satisfaction among members varies proportionally to the increase of internal discipline (the OP was perceived by some of those interviewed as a sort of 'police' guarantying respect and understanding between fishermen), and to the ability of the organisation - beside the economic and marketing performances - to create a sort of 'social circle', strengthening relationships, family bonds and friendships among members. Other factors broadly taken into account, moreover, are the level of education and fisheries experience of the POs leaders and managers[293], as well as the members' degree of participation in rules design and enforcement.

Conversely, weaknesses in structural characteristics (such as absenteeism of members, especially managers, because on work at sea) and lack of economic power, are the primary reasons for membership withdrawal. Conflict of interest of some members overcoming compliance with rules, is another quite common incentive to exit a PO. A regulatory framework more than often too simple, not indicating neither who is responsible for infringements, nor providing stringent penalties to ensure individual commitment to rules and established marketing strategies, is a further shortcoming.

As a whole, it can be argued that the internal structure and administration of POs should, in order to strengthen fishers' commitment to the new CFP objectives, not only be focused on guaranteeing security and better working and marketing conditions, but also on promoting interaction and communication. It has been estimated, in this respect, that the internal trust among PO's members can improve the adaptation response[294] of the organisation in both 'convenient' contexts (for instance by anticipating market changes) and 'bad' contexts (such market crises and progressive environmental changes). Leadership of managers is also a decisive factor for POs

[292] V. KARADZIC, J. GRIN, P. ANTUNES, M. BANOVIC, *Social learning in fish producers' organizations: how fishers perceive their membership experience and what they learn from it*, in Marine Policy 44 (2014) p. 427 – 437.

[293] According to N.L. GUTIERREZ, R HILBORN, D OMAR, PO leadership is one of the most important elements contributing to the success of fisheries management, in *Leadership, social capital and incentives promote successful fisheries*, Nature 2011, 470, 386-9, p..

[294] For an revealing analysis of POs adaptive capacity in different scenarios see V. KARADZIC, P. ANTUNES, J. GRIN, *Adapting to environmental and market change: Insight from Fish Producer Organisations in Portugal*, in Ocean & Coastal Management 102 (2014), p. 364 – 373.

performance, as in both negative and positive contexts 'adaptation is rarely a spontaneous, self-organised process, but very intentional and thus reliant on an agency, such as a proactive leadership, maintained and reproduced trust in agent actions and perceptions and how they shape their motivation to adapt'. It is therefore appropriate to promote PO management based on frequent membership meetings and sharing of views on common concerns. At the same time, ship-owners that, as consequence of the carry-out of fishing activity, are not fully available to deal with PO's daily management, should not be entrusted with the role of leader or manager.

An enhanced contribution of POs to fisheries management, therefore, can be attained taking into account not only the economical, but also the sociological aspects, insofar as an organisation, through its structures and mechanisms, should 'inform the members and help them to recognise, beyond mental *intertia*, the interconnectedness of things – e.g. in the context of POs, how new market rules, which ask for collective responsibility, aid price stability (social resilience) hence decrease fisheries efforts (ecological resilience). And under the conditions thus created, POs could better promote fisheries resilience'[295].

II. 4. Common marketing standards

In accordance with Article 33 of the new Markets Regulation common marketing standards related to the quality, size, weight, packing, presentation or labelling of fisheries products intended to human consumption can be established.

Such marketing standards have played, traditionally, an important role in ensuring that products of unsatisfactory quality are kept off the market and in facilitating commerce based on fair competition[296]. This specific goal has been repeatedly mentioned in the list of recitals of the several Markets Regulations which have succeeded over the last few decades.

However, compared to this long-established framework, the current Markets Regulation emphasises the contribution of common marketing standards to conservation objectives, since the primary purpose of such rules, in addition to the facilitation of marketing activities based on fair competition[297], is now to 'enable the market to be supplied with sustainable products' (Recital 18).

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[295]Ibid. p. 373.

[296] Recital 6 of Markets Regulation (EU) No. 104/2000.

[297] According to A. KARAGIANNAKOS, whose analysis of the common fisheries policy dates 1994, it was hard, at that time, to find a justification for the existence of common marketing standards other than the right functioning of the common price mechanism. However, in the view of the author, a policy seeking uniformity of prices through the whole Community is not consistent with the differences in quantities of supply, variety of species distribution and tastes of consumers, which vary considerably from one Member

The emphasis is therefore put, in line with the general orientation of the CFP reform, on sustainable development, and especially on its environmental dimension. In order to support the rules on minimum fish sizes adopted within the conservation policy, for instance, the minimum marketing sizes correspond, where relevant and taking into account the best available scientific advice, to minimum conservation reference sizes (Article 33.2 point a)).

Furthermore, it is provided that common marketing standards concern also specifications of preserved products 'in accordance with conservation requirements and international obligations' (Article 33 par. 2 point b)).

The new Regulation, in addition, contains an innovative provision concerning products not complying with standards. As it was the case under Regulation No. 104/2000, products intended to human consumption to which common marketing standards apply (indicated in Annex I under the current Regulation), can be made available on the Union market[298] (regardless of their origin whether they are from the Union or imported) only if they are in line with those common standards[299].

However, according to Article 34 of the Markets Regulation, whenever fisheries products have been landed they can all, including those non complying with common marketing standards, be used in alternative ways 'for purposes other than direct human consumption, including fish meal, fish oil, pet food, food additives, pharmaceuticals or cosmetics'.

It should also be noted that common marketing standards must be applied in accordance with the international commitments entered into by the European Union, especially within the World Trade Organisation (WTO). In particular, when trading fishery and aquaculture products with third countries, conditions for fair competition require that imported products entering the Union market comply, in terms of social, food safety and hygiene and health rules, with the same requirements and marketing standards that Union producers have to comply with (Recital 19). This goal can be achieved, in particular, by strengthening and improving controls performed by Member

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State to another. In addition, the improvement of food quality and health standards to the benefit of consumers should not be pursued through common marketing standards, insofar as ' the net result of such measures is that the consumer pays more for the good and the producer, restricted by law, fails to meet the real demand of consumer', op. cit. p. 149-150. Given that the common price mechanism has been removed by the 2013 reform (with the exception of private storage as described above), it seems that the main purpose of common marketing standards now relies, on the one hand, on resource management and conservation objectives, on the other hand, on consumer protection. Although, more research on this issue is required before any very definitive statement on the efficacy and performance of such rules to meet these objectives can be reached.

[298] 'Making available on the market' shall be intended as any supply of a fishery or aquaculture product for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge (Article 5 point e) of the Markets Regulation).

[299] See Article 2 (2) of Regulation EU No. 104/2000 and Article 34(1) of the New Markets Regulation.

States to ensure knowledge about the origin and traceability of imported products as well as their compliance with EU standards[300].

II. 5. Scope of the CMO: a more comprehensive definition of the fisheries and aquaculture products

According to Article 2 of the Markets Regulation, the CMO applies to "the fishery and aquaculture products" listed in Annex I. Compared to Regulation (EC) No. 104/2000 some new products have been added, in particular: - Seaweeds and other algae; - Fats and oils and their fractions, of fish, whether or not refined, but not chemically modified, and especially fish-liver oils and their fractions and fats and oils and their fractions, of fish, other than liver oils; - Extracts and juices of meat, fish or crustaceans, molluscs or other aquatic invertebrates[301]. Furthermore, while in the former Markets Regulation fisheries products were defined as "both products caught at sea or in inland waters and the products of aquaculture listed below.." (Article 1), under the current rules fisheries and aquaculture products are, respectively "aquatic organisms resulting from any fishing activity or products derived therefrom, as listed in Annex I" and "aquatic organisms at any stage of their life cycle resulting from any aquaculture activity or products derived therefrom, as listed in Annex I" (Article 5 point a) and b)). It should be noted, in this regard, that the new definition focuses on "any fishing activity" instead of fish catching, thus acknowledging the increasing importance of the processing industry in the EU. To the same extent, also the change made to the list in Annex I is symptomatic of this new approach, as the concept of fisheries products include now a larger number of products transformed by processing industry. More emphasis is moreover put on products deriving from aquaculture, which is equated to fisheries.

Processing is a complex sector, which comprises a wide range of activities, from preparation (filleting, packaging etc) of fresh, chilled and frozen fish, crustaceans and molluscs, to dried, salted, smoked fish, canning factory and conservation, production of lines of dishes prepared and ready, and, as aforementioned, extraction of fishmeal and fish oil (even if generally not intended for human consumption). As it has been noted in relation to production and marketing plans (PMPs),

[300] On the relationship between WTO rules and EU fisheries legislation see, among many others, A. CUDENNEC, *OMC and développement durable de l'activité de pêche en Europe*, in R. CASADO RAIGÓN, *L'Europe et la mer: pêche, navigation, et environment marin*, Bruxelles, 2005, p. 47 – 67. Y. RENOUF, *La politique commune de la pêche et l'Organisation mondiale du commerce*, in *La politique européenne de la pêche : verso un développement durable ?*, op. cit. p. 175-205.

[301] See Annex I to the Markets Regulation, from point (e) to (g).

POs are expected, within the CMO reform, to plan their activities by taking into account fluctuations in the market demand. In this sense, processing industry is essential to provide added value to products and therefore meet consumers' needs. The Markets Regulation sets-out, in this respect, the establishment of Inter-branch organisations, whose scope is to improve coordination among producers and processing and marketing operators. In addition, as processed product are characterized by the relevance of their quality standards and of their image in international market, a performing processing industry requires also the adoption of an export-oriented approach of final products and, conversely, of an imports-oriented approach for raw materials[302]. Consumer information in this context is particularly relevant, since better labelling standards can improve consumers' well-being and, at the same time, encourage more sustainable food choice. Finally, as the processing activities are mainly localized in those coastal areas of the Union's where economy is dependent upon fisheries, the processing industry has a major impact in terms of regional development and social dimension.

As for aquaculture, its value as an alternative to fishing is fully recognised. Through its potential contribution to fish supplies, farmed fish can in fact provide an important, increasing source of food, a wide range of job opportunities in both production and processing activities, and moreover, as far as some species are concerned[303], lower pressure on wild stocks and consequently on marine ecosystems.

II. 6. Inter-branch organisations: the opportunities offered by a more interconnected supply chain

The first elements revealing that the CMO focuses on trade and processing activities, are the provisions of the Markets Regulation related to inter-branch organisations (IBOs). An inter-branch organisation is a group of organisations or associations involved in at least two part of the supply chain. Thus, unlike a producer organisation an inter-branch organisation is not restricted only to the production side of the supply chain, but covers also operators performing processing and/or trade activities.

The scope of inter-branch organisations, whose regulatory framework (including recognition, extension of rules to non-members, internal functioning, check and withdrawal of

[302] This issue will be analysed in Chapter V, dedicated to the external aspects of the CFP, including EU trade and commerce with third countries.
[303]In this sense, R.L. NAYLOR and others, *Effect of aquaculture on world fish supply*, Nature 405, 29 June 2000, p. 1017-1024.

recognition) is substantially similar to that established for producers organisations, is outlined, in rather general terms by Article 12 of the Markets Regulation: these entities 'shall improve the coordination of, and the conditions for, making fishery and aquaculture products available on the Union market. The basic idea behind the promotion of inter-branch organisations is therefore that production and distribution sides of the supply-chain should be more interconnected by interdependences in providing fisheries products[304].

As stressed by the communication of the Commission on promoting the adaptation of the European Union fishing fleets to the economic consequences of high fuel prices[305], is imperative for Community producers to take into account changes in consumer habits and of distribution, as big distribution chains - through which the majority of EU products are sold - generally have a policy of buying in quantity on the basis of forecast demand. In this context 'the uncertainties over landings and the fragmented nature of the first-stage marketing sector 'are reasons why these major chains may avoid purchasing Community products'.

Inter-branch organisations are considered as tools which could contribute to improve that situation, strengthening the cooperation between several operators of the chain to the benefit of the entire industry[306]. In the view of producers, they are tools expected to help them in enhancing their bargain power thought a closer connection with the subsequent stages of the chain.

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[304]As stressed by T. ASCARELLI 'il consumo rappresenta un momento di un processo economico che comincia con la produzione [..] e certamente, non può porsi la distinzione tra il diritto dell'economia di consumo e quello dell'economia di produzione o scambio ma tra le epoche nelle quali la divisione del lavoro importa la concentrazione dei vari soggetti sulla produzione di distinti prodotti o servizi poi offerti al mercato e quelle invece nelle quali vige una specie di autarchia individuale o familiare o di piccole comunità autoproducenti quanto occorra per il proprio consumo', in *Lezioni di diritto commerciale, Introduzione, Milano*, 1955, p. 62.
In this respect, it has also been remarked: 'non può sfuggire, come la cifra distintiva della risalente configurazione dell'impresa agricola, attinente alla mancata assunzione della funzione mercantile, abbia configurato un limite verso la necessaria proiezione [dell'impresa] a raccogliere e valorizzare l'esperienza dei consumatori', S. MASINI in *Diritto alimentare, una mappa delle funzioni*, Milano, 2014, p. 60.
On this issue see also A. JANNARELLI, *Dal prodotto agricolo all'alimento: la globalizzazione del sistema agro-alimentare ed il diritto agrario,* in *Prodotti agricoli e sicurezza alimentare, Atti del VII Congresso mondiale di Diritto agrario dell'Unione Mondiale degli Agraristi Universitari in memoria di Louis Lorvellec* (Pisa-Siena, 5 novembre 2002), vol. I, a cura di E. ROCK BASILE, A. MASSART, A. GERMANÓ, Milano, 2003.

[305] See the Communication from the Commission to the Parliament and the Council, of 8 July 2008, on promoting the adaptation of the European Union fishing fleet to the economic consequences of high fuel prices, COM (2008) 453 final, p. 9.

[306] Maritime Cluster Organisations and Sector Associations in maritime sector which are active in several European regions and include operators from various industries such as shipping, shipbuilding, ports and transports services could be taken as a model. Whereas Cluster Organisations provide a common platform for all companies in sectors which are related to each other, sector associations link companies and/or organisations belonging to a specific sector. For a detailed analysis of the characteristics of these groups and their potential development in the framework of the EU Maritime Policy see R. VIEDERYTE, *Maritime*

To this aim, inter-branch organisations can undertake several measures, such as promoting product certification; laying down rules on the production and marketing which are stricter than those laid down in Union or national legislation; carrying out professional and vocational training activities; performing research and market studies; developing techniques to optimise the operation of the market; providing information and carrying out the research needed to deliver sustainable supplies at the quantity, quality and price corresponding to market requirements and consumer expectations; promoting, among consumers, species obtained from fish stocks that are in a sustainable state; monitoring and taking measures for compliance of their members' activities (Article 13).

It should be stressed, however, that the lack of specific provisions in the European Maritime and Fisheries Fund (EMFF) dedicated to financial support to inter-branch organisations raises question on the actual development of these figures, which, despite the relevance of their potential contribution to CMO objectives, have not received yet a significant weight in the organisation and management of the sector[307].

II. 7. Consumer information: between new labelling rules and eco-labelling opportunities

Cluster Organizations: Enhancing Role of Maritime Industry Development, in Social & Behavioural Sciences 81 (2013), p. 624 – 631.

[307]There are currently only four recognised inter-branch organisations: *Comité Interprofessionnel des Produits de l'Aquaculture*, C.I.P.A. (France), INTERATÚN (Spain), AQUAPISCIS (Spain) and O.I. FILIERA ITTICA (Italy).

In recent years, both the variety in the supply of fishery and aquaculture products and demand for them by consumers[308] have increased. In such context, is essential to provide consumers with a minimum set of information about the origin, method of production and characteristics of the products, in order to facilitate a more confident and responsible choice[309].

The Markets Regulation has therefore introduced some changes in products labelling requirements. These complement the general EU legal framework on food information to consumers[310], in line with Article 169 of the Treaty on the Functioning of the European Union (TFEU), which states that the Union contributes to the attainment of a 'high level' of consumer protection, by promoting the health, safety and economic interests of consumers as well as their right to information[311], education and to organise themselves in order to safeguard their interests.

In this view, as far as the CMO for fisheries and aquaculture is concerned, the new rules provide that fishery and aquaculture products which are marketed within the European Union, regardless of their origin, may be offered for sale to the final consumer when indicate in the marking or labelling :(a) the commercial designation of the species and its scientific name; (b) the production method, in particular by the following words "… caught …" or "… caught in freshwater …" or "… farmed …"; (c) the area where the product was caught or farmed, and the category of fishing gear used in capture of fisheries, as laid down in the first column of Annex III to the Regulation; (e) the date of minimum durability, when appropriate. (Article 35).

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[308] According to the *State of the World Fisheries and Aquaculture 2014* of the Food and Agriculture Organisation (FAO) world per capita fish consumption has been increasing from an average of 9.9 kg in the 1960s to 19.2 kg in 2012. Such increase was driven, in developing countries, by several factors, including population growth, rising incomes and urbanization, strong expansion of fish production and more efficient distribution channels. As far Europe is concerned, EU consumers buy less seafood (consumption per capita decreased from 26 kg to 23,9 kg between 2008 and 2012), but spend more for it, which indicates a change in consumption preferences as well as in fish prices. For extended treatment of this topic see the annual report from the EUMOFA, *EU Fish Market 2015*, p. 3 ss.
For an analysis of projections of global fish consumption towards 2030 see M. SPAGNOLO, *L'economia e la gestione della pesca nel Mediterraneo*, in *Verso un sistema di regole comuni per la pesca nel Mediterraneo*, Roma, 2006, p. 52 -55.

[309]On the value of labelling as an essential tool of communication between producers and consumers in increasingly globalised markets and on the relevance of reciprocal trust in first-direct sales see N. LUCIFERO, *Il legame fiduciario tra agricoltore e consumatore nella vendita diretta dei prodotti alimentari*, in A. GERMANÓ, *Agricoltura dell'area mediterranea, qualità e tradizione tra mercato e nuove regole dei prodotti alimentari, Atti del Convegno di Pisa del 14-15 novembre 2003*, Milano, 2004.

[310]See the Regulation (EU) No 1169/2011 of the European Parliament and of the Council, of 25 October 2011, on food information to consumers. For an overview of EU food legislation and respect of standard in relation to products imported from third countries see G. GALLIZIOLI, *La normative comunitaria dei prodotti ittici*, in *Atti del VII Congresso mondiale di diritto agrario dell'UMAO in memoria di L. Lorvellec*, *Prodotti agricoli e sicurezza alimentare*, Milano, 2004, p. 109 ff.

[311] It is estimated that at least 6% of the labels of fisheries products in commerce on EU market do not match with the true characteristics of the products themselves. False labelling has negative impacts not only in terms of consumer protection, but also insofar as IUU fishing practices are encouraged. On this topic see El País, *España pesca en un mar reñido*, Domingo 13 diciembre de 2015, numero 1571, p. 3.

Such provisions apply to 'products referred to in points (a), (b), (c) and (e) of Annex I', both prepacked or not prepacked. They concern, therefore, all unprocessed and certain processed products (e.g. salted, smoked products, cooked shrimps in their shells).

In order to accompany the sector in the implementation of these rules, the Commission has published a 'Pocked guide to the European Union's new fish and aquaculture labels'.[312]

According to this document, as for the first mandatory requirement, i.e. the commercial designation, both the commercial and scientific names of the food must be displayed on the product and match those on the official list of commercial designations drawn up and published by each Member State in accordance with Article 37 of the Markets Regulation.

Moreover, the catch area must be intended, in case of fish caught at sea, as the sub-area or division included in the FAO list of fishing areas. Such zone must be easily recognisable for consumers through its name or, where appropriate, through a map or a pictogram. As far as farmed fish is concerned, the label must show the country of production. Finally, fish caught in freshwater must display both the name of the body of water (river, lake, etc.) and the country where the product was caught.

Where a product is mixed, i.e. composed by elements of the same species arising from different method of production or caught in different areas or with different fishing gears, the label must indicate the method of production and the gear category for each batch and, at least, the area/country of the batch that is more representative in terms of quantity, also specifying that products come from different areas/countries.

As laid down in Article 35 point d), the label should also display whether the product has been defrosted[313]. For pre-packed products, this information must be included into the commercial name. For non-prepacked products, although it is not required that such information accompany the name, it must be displayed where appear on billboards or posters.

For all products, in addition, information on allergens are mandatory and must be, in case of pre-packed products, put in evidence within the list of ingredients. All pre-packed product not highly perishable must also indicate the 'best before' date, i.e. the date of minimum durability, whereas those highly perishable display the 'use by' date. For all non pre-packed products, Member States can establish through their national rules whether the 'best before' or the 'use by' date must be used.

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[312]See the 'Pocket guide to the EU's new fish and aquaculture consumer labels' of the European Commission, 2015 available at the link: http://ec.europa.eu/newsroom/mare/itemdetail.cfm?item_id=19497

[313] This provision does not apply whenever fisheries and aquaculture products: (a) are ingredients present in the final product; (b) are products for which freezing is a technologically necessary step in the production process; (c) have been previously frozen for health safety purposes; (d) have been defrosted before smoking, salting, cooking, pickling, drying or a combination of these processes.

As a whole, it can be argued that the system of labelling requirements outlined above appears, to a certain extent, difficult to be implemented for a so wide variety of fisheries products.

As it has been pointed out[314], information should be tailored in relation to the specific nature of each product, taking into account, among other features, if it is fresh, frozen, a prepared or canned product or an elaboration based on products deriving from fishing and aquaculture. This is because labelling rules are expected, on the one hand, to provide information to consumer so that they can make an accurate and well-informed choice and to keep producers' costs at a reasonable level on the other.

In this respect, more information in terms of quantity not always means improving the choice in terms of quality[315]. Taking as example fresh and therefore highly perishable fisheries products, several elements such as date of capture, landing, breeding areas and method of production are relatively easy to incorporate for the producer and constitute relevant and useful information for the consumer. But also more complex, prepared or precooked products exist whose components are foods of very different nature as fish, shellfish and crustaceans, coming from both fisheries and aquaculture, from diverse areas and periods of the year depending on the season. Applying the common rules outlined above imply, in this case, providing a wide and overwhelming amount of information on the dates, areas and production methods related to each components of the product, which are quite useless to guide consumer choice. Furthermore, such requirements may increase costs for producers and complicate procedures and formalities.

In addition to mandatory information, the Markets Regulation offers the possibility of adding voluntary information on the dates of catch and landing, the port of landing, the vessel's flag State, details on gears and other fishing techniques, on environmental, ethical or social aspects, on production techniques and practices, as well as on the nutritional content of the products, provided that such information do not detriment the space available for mandatory information and that they are clear, unambiguous and verifiable (Article 39).

Information indicated on a voluntary basis are seen as important tools to promote differentiation of products. The idea is that EU production, especially insofar as fresh, local and high quality products are concerned, could be better exploited by rising the profile of the products and its added value in the eyes of consumers. It should be noted, however, that despite such information is positive for some operators and in terms of differentiation and marketability, it

[314] Informe 1/2013, *La reforma de la política pesquera común*, Consejo Económico y Social de España, 2013, p. 77 ff.

[315] On the concept of 'quality' of agri-food products as genuiness, biological and ethical features are concerned see E. BONARI, M. GALLI, C. NERI, E.PICCIONI, *Gli aspetti agronomici della qualità dei prodotti agricoli*, in *Agricoltura dell'area mediterranea, qualità e tradizione tra mercato e nuove regole dei prodotti alimentari,* op. cit. p. 3 – 22.

should be subjected to a minimum level of standardization in order to avoid confusion and complexity.

Fisheries and aquaculture products other than those listed in Annex 1 (points a), b), c) and d)), insofar as they are 'processed products', fall under the general framework established by Regulation (EU) No. 1169/2011 on the provision of food information to consumers (hereinafter the FIC Regulation). Processed products must be intended as canned, composite, breaded products, which can be both 'pre-packed' and 'non-prepacked'.

Since the demand for processing and ready-made food in recent years has considerably grown worldwide[316], and this trend is observed also in fish consumption, particular attention is paid in EU legislation to the labelling of fisheries and aquaculture products that are processed. Mandatory information include their legal name or, if this is not in use, a customary or descriptive name. Furthermore, when the product has been frozen before sales and is sold defrosted, the label shall be accompanied by the designation 'defrosted'[317]. Other compulsory elements are net quantity, food operator, identification mark, list of ingredients, storage conditions, country of origin, instruction of use, added water, added proteins of different animal origin, nutrition declaration. For non-prepacked products falling within this category, only information on allergens is mandatory, while the remaining binding requirements do not apply unless EU countries adopt national measures on all or some of them. Voluntary additional information are similar to those set out under the CMO Regulation for non-processed products.

In order to help consumers to identify products that have a reduced environmental impact, the new Markets Regulation provides also an eco-label scheme for fishery and aquaculture products, to be established on Union-wide basis and setting minimum requirements for the use by Member States of a Union eco-label (Article 36). As highlighted by the Commission in its Communication launching a debate on a Community approach towards eco-labelling schemes for fisheries products[318], such certification would contribute to integrate environmental concerns into fisheries management and support the objectives generally associated with fishery policy.

An eco-labelling scheme entitles in fact a product 'to bear a distinctive logo, or statement, by way of which consumers are assured that the product has been produced according to a given set

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[316]See the circular by the Food and Agricultural Organisation (Fisheries and Aquaculture Department), *Economic Analysis of Supply and Demand for Food up to 2030*, Rome, 2014, p. 8.

[317] This information is not necessary for: - ingredients present in the final product; - foods for which freezing is a technologically necessary step of the production process; - foods where defrosting has no negative impact on the safety or quality of the food.

[318]See the Communication of the Commission to the Council, the European Parliament and the European Economic and Social Committee, of 29 June 2005, launching a debate on a Community approach towards eco-labelling schemes for fisheries products, COM(2005) 275 final, p. 5.

of environmental standards, such as the sustainability of the resource used as raw material, the environmental impact of the production method, or the recyclability of the product'. In this way, preferences of consumers are expected to influence producers' behaviours stimulating environmentally friendly practices and methods of production.

In fisheries sector, over the last few years, various private eco-labelling schemes (e.g. the "Dolphin safe" or the "Marine Stewardship Council" labels) have emerged and found their place in international markets, accompanied by debates on the issue held in international *fora* (FAO, WTO). The development of an harmonised approach in this field at Union level is, in this perspective, seen as an appropriate measure to face the emergence of disparate set of eco-labelling private schemes and to enhance, through a coherent set of guidelines and principles, the consumers awareness on the importance of product-related characteristics, such as production methods and environmental impacts.

Pursuant to Article 36 of the Markets Regulation the Commission launched a consultation[319] with the aim of collecting views of diverse stakeholders on the impacts (both positive and negative) associated with fisheries and aquaculture eco-labels. Following the consultation outcomes, on 18 May 2016 the European Commission has adopted a report on the feasibility on options for an EU eco-label scheme[320],analysing three possible scenarios: (1) reinforcing the use of existing tools; (2) mimimum requirements set by the EU; (3) establishing an EU-wide ecolabel scheme.

In this respect, it should be noted, nevertheless, that the positive effects of eco-labels already in place are to a certain extent, uncertain. Firstly, the proliferation of several eco-labelling schemes can be explained as a consequence of the implementation of the eco-system based management approach, and notably, as an attempt to incorporate avoidance of habitats degradation (including by-catch of non-target species) into a seafood qualitative grading scheme. However, by comparing the collateral impacts of fisheries certified by the Marine Stewardship Council (MSC) to those of non-certified fisheries, it can be observed that performance in terms of median by-catch

[319] The online questionnaire used for the consultation is available at the link: http://ec.europa.eu/dgs/maritimeaffairs_fisheries/consultations/ecolabel/index_en.htm. The consultation questionnaire was completed by a range of different actors including NGOs and professional organisations involved in fisheries and aquaculture certifications. Participation of stakeholder groups and EU Member State was not uniform. A high proportion of respondents were individual consumers and there was little representation from public institutions.

[320] Report from the Commission to the European Parliament and the Council, of 18 May 2016, on the feasibility on options for an EU eco-label scheme for fishery and aquaculture products, COM(2016) 263 final.

rate (referred to marine-mammals), discard rate as well as utilisation of gears do not differ significantly[321].

Another reason explaining the rising of transnational eco-labelling schemes, is the lack or insufficient international regulation, which leads sector operators to increase their influence in fisheries governance through private initiatives. A drawback of that is, however, as already mentioned, that certification schemes ' often subordinate the 'beneficiaries' of the certification, be that the environment, the producers, or both, to the demands of consumers and the market more broadly'[322]. In particular, the standardisation of the concept of sustainability through a market-tool creates a 'pressure to certify', which benefits big-scale and industrialised fisheries and can be detrimental to smaller operators, or to those able to respond to sustainability requirements and challenges in alternative ways. In addition, when a label becomes very popular on the market, there is a risk that the concept of sustainability will be incorporated in the label itself. The label can therefore results in a sort of 'monopolisation' of the concept of sustainability.

In this regard it should be noted that, beside eco-certification initiatives conceived to be applied at a global level, such as the MSC, in recent years alternative schemes have been developed, which are at once 'embedded in territorial practices and highly responsive to transnational governance norms and marketing conditions'[323]. Territorial eco-certifications have risen, in particular, in Japan (the Marine Eco-Label – MEL), Iceland (the Iceland Responsible Fisheries eco-label and eco – certification program – IRF), Alaska (the Alaska Responsible Fisheries Management Certification Program), Canada (pilot project) and United States (a proposal in progress).

As universal standards like MSC are often criticised with the allegation that they are driven by interests of northern market operators and for imposing high compliance costs and foreign-generated principles on southern world producers[324], regional eco-certification initiatives are designed to promote a territorial brand identity associated with responsible fisheries.

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[321]For extended treatment of this topic see R.L. SELDEN, S.R. VALENCIA, A.E. LARSEN, J. CORNEJO-DONOSO, *Evaluating seafood eco-labeling as a mechainism to reduce collateral impacts of fisheries in an ecosystem-based fisheries management context*, in Marine Policy 64 (2016), 102 – 115.

[322] This statement is based on comparative analysis of different MSC certified fisheries, i.e. the Bearing Sea and Aleutian Islands Alaska Pollock Fishery, the Australian Northern Prawn Fishery and the Faroe Islands Saithe Fishery, which have all proven to be unsuccessful in supporting sustainable fishing practices without leading to monopolisation of the market. See in this respect, M. HADJIMICHAEL, T.J. HEGLAND, *Really sustainable? Inherent risks of eco-labelling in fisheries*, in Fisheries Research 174 (2016), p. 132.

[323] See P. FOLEY, E. HAVICE, *The rise of territorial eco-certifications: new politics of transnational sustainability governance in the fishery sector*, in Geoforum 69 (2016), p. 24.

[324] For an analysis of the impacts of MCS certification scheme in developing countries and of the challenges and opportunities offered by its implementation see M. PÉREZ- RAMÍREZ, B. PHILLIPS, D. LLUCH-BELDA, S. LLUCH-COTA, *Perspectives for implementing fisheries certification in developing countries*, in Marine Policy 36 (2012) 297–302.

In particular, territorial eco-labels are seen as a response to certification costs which are excessive for small scales fisheries (especially in developing countries) as well as instruments preserving national authority over fisheries management, access to market, expression of local fishers' interests and, at the same time, compliance with international norms and practices and science-based approach, therefore gaining transnational credibility. In this perspective, also the eco-certification scheme at the EU level envisaged by Article 36 the Markets Regulation, if implemented, could emerge as a system of *territorial sustainability governance*, asserting the value of territorial industry identities and embracing, at the same time, transnational opportunities and challenges.

A first element highlighted in the above mentioned report of the European Commission on options for a EU eco-label scheme is that market penetration of eco-labelled products varies significantly across Member States, and concentrates on frozen or processed products. In countries where consumers mainly purchase fresh products such as France, Italy, Portugal and Spain, eco-labels and certifications have a marginal role. Conversely, eco-labelled products have become well established in other Member States, such as Germany and the United Kingdom. The main consumers of seafood products (per capita consumption), therefore, are not the main buyers of products bearing eco-labels. Furthermore, despite the use of eco-labels is limited compared to other consumer information tools, EU producers are increasingly moving towards certification, in order to differentiate their products from those imported from third countries and to access new markets that will otherwise remain closed or undervalued.

The Report underlines that a common eco-label scheme set at EU level may have, when supported by effective public control, positive impacts in terms of credibility of products certification and improvement of standards, and that it may also reduce the risk that private eco-labels become too dominant on the markets. However, in terms of costs for the certification, only limited savings could be achieved. Confusion may arise in relation to other types of environmental information. The implementation of this option would also imply adoption of new legislation, including procedures for review, certification, labelling and dispute resolution. Furthermore, as penetration of eco-labelled scheme varies consistently across Member States, the opportunity to introduce EU level rules must be considered carefully in the light of the subisidiarity principle. Finally, the dual role of EU in promoting environmental sustainability through the CFP and in setting criteria assessing the concept of sustainability itself, may raise problems of consistency. After the submission of the Commission report, the issue will be debated by the Parliament and the Council.

II. 8. The social aspects as a key (but overlooked?) dimension of the Common Fisheries Policy

Social sustainability is an essential dimension of the common fisheries policy[325]. As acknowledged by the Commission in the Communication on the reform of the common fisheries policy 'the CFP must provide the conditions for a strong, viable competitive industry that offers attractive jobs'. Moreover 'job attractiveness and decent working conditions are pressing issues for the fleet in general, and particularly important for many small-scales coastal fleets. Together with development of social dialogue [..] the reformed CFP needs to contribute to the modernization of working conditions on board of vessels and to ensure that modern health and safety standards are meet.'[326]

However, although both the environmental and social dimensions are recalled in the package of reform regulations whenever the concept of sustainability is addressed, conservation objectives

[325]As highlighted by R. CASADO RAIGÓN 'tanto la pesca como, más recientemente, la acquicoltura, tengan una relevancia social considerable, ya que desempeñan un papel muy importante en la economía de distintas regiones mediterráneas: genera un considerable número de puestos de trabajo y constituye el motor económico de comunidades locales enteras, lo que ocurre en Andalucía, Sur de Italia, Sicilia, o islas griegas', in *El régimen jurídico de la pesca en el Mediterráneo. La aplicación de la Política Pesquera de la Comunidad Europea*, Sevilla, 2008, p. 20.

[326]See the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 13 July 2011, *Reform of the Common Fisheries Policy*, COM (2011) 417 final, p. 5.

undoubtedly prevail on social concerns[327]. This choice can be probably explained with the fact that, as pointed out in the Green Paper itself, social objectives, such as employment, have often been invoked to advocate more generous short-term fishing opportunities, thus jeopardising the state of the stocks and, therefore, the future of the fishermen who make a living out of them[328].

The recognition of the importance of ecological sustainability as a basic premise for the economic and social future of European fisheries do not justify, nevertheless, the scarce attention paid by the reform to several social issues which arise in fisheries management.

In addition to decline in employment (especially in the catching sector), low attractiveness of jobs, particularly for young generations, low wages, instability of employment, hard work, low safety and bad living conditions on board are common problems affecting people working in the sector[329]. Recent surveys carried out on fisheries in Andalusia, a EU region which has a relevant tradition in the fishing industry[330], indicate that life styles onboard can be very detrimental to fishermen health. Especially in small-scale fisheries, where availability of cooking facilities on board is scarce, diets are usually not balanced and calorie supply is clearly insufficient for the energy effort required by the daily work. Ocular refraction defect, *musculoskeletal pain,* long exposure to continuous noise of the boast's engine, solar radiation[331], daily work exceeding 8 hours and nocturnal work, are frequently reported. Despite these adverse health conditions, access to health care system is almost impossible while workers are at sea. Furthermore, the lack of emergency provisions such as watertight doors, deckhouses that can be closed on both sides, danger

[327] In this respect see the position paper of EUROPECHE and COPA-COGECA, of 13 July 2011, on the proposal of the European Commission for the reform of the CFP, which stresses that ' las propuestas de reforma de la PPC no tienen en cuenta las consultas anteriores del sector, ni el impacto socioeconómico que conllevarán' (available at the link: www.pescarecreativaresponsabile.es/html_docs/archivos/716.pdf), as remarked by R.M. FERNÁNDEZ EGEA, op. cit. p. 206.

[328] See the Green Paper of the European Commission on the reform of the Common Fisheries Policy, op. cit. p. 9.

[329]See the study of the European Commission, *Environmental, Economical, Social and Governance Impacts of the alternative options scenario of the 2012 CFP revision*, July 2010, p. 28 ff.

[330] Andalucia has over 800 kms of coastlines, where extractive fishing and related activities constitute an important source of employment and economic growth. The local fleet is composed of 1778 vessels, 804 of which operate in the Gulf of Cadiz, 901 on Mediterranean fishing grounds and 73 along African coasts.
The economy of some coastal municipalities, such as Isla Cristina and Barbate, has depended upon fisheries for generations. In the region about 27.800 workers are engaged in the sector, of which 34% in extractive fishing and aquaculture production and 66% in indirect, related activities, including processing industry. For extended treatment of the topic see the *Adalusian Government position before the reform of the Common Fisheries Policy*, Junta de Andalucia, October 2009, p. 7.

[331] In the majority of fleets (89%), crew members spend most of their time working on deck at the various fishing activities, a factor which explains the scarce habilitability of cabins and internal spaces in several small fishing vessels.

zones, stairs and passageways, gangways and guardrails, or the scarce attention paid to their use and maintenance when they are present, increase the risk of accidents onboard[332].

Furthermore, the absence of certain and reliable statistical data about the real number of employees in the fisheries sector is, especially with regard to women, a major social concern. The transition to a new model of fishing based on reduction of catches and withdrawals of fleet capacity in order to meet conservation objectives can have, in addition, significant negative impacts on the economies of some regions and coastal communities in Europe in which fisheries is an important source of job.

In the body of legislation adopted in the framework of the CFP reform, however, there are few concrete proposals to improve fishermen working conditions. Moreover, the CFP refers generally to 'fishermen', without making any distinction between the different figures that operate in the fishing sector[333]. A distinction in the fisheries legal framework is necessary, though, since the owner of a vessel and the employee(s) working onboard are both 'fishermen' in a technical way, but undoubtedly in different situations in a social way. Furthermore, no reference is made to European fishermen and non-EU nationals working on EU fishing vessels. This 'one-size-fits-all' approach is not appropriate, as social issues arise in different contexts.

With regard to the improvement of living conditions on board, in 2013 the EU social partners in the fishing sector reached an agreement, which proposed to align the EU law with the "Work in Fishing" Convention 2007 (No 188) of the International Labour Organisation (ILO) and its accompanying Recommendation 2007 (No 199)[334]. The Convention, which collects and revises five of the seven ILO conventions on labour in fishing already in force, sets minimum requirements for working conditions on board fishing vessels, such as accommodation and food, occupational health and safety, medical care, contractual conditions and social security. It therefore establishes a set of international recognized standards which constitute a playing field leveled

[332]See the analysis of F. PINIELLA, J.P. NOVALBOS, P.J. NOGUEROLES, *Artisanal Fisheries in Andalusia : Safety and working conditions policy*, in Marine Policy 32 (2008) p. 551–558. On the same topic see also: International Labour Organisation (ILO), *Safety and health in the fishing industry*, Geneva, 1999.

[333] Also a definition of 'aquaculture farmer' is missed. On this point see G. GALLIZIOLI, *Osservazioni sulla nuova riforma della politica comune della pesca,* in *Rivista di diritto agrario, Agricoltura – Alimentazione – Ambiente*, Anno XCII – Fasc. 4, 2013, p. 706 – 719.

[334]See the Agreement between the EU social partners in the sea-fisheries sector, of 21 May 2012 as amended on 8 May 2013, concerning the implementation of the Work in Fishing Convention 2007 (No 188) of the International Labour Organisation (ILO). The agreement was reached by the European Transport Workers' Federation (ETF) and by the Association of National Organisations of Fishing Enterprises in the European Union (Europêche) on the workers' side, and by the General Confederation of Agricultural Cooperatives in the European Union (COGECA) on the employers' side.

globally and include the possibility for the State port to perform inspections[335]. Although the Convention will not enter into force until is ratified by ten ILO Member States[336], the European Commission has adopted on 29 April 2016 a proposal for a Directive in order implement the 2013 social partners agreement[337].

In this respect, it is worth to mention that despite the implementation of the ILO Convention represents undoubtedly a positive step towards social fishing, its entry into force will have limited impact in improving working conditions of fishermen dependent upon vessels operating in EU waters, where most of existing regulations are already more stringent than those under the Convention itself. What is relevant in these areas is the application and enforcement of the already existing rules, together with the development of a culture of compliance among fishermen and operators.

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[335] For a comprehensive analysis of the emergence of human rights in modern international law and of their transnational and universal character see R. CASADO RAIGÓN, *Derecho international*, Madrid, 2012, which in relation to social and economical (human) rights states the following: 'el ser humano posee derechos inherentes a su propia condición en tanto que expresivo de su dignidad intrinseca; que está no solo comprende derechos civiles y políticos, de corte más individual o personal, sino también economicos, socials y culturales, protectores igualmente de su dimension colectiva y social; que tales derechos, de carácter inalienable, forman un todo indivisibile e interdependente, en cuanto que no y se puede fragmentar ni separar la dimensión individual y la social del ser humano', p. 357. As for the imperative character of international human rights law: 'mientras encontramos un claro reconocimiento de la naturaleza imperativa de diversas prohibiciones en relación con derechos fundamentals de naturaleza eminentemente civil (la vida o la integridad) el reconocimiento come imperative de otros, sobretodo los de carácter económico, social y cultural [..] parece aún lejano.' p. 360. In the light of this, the effective implementation of the ILO Convention through its integration into EU Law and ratification by Member States (and by other States across the world) is an essential step forward. On the role and duties of States in protecting human rights under modern international law see J.A. CARRILLO SALCEDO, *Soberania de los Estados y derechos humanos en el Derecho internacional contemporaneo*, Madrid, 2001. For an analysis of the concept of 'jus cogens' and its implications on State international resposability see R. CASADO RAIGÓN, EVA Ma VÁZQUEZ GÓMEZ, *La impronta del ius cogens en el proyecto de artículos de la Comisión de derecho internacional sobre la resposabilidad del estado por hechos internacionalmente ilícitos*, in C. SALCEDO, J. ANTONIO, *Soberanía del Estado y derecho internacional*, Sevilla, 2005, p. 343 – 360.

[336] At present, eight States have ratified the Convention. Among them, the only EU Member having ratified is France. The status of the Convetion can be checked on the ILO website at the link: http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:4179240914231357::::P11300_INSTRUMENT_SORT:3.

[337] In accordance with Article 155(2) TFEU, EU social partners may request that an agreement signed by them is implemented through a Council Decision, thus becoming legally binding in all EU Member States. On 29 April 2016, the Commission has adopted a proposal for a Directive to translate into EU Law the 2012 EU social partners agreement on fishing working conditions, as amended in 2013. Once adopted by the Council, the Directive will also be an incentive for Member State to ratify the ILO Work in Fisheries Convention 2007, No. 188. For a full analysis of the evolution of the legal framework governing maritime labour as a consequences of developments occurred over the last few decades in the international community and consequently in international law see P. PUSTORINO, D*evelopments in Maritime Labour between International Law and EU Law*, in A. DEL VECCHIO, *International Law of the Sea. Current Trends and Controversial Issues*, The Hague, 2014, p. 329 ff.

Conversely, fishermen on vessels operating abroad (outside EU waters), in particular local people employed by EU vessels in developing countries[338], would benefit from the recognition of social standards at international level[339].

As for fishers in the EU, in order to make a significant change further progress is necessary.

Insofar as implementation of rules is concerned, compliance with labour security standards should be ensured by Member States through efficient monitoring and labour inspections, extended not only to vessels flying the EU flag but also to foreign vessels entering in EU ports. In this perspective, EU financial aid to fisheries industries aimed at improving security conditions, as well as better integrated governance to face shortage of inspections and improvement of States' control port are important steps forward.

With respect to safety on board, it can be noted that the CFP reform does not set up specific rules to prevent accidents in the workplace, such as incentives to training of crews or financial support to promote modernisation of fleets[340]. Several studies have revealed, though, that sea fishing is one of the least safe occupations, presenting the highest rates of workplace accidents in the EU among all industrial activities[341]. In each type of fishing, is important to select the correct personal protective equipment in function of the particular nature of the risks incurred. These risks appear to be higher on boats engaged in small-scale fishing, as there is no enough space on board to

[338] Globalisation in the maritime industry has led to increased use of flags of convenience, resulting in recruitment by ship owners of 'crew of convenience' from developing countries. For an analysis of this practice see T. ALDERTON, n. WINCESTER, *Globalisation and de-regulation in the maritime industry*, in Marine Policy 26 (2002) p. 35–43.

[339] As emerges from the analysis of B. D. RATNER, B. ASGARD, E. H. ALLISON, *Fishing for justice: Human rights, development, and fisheries sector reform*, in *Global Environmental Change* 27, 2014, p. 120–130, in several countries such as India, Philippines, Cambodia and South Africa the fisheries sector is still affected by frequent human rights violations, including child labour, forced labour, unsafe working conditions, lack of personal security, forced evictions and displacement, gender-based violence.

[340] For a full analysis of the measures undertaken by the European Union in the field of maritime security, with special regard to maritime transport see A. DEL VECCHIO, *Protection et sécurité dans les transports marittimes: les mesures de l'Union européenne*, in M. SOBRINO HEREDIA, *Sûreté maritime et violence en mer,* Bruxelles, 2011, p. 357-379.

[341] In this sense see S.E. ROBERTS, *Occupational mortality in British commercial fishing*, 1976–95, in *Occupational and Environmental Medicine*, 2004, 61(1), p. 16–23; C. CHAUVIN, G. LE BOUAR, *Occupational injury in the French sea fishing industry: a comparative study between the 1980s and today*, in *Accident Analysis and Prevention* 2007; 39: p. 79–85; D. JIN, E. THUNBERG, *An analysis of fishing vessel accidents in fishing areas off the north eastern United States*, in *Safety Science* 2005, 43: p. 523–40; J. NORUM, E. ENDRESEN, *Injuries and diseases among commercial fishermen in the Northeast Atlantic and Barents Sea. Data from the Royal Norwegian Coast Guard*, in *International Archives of Occupational and Environmental Health* 2003, 76(3), p. 241–5; T. LAWRIE, C. MATHESON, L. RITCHIE, E. MUERPHY, C. BOND, *The health and lifestyle of Scottish fishermen: a need for health promotion*, in *Health Education Research 2004*;19(4), p. 373–379.

stowing lifesavings devices and, moreover, the proximity to the coasts reduce crew's awareness of the dangers they are exposed to[342].

Furthermore, in order to face the lack of attractiveness of the sector for young people, a system of integrated maritime-fishing training should be set up, the aim of which would be the raising of working qualifications and the improvement of employability of people in the medium and long term. Fishing occupations, in this sense, should become a priority of Blue Growth strategy in the wider context of the Integrated Maritime Policy (IMP), in view of developing more skilled and diversified works and therefore improving occupational versatility in both the fisheries and maritime sector.

At the same time, the integration of gender policies into maritime strategies is essential. It is well known that European statistical data on the number of persons working in the fisheries sector are fragmented and incomplete. This is especially relevant for women, whose contribution to economies of fisheries communities is crucial but underestimated and, what it makes it worse, often invisible[343].

In particular, within fisheries family businesses, women work sometime on board as crewmembers, more often on the ground as sellers of fish or crustaceans, for the preparation of nets, as well as in administrative and accounting activities. They also cover different roles in the fisheries and maritime sector, as ship-owners and entrepreneurs, suppliers, or workers in food processing establishments. However, especially in family businesses, their activities are generally undeclared and as such they have only rarely the legal status of an 'employee', associated working rights and social benefits are not guaranteed to them[344]. A positive advancement in this respect is that the

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[342] See F. PINIELLA, M.C. SORIGUER, G. WALLISER, *Analysis of the specific risks in the different artisanal fishing methods in Andalusia, Spain*, in *Safety Science* 46 (2008), p. 1194.

[343] This issue embraces, more widely, the need to improve the *status* of women in accordance with the EU gender equality policies. As highlighted by A. DEL VECCHIO in this respect 'il tema specifico della tutela dei diritti delle donne è divenuto oggetto di studio e di dibattito solo in tempi recenti, da quando cioè nella comunità internazionale si è iniziato ad avvertire il bisogno di differenziare la tutela dei diritti umani per genere, nonché di verificare l'effettivo godimento da parte delle donne di diritti fondamentali […] nella comunità internazionale sono stati elaborati gradualmente nel tempo diversi trattati regionali al fine di tenere conto del fatto che la protezione dei diritti della persona, e della donna in particolare, assume frequentemente una configurazione che varia a seconda delle regioni geografiche considerate'. As for Europe, despite both the European Convention on Human Rights (ECHR), notably its additional Protocol No. 12, and the EU legal system (see in particular Article 2 TEU and Article 23 of the Charter of Fundamental Rights of the European Union) stress that equality between men and women must be ensured 'in all areas, including employment, work and pay', statistical data, such for instance those related to employment in the fisheries sector, reveal that the equal protection and recognition of women rights is still far from be achieved. See A. DEL VECCHIO, *La tutela dei diritti delle donne nelle Convenzioni internazionali*, *Atti del Convegno in memoria di Luigi Sico*, Napoli, 2011, pp. 315-329.

[344] See the study performed by the Osservatorio nazionale della pesca: *Women in world of fisheries, Veer in Europe and the case Italy*, March 2015, available online at the link: http://www.neteconsulting.com/women-in-the-fishing-world/. For a rough estimation of women contribution to the fisheries sector worldwide,

European Maritime and Fisheries Fund (EMFF) established under the CFP reform recognises for the first time the contribution of women to the fisheries sector, providing financial support to their training, in particular for the acquisition of skills linked to entrepreneurship and business management. Furthermore the *Report on specific actions in the Common Fisheries Policy for developing the role of women*[345] of the European Parliament proposes the establishment of a statistical programme aimed at collecting data on women working in Member States in both the fisheries and aquaculture sectors.

The recognition of informal work relationships in fisheries can also be attained by taking into account the role of sectors that traditionally complement the fisheries one (intended as harvesting) such as processing and marketing of fish products, aquaculture and other related activities). A gap of the CFP reform in this respect is that there is no reference to people working in the processing sector. This has implications in several fields. As said above[346], the new Basic Regulation introduces a transferable fishing concessions system, limited to larger vessels, which is intended as a market-based driver mechanism able to reduce fleet overcapacity. Such mechanism, however, is not satisfactory from the social point of view. Firstly, as it does not take into account the impacts on employees of ship owners' withdrawal from the market. As aforementioned, the concept of 'fishermen' in EU legislation refers generically to all persons engaged in a professional occupation on board of fishing vessels, but without making appropriate distinction based on employment relations. Furthermore, more freedom for self-regulation of markets arising from transferable concessions system would result in the reduction of Member States capacity to ensure compliance with rules, including respect of social legislation and standards by operators. In addition, continuity of employment of the crews after a transfer concession is not specifically addressed.

To face the problems outlined above, it is crucial to support diversification and conversion of skills to alternative employment opportunities, especially into fish processing sector and aquaculture. The processing industry is particularly relevant, as in recent years, strategies to incorporate added-value to fisheries products have acquired a growing importance in the EU fisheries policy, since consumers' demand of ready-to-eat products, or products which do not require much preparation, has significantly increased. Added value means, in this terms, employing processing methods, specialised ingredients or novel packing in order to enhance the nutrition,

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especially within the Pacific area see S. HARPER, D. ZELLER, M. HAUZER, D. PAULY, U.R. SUMALIA, *Women and fisheries: Contribution to food security and local economies*, in Marine Policy 39, 2013, p. 56–63.

[345] See the Report of the Fisheries Committe of the European Parliament, of 30 October 2014, on specific actions in the Common Fisheries Policy for developing the role of women, 2013/2150 (INI).

[346] See Chapter II paragraph 5.

sensory characteristics and shelf life of foods[347]. Besides the contribution to meet consumers' demand, it should be stressed that processing industry represents also an important source of employment opportunities, especially for low-skilled women and in coastal areas with few alternatives. Therefore, work in fish processing industry should be fully recognised as an integral part of the CFP policy, to the same extend of the work of fishermen. Conversely, the 2013 reform did not provide measures related to industry workers' professional training[348] neither financial support to promote occupational integration in processing sector of vessels' employees, as a consequence of job losses due to the restriction of volume of fishing activities arising from implementation of conservation rules and transferable concessions. Furthermore, when acquisition of new skills is no possible, such as in the case of old fishermen with limited access to new jobs opportunities and before retirement age, special aid should be provided to avoid situations of poverty and marginalisation.

In order to ensure a fair competition in the market of processed products it is also essential that EU standards on food safety, health and hygiene, apply equally to both operators from the EU and third countries, as provided for by Chapter III of the CMO Regulation (See paragraph 4) dedicated to common marketing standards. To the same extent, also labour rules, and in particular the obligation to create decent working conditions under the 'Work in Fisheries' ILO Convention, should be extended to EU companies or private operators who sell processed products in Europe, but delocalising part of that production in other countries where respect of human rights and social standards are low.

Finally, it is worth to mention that development of processing industry does not imply a decline of artisanal fisheries techniques in favour of big industrial production, insofar as EU processing industries are often located within fishing coastal communities.

According to a definition provided by the Magnuson-Stevens Fishery Conservation and Management Act the term 'fishing community' stays for a community 'which is substantially dependent on or substantially engaged in the harvest or processing of fishery resources to meet social and economic needs, and includes fishing vessel owners, operators, and crew and United States fish processors that are based in such community'[349]. Since the 1970s, when the CFP came into being, the Community (now the Union) has undertaken several actions to protect the interests

[347]A. GREEN, *Value-added products boost sales at seafood companies*, in Coastwatch - North Carolina Sea Grant Magazine, Spring 2004.

[348] With the exception of training activities which can be inserted into POs' production and marketing plans (PMPs). See in this respect paragraph 3 of the Commission Recommendation on the establishment and implementation of production and marketing plans, cit.

[349]See the Magnuson-Stevens Fishery Conservation and Management Act, Public Law 94-256, as amended by the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (P.L. 109-479).

of coastal areas where fisheries have a special economic, social and cultural significance, through both restriction of access from fleets of other States in recognition of historical fishing rights of local people as well as through financial support to improve their living conditions[350]. However, such communities are the socio-economic realities which may be most affected by reduction of fishing activities[351] due to implementation of conservation policy, whether their fishermen would unable to find other employment opportunities in the local area or alternative source of income, such as welfare subsides[352]. Decline of fishing activity may result, in these cases, in worsening or even decline of local economy, a consequence that is particularly important to avoid for both social and environmental concerns. In social terms, because despite statistical analyses show that only few coastal regions in EU are highly dependent on fisheries[353], those are in rather isolated, less

[350] For a full account on the measures undertaken at EU level to support coastal fishing communities since the beginning of the common fisheries policy see G. GALLIZIOLI, *The Social Dimensions of the Common Fisheries Policy: a Review of current measures*, op. cit. p. 69 – 77. On the same issue see also G. CATALDI, *Les principes généraux de la politique commune de la pêche à l'aube du troisième millénaire*, in *La Méditerranée et le droit de la mer à l'aube du 21e siècle*, p. 416-420.

[351] In recent years a significant decline of fishing in most Mediterranean coastal areas had been registered, with an important impacts in terms of economy and development of coastal rural communities. For an assessment of the measures undertaken by the EU in this field within the 2007-2013 Common Fisheries Policy and their impacts on Greece coastal communities see E. LOIZOU, F. CHATZITHEODORIDIS, K. POLYMEROS, A. MICHAILIDIS, K. MATTAS, *Sustainable development of rural coastal areas: impacts of a new fisheries policy*, in Land Use Policy 38, 2014, p. 41–47. The analysis indicates, in particular, that employment and income generated through EU measures was relatively low because of funds limitations, but that indirect benefits could occur in the long term.

[352]According to analyses carried-out on fisheries in the coastal communities of Piriapolis (Uruguay) and Paraty (Brazil), fishers need to move into different occupations or supplementing their work in fishing with other sources of employment if they want to continue their fishing activity in the future. Furthermore, despite people engaged in fishing in such zones generally do not consider fisheries as a viable, gainful and stable occupation for their children, young people in these areas, both men and women, are increasingly involved in the fisheries sector or fisheries-related activities. See M. TRIMBLE, D. JOHNSON, *Artisanal fishing as an undesirable way of life? The implications for governance of fishers' wellbeing aspirations in coastal Uruguay and south eastern Brazil,* in Marine Policy, vol. 37(c), 2013, p . 37-44. On the same subject, with particular reference to the role of women in coastal fishing communities see N. SANTOS, *Fisheries as a way of life: Gendered livelihoods, identities and perspectives of artisanal fisheries in eastern Brazil*, in Marine Policy, vol. 62(C), 2015, p. 279-288.

[353] Several studies have been developed to estimate the contribution of fisheries to employment in coastal areas and to identify the EU coastal communities relying on fisheries. The absence of specific indicators set at EU level make this an huge task. As it has been pointed out, however, it is commonly accepted that the concept of dependency on fishing include aspects other than catching, landing and fisheries-related activities, such as the history of the community, cultural and traditional heritage and urban landscapes. Whether a more restricted definition would be adopted, under which a fishing community 'only exist where the fishery sector constitute the mainstay of the local economy, so that a drastic reduction in the harvesting activity [..] would causing decline of the entire local economy' only very few areas in Europe would be categorised as depending on fisheries. See on this point G. GALLIZIOLI, *The Social Dimensions of the Common Fisheries Policy: a Review of current measures*, op. cit. p. 68. According to a recent analysis, however, the level of dependency on fishery in coastal areas can be assessed by comparing estimated employment from fisheries at each port with general employment in the area of accessibility surrounding the port. In this way, fishing communities can be mapped not on the basis of arbitrary administrative boundaries but taking into account the socio-economic realities of regions concerned. The study identifies in 2010 388 communities out of 1697

developed areas, and therefore more at risk of poverty and marginalisation. In addition, as Member States' fleets are in an even increasingly manner composed by fewer, larger and more powerful vessels which needs fewer crews on board, and fishermen are less and less in touch with coastal communities since an increasing number of non-European work onboard of EU fishing vessels, the local and traditional fishing communities are also an historical and cultural heritage that is important to preserve[354]. Small-scale, artisanal fisheries has, moreover, a lower impact both on marine resources and landscapes. In this light, the European Maritime and Fisheries Fund (EMFF) increases funding options for integrated local development strategies to promote growth and creation of employment opportunities in coastal fisheries and more widely in the maritime sector and aquaculture, as well as the valorisation of cultural fishing heritage. Strategies on development of local coastal communities should include also measures to foster processing activities in these areas, such as improvement in raw material supply, reduction of transport costs (especially in peripheral regions) and of energy costs, as well as professional training for operators in order to strengthen their adaptability to different occupational opportunities in the maritime cluster.

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which have a dependency ratios above 1% and account around 54% of the overall EU fisheries employment. These, are mainly located in northern EU countries, a factor which can be explained by the existence of large populated areas along the Mediterranean coasts together with good transport infrastructures, meaning that southern European (Mediterranean) communities are not located so far from highly populated centres and therefore, are less economically dependent on pure fishing activities. See F. NATALE, N. CARVALHO, M. HARROP, J. GULLIEN, K. FRANGOUDES, *Identifying fisheries dependent communities in EU coastal areas*, in Marine Policy 42, 2013, p. 245 – 252.

[354] On the importance of developing methodologies to estimate the social and cultural value of marine fisheries so that they can be integrated into fisheries and marine policy management, see J. URQUHART, T. ACOTT, M. ZHAO, *Social and cultural impacts of marine fisheries*, in *Marine Policy* vol. 37, 2013, p. 1 – 2. In this sense see also M. REED, P. COURTENEY, J. URQUHART, N. ROSS, *Beyond fish as commodities: Understanding the socio-cultural role of inshore fisheries in England*, in Marine Policy 37, 2013, which underline the importance of fishing traditional background in shaping communities identity and creating, at the same time, tourism opportunities.

CHAPTER IV

The European Maritime and Fisheries Fund (EMFF): the structural side of the EU fisheries and maritime policy

IV. 1. Introduction

The financial and budgetary aspects of the Common Fisheries Policy (CFP) concretely ensure the effective implementation of the objectives and values of the CFP as they have been discussed in the previous chapters, ranging from conservation of fisheries resources, protection of the marine environment, economic and social development, consumer information, food safety. The financial allocations are therefore an essential part of the legislative and regulatory body governing all the aspects of the CFP governance, including the activities performed by EU fishing enterprises.

In 2013, for the first time ever, the Basic Regulation laying down the reform of the Common Fisheries Policy and its financial instrument, the European Maritime and Fisheries Fund (EMFF), have been discussed almost simultaneously, one just after the other[355], providing an unprecedented opportunity to foster the consistency between the newly established political objectives of the CFP and the financial tools necessary to achieve them[356]. EU fisheries enterprises are, in this context, the main recipients and beneficiaries of financial support, and can therefore be considered as important players to promote the orientation of fisheries activities towards CFP sustainable objectives.

These special circumstances of the adoption of the Fund, resulted in the European Maritime and Fisheries Fund (EMFF) that, on the one hand, reflects the need to support the changes introduced in the CFP political framework by the recent reform, and, on the other, reflects the need to preserve some of the traditional features of the long-established and accustomed common fisheries policy. Additionally, an important element affecting the EMFF is its incorporation in the broader context of the 'European 2020 Strategy for smart, sustainable and inclusive growth'

[355] The process leading to the adoption of the EMFF was more complicated than expected and the financial Regulation was formally adopted by the Parliament on 16 April 2014 and approved by the Council on 6 May 2014, few months after the final versions of the Basic Regulation and of the Common Market Organisation Regulation were adopted, on 10 December 2013. The negotiations on the EMFF between the Council and the European Parliament, with the participation of the Commission (the so-called trilogues), started on 7 November 2013 and were carried out under the political pressure of reaching the agreement as soon as possible. Compared to the negotiations of the 2002 CFP reform, 28 Member States, (instead of 15), were around the table, including some land-locked countries whose interests significantly diverged from those of the coastal States. Additionally, the process was also influenced by the traditional antagonism between groups representing different interests, such as the so-called 'friends of fishermen' and the 'friends of fish'. For a fuller account of the negotiation topics of a particular relevance and complexity see E. PENAS LADO, *The Common Fisheries Policy: the quest of sustainability*, Brussels, 2016, p. 326 – 339.

[356] E. PENAS LADO, op. cit. p. 325.

approved in 2010 by the European Commission, which is expected to permeate all policy areas, including the fisheries policy.

In order to understand the concrete functioning and the operational aspects of the EMFF and assess how it accompanies the EU fisheries industry towards a better sustainable management, it is necessary, firstly, to analyse this Fund as a part of the common legislative and financial framework established by the European Union for the all 'European Structural and Investment Funds' for the period 2014-2020, in consistency with the 'Cohesion Policy' (also called Regional Policy) of the European Union, which is now inherently connected to the common fisheries policy through the 'Europe 2020 Strategy' (Section 2). Particular attention will be given, in this context, to the new mechanisms based on conditionality of aid to foster effective implementation by both Member States and fisheries operators (Section 3). The main changes introduced in the EMFF will be analysed subsequently and compared to the previous financial instrument of the CFP (i.e. the European Fisheries Fund) in order to assess to what extent the CFP reform is reflected in its financial instrument and taking into account, in particular, the opportunities and challenges arising for EU fisheries enterprises (Section 4).

Finally, some main aspects which are expected to deeply influence the development of the common fisheries policy in the programming period 2014-2020 will be taken into account: the shift of the common fisheries policy from a subsidies-based approach to EU-fleets to a reorientation of financial support towards new and wider political objectives and wider range of funds recipients (Section 4); the more strategic spending of the EU financial resources by using financial and political tools that enable coordination and synergies among several European structural and investment funds, such as the Community-led local development strategies, which involves a plurality of economic actors (Section 5).

IV. 2. The stronger alignment with the Europe 2020 strategy: new mechanisms to implement the Common Fisheries Policy in consistency with the Cohesion Policy of the European Union

The European Maritime and Fisheries Fund must be regarded as a part of the legislative package governing the reformed Cohesion Policy of the European Union for the period 2014-2020. The 'Cohesion Policy' (which is also called 'Regional policy'), is an investment policy which provides the necessary financial support to Member States to pursue the objectives of economic growth, social development, environmental sustainability and territorial cohesion that are set out

periodically[357] at Union level[358]. The legal basis is provided by Articles174-178 of the Treaty on the Functioning of the European Union (TFEU). The primary goal is to 'reduce disparities between the levels of development of the various regions and the backwardness of the least favoured regions' (Article 174 (2) TFEU) which reflects the preamble of the 1957 Treaty of Rome[359]and, therefore, one of the most ancient aims of the European integration process. 'Least favoured regions' are, in particular 'rural areas, areas affected by industrial transition' and 'regions which suffer from severe and permanent natural or demographic handicaps such as the northernmost regions with very low population density and island, crossborder and mountain regions.' (Article 174 (3) TFEU).

Compared to the initial setting, the TFEU has added a further field of action that significantly enlarges the scope of the EU regional policy: the territorial cohesion (Article 174 (1) TFEU). According to the *Green Paper on Territorial Cohesion of the European Commission*, territorial cohesion means to make the best use of all territory's strengths through an integrated

[357]At present, the cohesion policy is revised every seven years, a timing which is established taking into account the length of the programming period (i.e. the period over which the Member States shall implement their respective operational programmes in order to allocate budgetary resources). Although of the fact that the origin and core principles of the Cohesion Policy date back to the 1957 Treaty of Rome on the European Economic Community (EEC), it happened only in 1988 that the financial instruments existing at Community level were integrated in a common regulation (Regulation **No 2052/88, of 24 June 1988, on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments)**. This decision was taken in response to some significant events, such as the accession of Greece (1981), Spain and Portugal (1986) to the Community and the adoption of the single market programme within the 1986 Single European Act, which pushed towards the establishment of a common economic and social cohesion policy. For a comprehensive analysis of the historical evolution of the EU Cohesion Policy see, among others, I. BACHE, *The politics of the European Union Regional policy: Multi-Level Governance Or Flexible Gatekeeping?,* Sheffield, 1998; R. LEONARDI, *Cohesion policy in the European Union : the building of Europe*, Brussels, 2005; A. SCAVO, *La politica di coesionedell'Unioneeuropea: tendenze a unari-nazionalizzazioneneinegoziati per il 2007-2013*, in Jean Monnet Working Papers in Comparative and International Politics, No. 60, available at: http://aei.pitt.edu/11073/1/jmwp60.pdf. See also the document of the DG 'Regional Policy' of the European Commission, *TheEU's Cohesion Policy 1988-2008: Investing in Europe's Future*, in Panorama Magazine, No 26, June 2008.

[358] See the document of the European Commission, *An introduction to the EU Cohesion Policy 2014-2020*, June 2014, available at:
http://ec.europa.eu/regional_policy/sources/docgener/informat/basic/basic_2014_en.pdf

[359] Although the Treaty of Rome did not contain a specific commitment to create a comprehensive Community regional policy, several references were made in the Treaty to the regional dimension of the Community policies. The preamble, in particular, pointed out the need to 'strengthen the unity of [the Member States] economies and to ensure their harmonious development by reducing the differences existing between the various regions and by mitigating the backwardness of the less favoured'. In addition, Article 2 enumerates among the key objectives of the Community the promotion of 'an harmonious development of economic activities, a continuous and balanced expansion, an increased stability, an accelerated raising of the standard of living and closer relations between its Member States'.

approach based on trans-boundary cooperation, in order to promote a more balanced and sustainable economic and social development of the EU regions[360].

Within the previous programming period (2007-2013), the overall EU spending on regional policy (347 billion, more than one third of the total EU budget) was conveyed through three main financial tools: the *European Regional Development Fund* (ERDF), the *European Social Fund* (ESF) and the *Cohesion Fund*, the three together also called 'Structural Funds'. Financial support to the EU regions under these funds was delivered on the basis of three main priority objectives: Convergence, Regional Competitiveness and Employment &European Territorial Cooperation. It is worth noting in this respect that the 'Convergence objective', aimed at stimulating economic growth and employment in the less developed regions, accounted for 81,5% of the total cohesion policy budget[361]. Around 16% was reserved to the 'Regional Competitiveness and Employment objective'[362], addressing all the regions not eligible for the Convergence objective, while the remaining 2,5% was allocated within the 'European Territorial Cooperation objective'[363], regarded as a complement to the other two and mainly used to facilitate closer cooperation between border regions[364].

In this context, fisheries and maritime policies, alongside with agriculture, had their own legal base in the European Fisheries Fund (EFF) and the European Agricultural Fund for Rural Development (EAFRD) respectively, as they where not formally included in the wider cohesion policy. However, financial assistance under the cohesion policy could cover, where appropriate 'actions relating the diversification of rural economies and areas dependent on fisheries' (Article 27 (4) (b) of Regulation (EC) No. 1083/2006, laying down common provisions on the ERDF, the ESF and the Cohesion Fund). Accordingly, the European Fisheries Fund (EFF) provided that 'the Commission and the Member States shall ensure coordination between assistance from the EFF and the European Agricultural Fund for Rural Development (EAFRD) [..] the European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund and of other

[360] See the communication of the European Commission to the Council, the Parliament, the Committee of the Regions and the European Economic and Social Committee, of 6 October 2008, *Green Paper on territorial cohesion: Turning territorial diversity into strengths*, COM (2008) 616 final. For an analysis of the Cohesion Policy approach to sustainable development, especially in its environmental dimension see M.ARGÜELLES, C. BENAVIDES, *Analysing How Environmental Concerns are Integrated in the Design of EU Structural Funds Programmes,* in European Planning Studies, Vol. 22, No 3, 2014, p. 587 – 609.

[361] The Convergence objective could be supported by the European Regional Development Fund (ERDF), the European Social Fund (ESF) as well as by the Cohesion Fund.
[362]This objective was supported through the ERDF and the ESF but not through the Cohesion Fund.
[363] This objective was supported solely by the ERDF.
[364] For a full account on the structure, principles and functioning of the EU Cohesion Policy during the 2007-2013 programming period see the guide of the European Commission, *Cohesion Policy 2007-2013: Commentaries and official texts*, January 2007.

Community financial instruments' (Article 6 (4) of the Regulation (EC) No 1198/2006 on the European Fisheries Fund).Most importantly, Article 12 of the EFF Regulation, entitled 'Resources and concentration' provided for the allocation of budgetary resources shall be 'such as to achieve a significant concentration on the regions eligible under the Convergence objective'. Finally, Territorial Cooperation, the third dimension of the 2007-2003 Cohesion Policy, expressly embraced urban, rural and also 'coastal development'. Several regions eligible for financial support under this objective included in fact maritime areas such as the Baltic Sea, the North Sea, the Atlantic Coast and the Mediterranean Sea. Despite the relevance of the demarcation between Convergence and Non-Convergence objectives, the EFF was, however, a body of legislation formally disjuncted from the other EU funds.

Conversely, in the current programming period 2014-2020, the Maritime and Fisheries Policies are regulated by a unique 'Common Provisions Regulation' (hereinafter CPR)[365] covering the European Maritime and Fisheries Fund (EMFF), the European Regional Development Fund (ERDF), the European Social Fund (ESF), the Cohesion Fund and the European Agricultural Fund for Rural Development (EAFRD)[366].

The purpose of this common legislative framework governing the five funds (which are now called, including the European Maritime and Fisheries Fund, Structural and Investment Funds – ESI Funds), is to establish a clear link with the 'Europe 2020 strategy for generating smart, sustainable and inclusive growth in the EU'[367]. The Europe 2020 strategy sets out precise objectives and corresponding targets that the European Union should achieve by 2020 in relation to three main socio-economic goals: Sustainable Growth (i.e. promoting a more resource efficient, greener and more competitive economy), Smart growth (i.e. developing an economy based on knowledge and innovation), Inclusive Growth (i.e. fostering a high employment economy which delivers on social and territorial cohesion)[368]. All Union policies (including those covered by ESI Funds, among

[365]Regulation (EU) No 1303/2013 of the European Parliament and the Council, of 17 December 2013, laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006.

[366] For an extended treatment of this topic see M. BAUN, D. MAREK, *Cohesion Policy in the European Union*, London 2014; M. CAPPELLO, *Guida ai fondi strutturali europei, Santarcangelo di Romangna*, 2014.

[367] See the Communication of the Commission to the Council, the European Parliament and the Committee of the Regions, of 3 March 2010, *Europe 2020: A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020 final.

[368]See the document of the European Commission, *European Structural and Investment Funds 2014-2020: Official texts and commentaries*, November 2015, p. 16.

which the Common Fisheries Policy and the Integrated Maritime Policy), are expected to contribute to these targets.

The Common Provision Regulation, therefore, translates the Europe 2020 strategy's goals into a set of 11 Thematic Objectives (TOs), identifying the fields of action where each ESIF Fund could support the 2020 strategy in its specific area[369].The Thematic Objectives (TOs) are then translated into 'priorities' which are set out in the Fund-specific rules.As for the European Maritime and Fisheries Fund (EMFF), six Union priorities (UPs) have been established, namely: UP1) Promoting environmentally sustainable, resource efficient, innovative, competitive and knowledge-based fisheries; UP2) Fostering environmentally sustainable, resource efficient, innovative, competitive and knowledge-based aquaculture; UP3) Fostering the implementation of the Common Fisheries Policy (CFP); UP4) Increasing employment and territorial cohesion; UP5) Fostering marketing and processing; UP6) Fostering the implementation of the Integrated Maritime Policy (IMP).

The implementation by the Member States of this common legislative framework requires, as a first step, the drafting of a Partnership Agreement (PA) covering all five Funds, the content of which is to be negotiated with and approved by the European Commission. For this purpose, the Common Provisions Regulation is complemented by a 'Common Strategic Framework' which outlines the strategic orientations that the Member States have to follow in developing their national strategies for the ESI Funds. More specifically, the Framework indicates both the horizontal policy principles and the practical operational tools through which coordination and synergies between different funds can be achieved at national level. Compared to the 2007-2013 programming period, a greater focus is put on the identification of territorial challenges at the national, regional and local stage, on the creation of macro-regional and sea-basin strategies and on a more effective involvement of local partners in policy making[370].

In drafting the Partnership Agreement, the Member States are expected to take into account both the 'Common Strategic Framework' for the ESI Funds and the 'National Reform Programmes' established for the implementation of the Europe 2020 strategy, and especially the 'Country specific recommendations'[371]. The most significant change is that while in the 2007-2013 programming

[369] Article 9 of Regulation 1303/2013.
[370] See the Annex I to Regulation (EU) No. 1303/2013.
[371]**'National Reform Programmes' are documents drafted annually by each Member State, presenting the policies and measures set-out at the national level to achieve the** Europe 2020 objectives. Each country's budgetary plan is laid down in a 'Stability/Converge Programme' that is presented together with the 'National Reform Programme'. Every year, the Commission publishes an analysis and evaluation of the economic and social policies undertaken by each Member State, the so-called 'Country report', followed by country-specific recommendations for the next 12 to 18 months. All the documents related to the implementation of the EU 2020 Strategy, i.e. the National Reform Programmes, the Convergence

period there was a unique National Strategic Reference Framework (NSRF) for the three Cohesion Funds and two separated National Strategy Plans (NSP) respectively for the European *Agricultural Fund for Rural Development* (*EAFRD*) and the European Fisheries Fund (EFF), the single Partnership Agreement now embraces all five funds. Furthermore, as mentioned above, the entire Partnership Agreement, including any amendments or modifications, needs to be formally approved by the European Commission, whereas previously only some parts of the National Strategic Reference Framework (NSRF) and of the National Strategy Plans (NSP), including those related to fisheries, were submitted to the Commission for approval[372]. The fisheries and maritime policies, therefore, are now managed under a more comprehensive policy framework which includes all the EU structural policies and it is endorsed by the Commission in all its aspects.

As for the content of the Partnership Agreements, each Member State indicates which are the thematic objectives of the Common Provision Regulation selected for the planned use of the ESI Funds, and the main results expected for each of these objectives in each of the European Structural and Investment Funds, as well as the indicative financial allocations.

Taking the Partnership Agreement of Italy as an example, the fisheries and maritime sector is supported under the following selected thematic objectives: OT3) enhancing the competitiveness of SMEs, of the agricultural sector (for the EAFRD) and of the fishery and aquaculture sectors (for the EMFF); TO4) supporting the shift towards a low-carbon economy in all sectors; TO6) preserving and protecting the environment and promoting resource efficiency; TO8) promoting sustainable and quality employment and supporting labour mobility.[373]

The Partnership Agreement represents a general starting point which then needs to be translated into operational programmes covering the different policies at national and at regional level (in the case of fisheries and maritime affairs there is a unique national operational programme). In practical terms, the operational programmes are drawn-up in line with the Regulation specific to each Fund (which addresses a specific policy area and defines in details the general rules of the Common Provision Regulation in its specific field) but taking into account the global strategic framework arising from the Partnership Agreement, whose investment objectives are, in this way, turned into concrete lines of action.

Programmes, the Country Reports and the recommendations of the European Commission, are available on the Commission's website: http://ec.europa.eu/europe2020/making-it-happen/country-specific-recommendations/index_en.htm

[372] See the document of the European Commission, *European Structural and Investment Funds 2014-2020: Official texts and commentaries*, cit. p. 21.

[373] See 'Paragraph 1A' of the Partnership Agreement for Italy 2014-2020, published on the website of the Italian Agency for Territorial Cohesion at the link: http://www.agenziacoesione.gov.it/it/AccordoPartenariato/

With regard to the European Maritime and Fisheries Fund (EMFF) the regulation concerned is the Regulation (EU) No. 508/2014, of 15 May 2014[374]. A significant change in comparison with the 2007-2013 programming period is that the operational programme for the Fisheries and Maritime Fund is now laid down by each Member State following a common template established by the European Commission[375]. Each EMFF operational programme contains therefore a range of elements established under Article 17 of the EMFF and detailed in the template, such as a description of the procedures put in place by the Member State in order to ensure the involvement of partners (economic, social partners and civil society) in the preparation of the programme; a set of legal, policy and institutional requirements (ex ante conditionalities); an analysis of the situation of the fisheries and maritime sector in terms of the strengths, weaknesses, opportunities and threats (SWOT analysis); the setting-out of a strategy for the sector in consistency with the Partnership Agreement and the Europe 2020 objectives, including complementarily and arrangements with the other ESI funds; a set of contexts, result and financial indicators; the implementation of local development strategies as recommended in the Common Provision Regulation; the planned allocation of EMFF financial resources and of the national co-financing rates; a description of the monitoring and enforcement system and of data management.

After the formal approval by the European Commission[376], each operational programme is implemented by the competent national authorities, which are in charge of selecting the projects to be supported under the EMFF. The process of implementation is accompanied by an 'EMFF Committee' and by an 'EMFF Expert Group' **composed by representatives of the Member States and set up** within the European Commission in accordance with Articles 290 and 291 of the Treaty on the functioning of the European Union and Regulation (EU) No. 182/2011 (the so-called Comitology Regulation).

The **EMFF Expert Group, in particular,** provides advice and expertise on the preparation of delegated acts, i.e. acts that the Commission is empowered to adopt to 'supplement or amend certain non-essential elements of a legislative act' (Article 290 TFEU). The EMFF Committee, instead, delivers its opinion on implementing acts, i.e. the acts whose adoption is conferred to the Commission 'where uniform conditions for implementing legally binding Union acts are needed' (Article 291 TFEU). Therefore, several provisions of both the Common Provision Regulation and

[374] For an analysis of the structure and of the main substantial changes introduced by this Regulation compared to the previous programming period see Paragraph IV. 3 below in this Chapter.

[375] See **Commission Implementing Regulation (EU) No 771/2014, of 14 July 2014, laying down rules pursuant to Regulation (EU) No 508/2014 of the European Parliament and of the Council on the European Maritime and Fisheries Fund, with regard to the model for operational programmes, and its corrigendum.**

[376] The list of operational programmes adopted by the Commission for the period 2014-2020 is available on the DG MARE website: https://ec.europa.eu/fisheries/cfp/emff/country-files_en

of the EMFF Regulation are defined in detail by means of delegated acts and implementing acts in order to allow their full implementation by the Member States[377].

At national level, the process involves, from an institutional point of view, a 'Managing Authority' responsible for the overall process and results, a Certification Authority in charge of verifying the state of expenditure of the payment applications, and an Audit Authority in charge of assessing the proper functioning of the management, control and monitoring procedures.

IV. 3. Conditionality of aid as a tool to promote compliance with CFP obligations

The European Maritime and Fisheries Fund (EMFF) covers both the maritime and the fisheries policies of the European Union. Despite its lower economic importance compared to the other EU structural policies, the EMFF is the last among the EU structural funds to have been adopted, after complex negotiations. Fisheries and maritime issues, in fact, beyond the economic value of the sectors affected, involve a number of politically sensitive matters and decisions. In recent years, sea and ocean resources management have acquired, in fact, a growing importance in the eyes of the public opinion[378]. For a large part of the population not directly engaged in maritime-related sectors, any restriction of human activities, including fisheries, in order to protect oceans habitats and marine environment, would be much welcomed and it is even more fervently wished[379]. This is difficult to accommodate, however, with the parallel need to not leave unexplored

[377] For an extended analysis of the reform of comitology and of the system of delegated and implementing acts introduced in the Lisbon Treaty see, among others, D. GUEGUEN, V. MARISSEN, *Handbook on EU Secondary Legislation: navigating through delegated and implementing acts: comitology after Lisbonne*, Brussels, 2013; P. CRAIG, *Delegated acts, implementing acts and the new comitology regulation*, in European Law Review, Vol. 36, No 5, 2011, p. 671- 687; A. HARDACRE, M. KAEDING, *Delegated and implementing acts :* the new worlds of comitology - *implications for European and national public administrations*, in EIPAscope (2011) n. 1, p. 29-32; T. CHRISTIANSEN, M. DOBBELS, *Non-Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts*, in European Law Journal, 2013, Vol.19(1), pp.42-56.

[378] On the emergence of a 'conciencia ecológica en la opinion pública mundial' within International Environmental Law see R. CASADO RAIGÓN, that stresses how, as a reaction to overexploitation of natural resources in the 1960s, this has been 'el motor que impulsaría a los gobernantes de todo el planeta a la adopción de medidas, especialmente en el ámbito internacional, para la protección de un medio ambiente amenazado y esencial para la vida sobre la Tierra', see R. CASADO RAIGÓN*, Derecho Internacional*, Madrid, 2014, p. 364.

[379]As pointed out by E. LÓPEZ VEIGA, fisheries policy is characterized by 'un tinte excesivamente ecologista quenose da en otras áreas de la economía, al menos en la misma medida en que se da en la pesca [..] donde la influnecia excesiva de la filosofias ecologistas ha hecho más daño ha sido en el aspect exterior de la PPC. Resulta incredible comprobar cómo aspectos tan relatives como el de velar por la seguridad

and unexploited maritime resources that could make a valuable contribution to economic development. As a consequence, the common fisheries policy is a 'contentious policy' by its very nature, involving a wide range of conflicting interests.

In addition, since the CFP is an exclusive competence of the European Union and the Member States cannot directly legislate in this field, the CFP revision and re-negotiation in Brussels is traditionally perceived as a sort of 'test bench' for the European integration process[380]. Last, but not least, another aspect which increases the political sensitiveness of the CFP is that, as the historical analysis of this policy has shown[381], the CFP has preserved over the time and successive reforms a certain number of constant features. This makes the CFP a policy particularly resilient to change, in a European Union that since its beginning as a European Economic Community of 6 Member States has undergone major changes. As a consequence, a typical situation that can be observed whenever the CFP pillars – and especially its budgetary and financial pillar – are re-negotiated, is that the policy is constantly criticised by both by the institutional side – at the national and at the European level – and by stakeholders, but in the end, the need to preserve the *status quo* tends to prevail, at least in relation to some crucial and well consolidated aspects.

As far as the 2014-2020 European Maritime and Fisheries Fund is concerned, the tension between different visions on the future of the CFP resulted in a wide range of instruments and measures at the service of the Member States and, most of all, of the fisheries industries to whom they are transmitted, which will be here summed up and analysed.

As for the structure, the EMFF is articulated around 6 main priorities[382]:

1) Promoting sustainable, resource efficient, innovative, competitive and knowledge based fisheries.

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alimentaria y la condena encubierta a las iniciativas privadas se han hecho hueco en esta política, de una maniera en que no lograría abrirse paso en pas políticas, por ejemplo, energéticas', See E. LÓPEZ VEIGA, *La reforma de la política pescquera de la Unión Europea y la cinta de Moebius*, in Noticias de la Unión Europea, Política Común de Pesca, Año XXVIII, Marzo 2012.

[380] E. PENAS LADO, op. cit. p. 7.

[381] See Chapter I.

[382] The allocation of the total amount among the several priorities was one of the most controversial issues in the negotiation leading to the adoption of the EMFF. The European Parliament, strongly supported the idea that high budget should be assigned to control, data collection and scientific advice. In this respect, the Council argued however that during the 2007-2013 programming period these measures had registered a low level of financial absorption by the Member States. In the end, a compromise was reached by increasing the overall EU budget dedicated to control and data collection (to 580 million and to 520 million respectively) and increasing, at the same time, the co-financing rates, in order to stimulate the use of funds by the Member States. It is worth mentioning, furthermore, that around 75% of the total EMFF budget for shared management (i.e. for expenditure of Member States under their national operational programmes) has been allocated to sustainable development of fisheries and aquaculture (Priorities 1) and 2)). As for direct management of funds by the Commission, the large amount of resources has been devolved to measures for the implementation of the Integrated Maritime Policy (Priority 6).

2) Fostering sustainable, resource efficient, innovative, competitive and knowledge based aquaculture.
3) Fostering the implementation of the CFP.
4) Increasing employment and territorial cohesion.
5) Fostering marketing and processing.
6) Fostering the implementation of the Integrated Maritime Policy.

The EMFF objective under priority 1) is to promote an environmentally sustainable, resource efficient, competitive fisheries which should be more selective, produce less discards and less damage to the marine environment while improving, at the same time, better safety and working conditions for fishermen. Similarly, under Priority 2), the EMFF supports the development of an environmentally sustainable, resource efficient and competitive enterprises in aquaculture, with a focus on environment protection, added value of products and consumers health. Under Priority 3) of the EMFF, the implementation of the reformed CFP relays, on the one hand, on collection and management of data to improve scientific knowledge and, on the other, on monitoring, control and enforcement of operators compliance with fisheries legislation. In the framework of Priority 4), the EMFF can support economic growth and social inclusion in coastal and inland communities dependent on fishing, especially through the development of Community-led local development strategies (CLLD), involving several local actors and enterprises. This strand of the Common Fisheries Policy shall be understood in conjunction with the broader reform of the Cohesion Policy of the European Union, the purpose of which, as mentioned before, is to promote economic growth and sustainable development across the all the regions of the EU. Union Priority 5) can include support to producer organisations in both fisheries and aquaculture, as well as to the processing and marketing of fisheries and aquaculture products. Finally the EMFF, differently from the European Fisheries Fund (EFF) that was in place in the 2007-2013 programming period, can provide financial support not only to the fisheries industry but, more broadly, to the objectives of the Integrated Maritime Policy (IMP)[383]. The EMFF, in particular, can support projects involving different maritime sectors (transports, ports, trade, environment, fisheries, aquaculture, energy, tourism) in order to create synergies and coordination among several maritime activities and promote a more holistic and integrated governance, involving all the EU policies connected with the sea.

[383]For a fuller account see paragraph 6 in this Chapter.

The total EU allocation for the EMFF is 5.75 billion EUR [384], compared to the 4.33 billion EUR of the 2007-2013 European Fisheries Fund (EFF). Each Member State, with the exception of Luxembourg that is not a recipient of the EMFF, is allocated a share of the total EMFF budget, depending on the size of its fishing industry[385]. Besides the EU contribution, the policy is co-financed along with national funding. For the programming cycle 2014-2020, the biggest amount of funds has been allocated to Spain (1.16 billion EUR), followed by France (588 million EUR), Italy (537.3 million EUR) and Poland (531.2 million EUR). As mentioned before[386], a national 'operational programme' for the EMFF is drawn up by each Member State in accordance with Articles 17 and 18 of the EMFF Regulation, setting up the national priorities to which public funds shall be directed. The operational programmes are then submitted to the European Commission for evaluation and formal approval.

As a whole, several new elements have been introduced in the 2014-2020 programming period in order to adapt the financial framework to the substantial policy changes brought by the 2013 reform of the Common Fisheries Policy. It is worth to mention, in this respect, that the parallel negotiation of the CFP and of the CMO Basic Regulations with the EMFF Regulation has been an unprecedented opportunity in the history of the CFP to align the financial and the substantial aspects of the policy[387].

Firstly, the EMFF introduces for the first time in the CFP the principle that the EU financial aid should be conditional upon compliance with the EU rules, and that applies both to the Public Authorities of the Member States concerned and to the operators of the sector. In this perspective, each Member State is expected to satisfy a number of specific *ex ante conditionalities* in order to be eligible for financing (and therefore before the approval of the operational programme by the Commission). More specifically, *ex ante conditionalities*, which are set-out in Annex IV of the EMFF Regulation, are described as follows: a) A report on fishing capacity drafted in accordance with the Commission guidelines has been submitted by the Member State to the Commission as provided for in Article 22(2) of Regulation (EU) No 1380/2013, and the report shows that the national fleet does not exceed the capacity ceilings established in Annex II of Regulation 1380/2013

[384] This amount refers to budgetary resources under shared management, i.e. the funds that the Member States spent through their operational programmes. In addition to that, 647 million EUR are allocated to a number of measures that, due to their horizontal nature, are directly managed by the European Commission. These measures include scientific advice and control to foster cooperation among the Member States at the regional and at the sea-basin level (€ 123 millions), as well as funding of Advisory Councils, voluntary contributions to international organisations and Integrated Maritime Policy.

[385] This approach is a new element of the EMFF, as far as for the 2007-2013 programming period the allocation of funds among the Member States was made on the basis of the 'Convergence Objective'.

[386] See paragraph 2 in this Chapter.

[387] E. PENAS LADO, *op. cit.* p. 325.

; b) a multiannual national strategic plan on aquaculture has been adopted by the Member State, in consistency with its national operational programme; c) the Member State can ensure the administrative capacity necessary to comply with data requirements for fisheries management and with the implementation of a Union control, inspection and enforcement system, as set out in Regulation 1380/2013 (Articles 25 and 36). These *ex ante conditionalities* are specific to the EMFF, but they have been established in consistency with Article 19 of the Common Provisions Regulation, which makes the financial support to Member States conditional upon Fund-specific rules but also upon '*general ex ante conditionalities'*, set out in Part II of Annex XI of the CPR, that apply uniformly to all EU structural and investment funds. General ex ante conditionalities include the existence of administrative capacity of the Member State for the application and implementation of law and policies related to anti-discrimination, gender equality, right of persons with disabilities, public procurement law, aid rules, respect EU environmental legislation, effective system for control monitoring and assessment of results.

During the EMFF negotiations, it was pointed out that the mechanism of ex *ante conditionalities* could be harmful to those Member States that at the moment of the adoption of their operational programme cannot ensure the level of administrative capacity required, because of the financial crisis. In this view, it was pointed out that the suspension of access to EU funds to when the country is facing economic and financial distress would merely aggravate the situation. It can be argued, however, that the *ex ante conditionalities* should not be regarded as a restriction of funds, but as an incentive for the Member States to undertake those reforms which are necessary to overcome their traditional weaknesses in the implementation of the EU policies.[388] To this effect, in the event that the applicable *ex ante conditionalities* are not fulfilled by a Member State at the date of the submission of its Partnership Agreement or operational program, an Action Plan is to be transmitted to the Commission and implemented by the Member State by the end of 2016, and additional resources are provided for this purpose (Article 19 of the CPR).

In addition, under the EMFF, conditionality of financial support is linked not only to deliverance of funds, but also to their management throughout the entire programming exercise. This *'ex post conditionality'* concerns the compliance with the rules of the CFP by both economic operators (enterprises) and the Member States.

Firstly, according to Article 10 of the EMFF Regulation, once that the national operational programme has been approved by the European Commission and that funds have been delivered to the Member State, the applications submitted by single operators in order to receive funding for

[388]For a full account on this position see E. PENAS LADO, *op. cit*. p. 335.

their projects under the EMFF shall be considered as 'inadmissible'[389] where a competent authority had found that the operator concerned has committed a serious infringement of the CFP rules or has been involved in the operation, management or ownership of fishing vessels included in the Union list of vessels responsible for Illegal, Unreported and Unregulated (IUU) fishing, or of vessels flagged to countries identified as non-cooperating third countries[390]. In order to implement this provision, specific obligations are imposed upon operators and Member States. Firstly, each operator submitting an application under the EMFF must provide the competent National Authority with a declaration confirming the respect of the admissibility criteria outlined in Article 10. The declaration is verified by the Authority on the basis of the information available in the National Register of Infringements (Article 93 of Regulation (EC) No 1224/2009) or other relevant data available at national level. A duty of cooperation among Member States is also provided for, as Member States are expected to share information contained in their respective national registers of infringements when requested by other Member States in order to identify cases of non-compliance.

As for policy performance by the Member States, the EMFF sets out three other mechanisms to implement the principle of conditionality also after the approval of the national operational programmes: interruption of payment deadline (Article 100), suspension of payments (Article 101) and financial corrections (Article 105).

More specifically, the interruption of a payment deadline is a temporary measure adopted by the European Commission, consisting in the postponement of payments for a maximum period of 6 months. During that period, the Member State is expected to comply with the obligations under the CFP whose violation has led to the interruption of payments. In case of a 'serious non-compliance of the Member State with obligations under the CFP', furthermore, the Commission is allowed to suspend payments (Article 101) or completely remove a part or the entire financial contribution (Article 105).

It is worth to highlight, in this respect, that the EMFF provisions do not specify which cases of non-compliance are covered by interruption, suspension or financial corrections. The use of the word 'may' in Articles 100 and 101 gives the European Commission the discretionary power to establish when a CFP rules violation would result in an interruption or a suspension, while the use of 'shall' in Article 105, made particularly urgent to define which are the cases in which the Commission is expected to apply financial corrections.

[389]The inadmissibily last for a period of time and shall be evaluated taking into account criteria to establish the duration of the period of inammissibility are set out in Commission delegated regulation (EU) 2015/2252.

[390] For a fuller analysis of the EU legislation and enforcement system related to IUU fishing see Chapter V, dedicated to the external dimension of the Common Fisheries Policy.

Such gap in the legislation has been partially filled by means of delegated acts. In particular, Regulation 2015/852 contains a list of cases of non-compliance which can trigger interruption of payments, which have been grouped around 6 main categories: 1) Failure to contribute to the objectives of the Common Fisheries Policy that are essential to the conservation of marine biological resources; 2) Failure to meet international obligation on conservation; 3) Failure to ensure that the fleet is in balance with natural resources; 4) Failure to implement the Community framework for the collection, management and use of data; 5) Failure to operate an effective control and enforcement system; 6) Failure to establish and operate a functioning system of effective, proportionate and dissuasive penalties.

The Regulation clarifies, furthermore, that cases of 'serious non-compliance', that can result in the suspension of payments occur when, after the interruption under Article 100 of the EMFF ' the Member State has failed to take the necessary action to remedy the situation within the period of interruption of the payment deadline in relation to those cases' (Article 2 of the delegated act).

The list of the cases of non-compliance contained in Regulation (EU) No. 2015/852 concerns also financial corrections, insofar as Article 105 (2) (b) of the EMFF provides that financial aid can be partially or totally withdrawn by the Commission when suspension of payments under Article 101 (for serious non-compliance cases) has been applied, and the Member State concerned 'still fails to demonstrate that it has taken the necessary remedial action to ensure compliance with and the enforcement of applicable rules in the future'. Financial corrections are also applicable, in addition, when the expenditures certified by a Member State and transmitted to the European Commission are affected by cases in which the beneficiary does not respect the obligations referred to in Article 10 (2) of the EMFF Regulation, and the infringement has not been corrected at national level.

The regulatory framework has been completed by Commission delegated Regulation (EU) No. 2015/1930, that clarifies the criteria for the establishment of the level of financial corrections, taking into account several elements, such as the significance of the potential prejudice to the marine biological resources resulting from the non-compliance with the CFP rules, the frequency and the duration of the non-compliance with the CFP rules as well as the eventual remedial actions undertaken by the Member State.

As a whole, it can be argued that the principle of the conditionality of financial aid introduced by EMFF is an important tool that could provide, compared to the past, stronger incentives to compliance with the CFP rules by both individual operators and national authorities. However, despite the efforts made to better specify the conditions under which interruption, suspension and financial corrections are applied by the European Commission, there are several

aspects which are still vague in the EMFF regulatory framework and that have not been fully handled in the delegated acts recently adopted.

The concept of an 'operator' submitting application for financial support under Article 10 of the EMFF, for instance, refers in broad and general terms to the natural or legal person that 'owns or controls' a fishing vessels, without specifying what 'control' exactly means. It is also unclear whether the 'operator' responsible for infringements of the CFP rules under Article 10 of the EMFF shall be the owner of the vessels or can also be an employee operating onboard. In this regard, Article 6 (3) of Delegated Regulation 2015/288 specifies that serious infringements committed by an operator cannot relate to any of the fishing vessels owned or controlled by that operator. In this case, all applications for EMFF support by that operator shall be inadmissible. This provision does not necessarily fit, however, with national systems of fishing licenses schemes, and specific cases studies are not provided. Another element which cannot be found in the Regulation is the identification of the formal act by which the infringement procedure is triggered (should it be the Coast Guard report or the administrative decision of the competent Authority?).

IV. 4. The European Maritime and Fisheries Fund: an innovative financial instrument to accompany new policy objectives and opportunities for EU fisheries enterprises

As far as the political priorities of the EMFF are concerned, it can be argued that the most significant changes compared to the 2007-2013 programming period have been introduced in the EMFF in consistency with the general political objectives of the reform of the common fisheries policy.

A thorough analysis of the EMFF Regulation shows actually that projects and operations eligible for financing can be grouped, on an indicative basis, in three main thematic areas: 1) the environmental aspects (which include financial aid to fisheries enterprises to reduce pressure on stocks, enhance protection of biodiversity, energy efficiency and climate change mitigation), 2) the development of sustainable enterprises in aquaculture; 3) the direct support to operators (which include the socio-economic aspects as well as support to the processing and marketing industries).

More specifically, it is obvious that the most important financial commitment of the EMFF for the 2014-2020 programming period is to accompany fishermen in the transition towards a more sustainable exploitation of marine living resources[391]. In this perspective, the EMFF is expected to

[391] For a full analysis on the growing importance of the protection of the marine resources in the evolution of the international environmental law see A. DEL VECCHIO, *Il principio dello sviluppo sostenibile nello*

support a wide range of projects based on investments in vessels equipments, fishing gears and methods that, without increasing the overall fishing capacity of the EU fleets, can improve selectivity of catches, eliminate discards, avoid and reduce unwanted catches of commercial stocks, limit and, where possible, eliminate the physical and biological impacts of fishing on the ecosystem (Article 38 of the EMFF).

The EMFF also provides for innovation projects carried out by scientific and research bodies, which consist in testing of new fishing techniques and organisational tools with a lower impact on the environment, or operations to restore marine biodiversity, also through direct involvement of fishermen. It should be stressed, in this regard, that the EMFF can sustain advisory services and studies of immediate interest for the industry provided by scientific, academic, professional or technical bodies (Article 27) and that partnership agreements or associations between scientific bodies and organisations of fishermen is also supported (Article 28)[392].

Another important tool to contribute to the achievement of the CFP reform objectives, is the funding of activities, both on board and on land, aimed at opening market possibilities for unwanted catches, that are landed under the new landing obligation but that would have been otherwise discarded, due to their modest economic value.

As for climate change, although it is not expressly addressed in the 6 Union Priorities[393], several interventions financed by the EMFF can promote energy efficiency, contributing to climate change mitigation. Among them, it is worth to mention temporary or permanent cessation of fishing activities to adapt catches to available resources and reduce energy consumption (Article 33 and

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sfruttamento delle risoerse biologiche del Mediterraneo, in in AYMARD, MAFFETTONE, BARBERINI, Il Mediterraneo: ancora mare nostrum?, , Roma, 2004, pp. 27-40; R. CASADO RAIGÓN, *Le régime juridique de la protection du milieu marin dans le Droit international actuel*, in G. ANDREONE et al. Droit de la mer et emergences environnementales, Naples, 2012, p. 21 – 35. With regard to international cooperation for the preservation of fisheries resources at both the bilateral and multilateral level and to dispute settlement mechanisms for international litigations in fisheries see A DEL VECCHIO, *La gestion de los recursos marinos y la cooperación internacional, Roma, IILA, 2006. On* the same subject, see also G. CATALDI, *Il principio precauzionale e la protezione dell'ambiente marino*, in A. DEL VECCHIO, A. DAL RI JÚNIOR, Il diritto internazionale dell'ambiente dopo il Vertice di Johannesburg, Napoli, 2005.

[392]As highlighted by R. RIGILLO in this respect ' La diffusione delle conoscenze scientifiche acquisite negli ultimi anni attraverso la divulgazione dei risultati delle ricerche agli operatori della pesca risulta di prioritaria importanza per mettere i pescatori a conoscenza delle motivazioni che sono alla base di molte dinamiche e, conseguentemente, delle scelte adottate nelle varie sedi istituzionali per favorire l'auspicato ammodernamento del settore in vista di una gestione ottimale dell'attività di pesca. A rafforzare questa impostazione si aggiunge la nuova PCP e il suo strumento finanziario FEAMP che incentiva l'attivazione di partenariati tra ricercatori ed operatori della pesca ed acquacoltura, per individuare misure ed interventi gestionali calibrati sulle singole realtà in un quadro di rigorosità scientifica'. See the Preface, *in Sviluppo sostenibile e valorizzazione produttiva delle lagune italiane*, MiPAAF, July 2014.

[393] On the correlation between fisheries and climate issues see C. CARLETTI, *Il regime giurdico della pesca e dell'acqualcoltura alla luce del diritto internazionale del mare e dell'Unione europea,* Napoli, 2016, p. 67 – 68.

34), investments in equipment on board aimed at reducing the emission of pollutants or greenhouse (Article 41), improvements in infrastructures of the existing[394] portsand landing sites (Article 43).

Furthermore, in continuity with the 2007-2013 European Fisheries Fund (EFF), particularly attention is paid in the EMFF to the development of aquaculture. According to the Strategic Guidelines **adopted by the European Commission**[395], aquaculture accounts for 10% of the total supply of the EU seafood market, while 25% derives from the EU fisheries and 65% from imports from third States. Taking into account the increasing gap between the level of consumption of seafood in the EU and the volume of the EU captures from wild fisheries progressively in reduction, aquaculture is considered, in the context of the reform of the common fisheries policy, as a valid alternative to the fishing of marine overexploited species. Besides environmental concerns, the sector offers good opportunities under the economic and social point of view, insofar as it directly employs around 85 000 people and it is mainly composed of small or micro-enterprises located in coastal and rural areas.

Financial aid to aquaculture enterprises under the EMFF can be allocated, in particular, to support new sustainable production methods, products and organisational systems (Article 47); productive investments which could contribute to the general objectives of the reform (such as reduced environmental impacts, protection of biodiversity, energy efficiency, diversification of incomes through development of complementary activities, diversification of farmed species etc); management, relief and advisory services (Article 49); animal health and welfare in aquaculture enterprises (Article 56). With regard to spatial planning and management of aquaculture sites, the aim of the EMFF is to avoid spatial concentration of many aquaculture stations and reduce, at the same time, the negative environmental impacts of aquaculture sites, enhancing investments in land consolidation, energy supply or water management (Article 51).

As it is shown by the wide range of measures outlined above, the main challenge related to aquaculture is to find an appropriate balance between economic development and protection of the environment. In this respect, it is worth to stress that the EMFF can support aquaculture as a provider of environmental services, since this farming activities, if adequately equipped, can facilitate the preservation of ecosystem, biodiversity and landscapes. This occurs, for instance, in

[394] The financial support is limited to improvements of the 'existing' infrastructures since in the past copious funds in this field led to the costruction of new structures that are today underutilized.
[395]See the communication of the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, of 29 April 2013, *Strategic Guidelines for the sustainable development of EU aquaculture*, COM (2013) 229 final, p. 2.

continental Europe, where some aquaculture sites contribute to the preservation of wetlands and create therefore a ideal nesting habitats for birds[396].

Finally, the EMFF provides for a wide range of measures that can be implemented to support socio-economic operators. These include promotion of human capital, job creation and social dialogue through professional training, network and exchange of experiences and best practice (Articles 29), diversification of sources of income of fishermen through the development of complementary activities such angling tourism, restaurants and environmental and educational services related to fishing (Article 30), support to young (under 40) fishermen for the acquisition of their first fishing vessels as well as to the establishment of new aquaculture enterprises (Article 31), investments to improve health, safety and working conditions onboard (Article 32), improvement of the added value and quality of the fish (Article 42), marketing measures (Articles 68) investments in processing activities[397] (Article 69)[398]. **In case of** economic losses caused by adverse climatic events, environmental incidents or accidents at sea during the fishing activities, in addition, fishermen can obtain financial compensation from a 'mutual fund' scheme established at the national level and co-finance by the EMFF, in accordance with Article 35[399].

An important and widely debated topic during the negotiation of the EMFF, furthermore, was the concept of 'small-scales fisheries' and the setting of rules specific to this segment of the fleet. The views of the European Parliament and of the Council on this point differed in many aspects. The idea that small-scale fisheries deserve specific protection, in particular, was advocated

[396]As an exemple in Italy, see the study carried out by the University of Palermo under the supervision of Prof. A. MAZZOLA, Sviluppo di modelli di acquacoltura sostenibile per la valorizzazione conservative delle saline nel trapanese, in Sviluppo sostenibile e valorizzazione produttiva delle lagune italiane, MiPAAF, July 2014.

[397]A provision for financial aid to the fish processing industry was inserted in the EMFF, even though during the trilogies between the Parliament, the Council and the Commission it was pointed out that the processing activities are generally supported by other structural fund, such as the larger Regional Development Fund (ERDF). In order to avoid the risk of cutting off the fisheries processing industry from the general funding of the ERDF, which extends to all the economic sectors, the provision of a specific funding possibility for fish processing in the EMFF was however deemed as necessary. It can be argued, in this respect, that this approach does not appear fully satisfactory, as far as the processing industry offers great opportunities and potentials in relation to some key objectives of the CFP, such as diversification of income, and would therefore deserve more attention. For a fuller account on the economic and social impacts of the processing industries in the framework of the common fisheries policy see Chapter III Paragraph..
Article 69 (2), in particular, makes a distinction between small-scales processing industries, which can receive direct support for the purposes listed in paragraph 1, and larger enterprises, which can be funded by the EMFF only by means of innovative financial instruments (see paragraph 5 in this Chapter).

[398]Parallel measures are provided for aquaculture in Chapter II of the EMFF.

[399]Similarly, the EMFF can contribute to an aquaculture stock insurance system covering economic losses stemming from the unforeseeable events ad accidents listed in Article 57.

by the Parliament, whereas the Council stressed the parallel need to ensure the access to funding also for larger vessels. In the end, three new mechanisms, which clearly endorsed the approach of the Parliament, were agreed. Firstly, Member States having more than 1000 small vessels in their national fleet shall include a specific plan for small-scale fisheries in their operational programme. Secondly, in such States 60% of the funds allocated for engine replacement is to be devoted to small-scale vessels. Thirdly, a higher rate of co-financing is provided for projects involving small-scale fisheries. As for the definition, the traditional criterion (vessel's length of less than 12 m, excluding trawlers) was finally maintained, since no agreement could be reached on alternative definitions.

Finally, as far as social and economic measures are concerned, it is worth noting that beyond financial aid to individual operators, also Producer Organisations (POs) can receive support under the EMFF to prepare production and marketing plans, in consistency with the political objective of the CFP of enhancing the direct responsibility of the fishing industry in both the management of production and in the marketing activities. In this perspective, measures aimed at improving the added value and marketing of products, especially of those of lower value that would have been otherwise discarded, are strongly encouraged (Article 68).

IV. 5. The evolution of the fisheries structural policy: from subsides to the fishing fleets to the broader objectives of the current CFP

The most ancient dimension of financial support to the fisheries industry has undoubtedly been the structural aid to the EU fishing fleet. This is explained by the fact that a core aim of the post-war European integration process has been supporting the improvement of the means of production across different economic sectors, and especially of the primary ones, such as agriculture and fisheries.

Over the time, though, this initial approach has gone in parallel with the evolution of the overall objectives of the Common Fisheries Policy, and especially with the growing importance of its conservation pillar. Structural aid to operators owning fishing vessels has gradually moved, therefore, from being a separate strand of the CFP with its own rules and goals, to being a political domain in which enterprises are expected to contribute to the general objectives of the CFP. On the other hand, the aging and the steadiness of financial subsidies under the CFP has created, at the same time and in parallel with the CFP evolution process, a sort of 'culture of acquired rights' among such operators, which is very difficult to change.

In order to understand the innovations introduced by the European Maritime and Fisheries Fund (EMFF) for the period 2014-2020 in this field, and assess whether this Fund has truly broken with the highly subsidised policy of the past, it should be briefly recalled the historic development of the EU fleet policy, which is, essentially, the history of the progressive adaptation of the financial framework of the CFP to the broader policy objectives that gradually emerged in the other CFP pillars.

Structural aid to the EU fleets was established by the six founding EEC Member States in 1970 with the aim to 'promouvoir, dans le cadre de l'expansion économique et du progrès social, le développement rationnel du secteur de la pêche et afin d'assurer un niveau de vie équitable à la population qui tire ses ressources de la pêche' [400]. To this end, the Member States were required, firstly, to coordinate their respective structural national policies in the fisheries sector[401], and, additionally, they were allowed to provide financial assistance to the national fishing industries, as an exception to State aid rules established under the Treaty of Rome (Articles 92-94), in so far as these public funds could support the achievement of important economic and social objectives, such as the development of new fishing techniques to increase the productivity of the fishing fleets, the adaptation of production to markets requirements and the improvement of living conditions in coastal communities highly dependent on fisheries[402]. Financial assistance to construction and modernisation of inshore and pelagic fishing vessels and to marketing and processing activities within the fisheries sector, furthermore, could be provided not only at the national, but also at Community level, in the context of the European Agriculture Guidance Guarantee Fund (EAGGF), which the Community's financial instrument to support the Common Agricultural Policy (CAP). This initial approach can be understood bearing in mind that the fisheries policy was considered at the time, yet, as a specific part of the Common Agricultural Policy (PAC), whose aim was to achieve increased productivity and better living and economic standards for farmers (and fishermen). Public financing of the fisheries sector, therefore, was essentially directed to improve the socio-economic conditions of operators and was only marginally influenced by environmental concerns.

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[400]See Article 9 of the Règlement (CEE) No. 2141/70 du Conseil, du 20 Octobre 1970, portant établissement d'une politique commune des structures dans le secteur de la pêche. This Regulation was replaced in 1976 by Council Regulation No. 101/76, laying down a common structural policy for the fishing industry. Although Article 1 of the 1976 Regulation expressly mentioned, along with economic and social objectives, the need to ensure a 'rational use of biological resources', the measures that could be implemented under this Regulation were, essentially, the same as these of the previous one.

[401] See Article 6 of the Structural Regulation. For an extended treatment of this topic see R. CHURCILL, *EEC Fisheries Law,* Cardiff, 1987, p. 205 ff.

[402] These were the objectives of the CFP as outlined in Article 39 of the EEC Treaty. See on this point A. HATCHER, *Subsidies for European fishing fleet: the European Community's structural policy for fisheries 1971 – 1999*, in Marine Policy 24 (2000) p. 129.

In this perspective, between 1973 and 1982 several specific and short term programmes started to be developed both at national and at Community level, for the purpose of financing a wide range of projects for vessels construction and modernisation.

However, the declaration of 200-miles Exclusive Economic Zones by third States in the mid-late 1970s, resulting in a loss of fishing opportunities for Community's distant water vessels, together with the increasing pressure on fish stock in Community waters, made the Commission progressively aware of the need of adjusting the Community's fleet capacity to available resources, in order to reduce overfishing. It became manifest that the fisheries policy cannot be considered merely as an addendum of the common agricultural policy. Unlike agriculture, where more investments lead to more production, in fisheries more investments can lead to overfishing, and therefore to less productivity. In view of this, the organisational structure of the Commission was changed in 1976, separating agriculture management from fisheries management, through the establishment of a specific Directorate-General for Fisheries (DG XIV).

The need to adjust fleet capacity to catch potential was however expressly recognised only in 1983, with the adoption of the first comprehensive package of structural measures dedicated to the common fisheries policy.

The 1983 Regulation[403] combined measures aiming at increasing fishing capacity (i.e. support to vessels construction and modernisation, exploratory fishing voyages for under-utilised areas and species and conclusion of joint-ventures with third States, especially in the Mediterranean and West Africa) with efforts to reduce pressure on stocks.

Firstly, a Community aid for *permanent* removal of vessels of 12 m or more in length and for a *temporary* removal was provided for. Secondly, the Member States were required to draw up the so-called Multiannual Guidance Programmes (MAGPs), i.e. triennial planning instruments containing preventive measures to adjust fishing fleet capacity to the state of biological resources[404]. Under the first MAGPs established in 1983, in particular, Member States had to adopt national programmes to stabilise their national fishing fleets, consolidating the capacity levels of 1982 - 1983. The second generation of MAGPs, adopted in 1987, more significantly, set-out a specific objective for each national fleet, consisting in an overall capacity reduction of 3% in tonnage and 2% in engine power.

[403]See the Council Regulation (EEC) No. 2908/83, of 4 October 1983, on a common measure for restructuring, modernising and developing the fishing industry and for developing aquaculture. The accession of Spain and Portugal to the Community in 1986 raised concerns, due to the significant dimension of the fleets of these countries and the subsequent higher pressure that they would have exerted on the EU stocks. As a consequence, a new regulation, Council Regulation No. 4028/86, was introduced, which put greater emphasis on the adjustment objectives.

[404] All the investment programmes co-financed by the Community had to be consistent with MAGPs. See on this point A. HATCHER, *op. cit*. p. 130.

In the 1990s, the Common Fisheries Policy was reviewed[405] in consistency with several reports published by the European Commission which stressed the need to introduce more stringent measures to adapt fishing capacity to available resources. In this respect, it was highlighted that in the previous years the two main fisheries policy pillars, i.e. the conservation policy based on TACs and quotas and the structural policy, based on subsidies, had been largely separated, often pursuing contradictory objectives, such as restriction of catches of most commercial species and financial support to construction of new vessels[406].

In 1993 all structural measures relating to fisheries were grouped into a single Financial Instrument for Fisheries Guidance (FIFG), running from 1994 to 1999[407]. In this framework, approximately 22.7% of structural aid was devoted to adjustment of the fishing effort (through scrapping, temporary laying-ups and export of vessels in developing countries), renovation and modernisation of vessels accounted for 26,4%, processing and marketing for 23% and aquaculture for 9.4%. The new policy framework, however, contributed to a reduction of fleet capacity between 5% and 12%, which was significantly below the targets indicated by the European Commission (an expected reduction between 17% and 40%, depending on the case)[408]. This was partially due to the limited power of the European Commission to penalise Member States not complying with the targets established under their national plans and, also, to technological innovations which counteracted the reduction of the number of vessels with an increase in fishing capacity.

In 2001 the Commission published its first Green Paper on the future of the Common Fisheries Policy[409] , stressing the need to connect adjustments of fleet capacity with the fishing possibilities set annually through Total Allowable Catches (TACs) per species and distributed among the different Member States.

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[405] See Council Regulation (EEC) No. 3760/92, of 20 December 1992, establishing a Community system for fisheries and aquaculture.

[406]As stressed by HATCHER in this respect, a critical aspect of the EC's structural programmes is ' the lack of coordination of the structural policy with other elements of the Common Fisheries Policy and the apparent internal contradictions of a policy that has simultaneously provided aid for both increasing and decreasing fleet capacity', see A. HATCHER op. cit. p. 139.

[407] The MAGs continued to be drawn-up until 2001. The third MAGPs generation, running from 1992 to 1996, put emphasis on the need to set targets for fleet reduction in consistency with scientific advice. To this aim, national fleets were divided into segments corresponding to the species that they were used to catch. In addition, it was established that the national plans should take into account the effects of technical progress on fleet capacity. The last set of MAGs, running from 1997 to 2001, provided a more sophisticated linkage between fleet segments and fisheries stocks. Under these plans, management of fishing effort was introduced as a complementary or alternative mechanism to fleet capacity management.

[408]On this point, see J. C SURIS, REGUEIRO, M.. VARELA-LAFUENTE, M.D. GARZA-GIL, *Evolution and perspective of the fisheries policy in the European Union*, in Ocean & Coastal Management 54 (2011) p. 594.

[409]Se the Green Paper on the future of the Common Fisheries Policy, of 20 March 2001, COM(2001) 135 final.

Nonetheless, the second FIFG, running from 2000 to 2006, was adopted in 1999, shortly before the definitive approval of the thoroughgoing 2002 reform of the Common Fisheries Policy[410].As a consequence, this instrument was more a continuation of the previous FIFG, rather than reflecting substantial political changes introduced by the CFP.

An important element of the second FIFG was, however, the restriction of financial aid for vessels construction (including exports to third countries and joint ventures). Secondly, the FIFG II introduced stricter conditions for obtaining financial aid for fleet renovation and modernisation, since the Member States could provide additional funds only if engaged in recovery plans or in case of a significant reduction of their TACs. At the same time, the fund provided for an increased support to scrapping of vessels, processing and marketing, development of aquaculture and ports infrastructures and temporary cessation of fishing activities. Over the 2000 – 2006 programming period[411], the EU-15 fleets[412] decreased by 20% in terms of number of vessels, which was reflected in a reduction of 16% in terms of tonnage and of 17% in terms of engine power.

As a result of the reorientation of the European Cohesion Policy in the 2007-2013 programming period, furthermore, a new financial instrument specifically dedicated to fisheries was introduced in 2007, the European Fisheries Fund (EFF)[413]. Compared to the FIFGs, the EFF was more focused on sustainability, in consistency with the 2002 reform of the CFP, and it was, in addition, designed to tackle the needs of the new EU geopolitical context, characterised now by 26 Member States, after the 2004 enlargement of the Union to Eastern countries.

In order to stress the close connection between the economic dimension of the fisheries policy and the protection of the marine environment, the EFF, unlike the FIFGs, was not formally included into the so-called 'Structural Funds' but it was embedded in another area of EU financing, the 'Conservation and Management of Natural Resources'[414]. The Fund was articulated in 5 main Priority Axes, as follows: Axis 1: Measures to adapt the EU fishing fleet (27,68%), Axis 2: Aquaculture, inland fishing, processing and marketing of fishing and aquaculture products

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[410] See the *Council Regulation* (*EC*) No *2371/2002,* of 20 December 2002, on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

[411] Between 2000 and 2006, financial support to the fisheries sector was allocated in the context of the new European strategy for growth and employment, known as Agenda 2000. The eligibility of expenditure under the FIFG II was extended until the 30th September 2010.

[412] The accession of 10 new Member States to the European Union in 2004, had a limited impact on the distribution of budgetary resources, insofar as 94,1% of the financial support programmed under the FIFG continued to be devote to the previous EU-15 Member States. See J. C SURIS, REGUEIRO, op. cit. p. 596.

[413]See Council Regulation (EC) No. 1198/2006, of 27 July 2006, on the European Fisheries Fund. The overall budget of the EFF was approximately 4.305 billion EUR.

[414] For an extended treatment of this topic see E. CORDÓN LAGARES, F. GARCÍA ORDAZ, *Fisheries structural policy in the European Union: A critical analysis of a subsidied sector*, in Ocean and Coastal Management 102 (2014) p. 203.

(28,75%), Axis 3 : Collective Actions (26,94%); Axis 4: Sustainable development of fishing areas (12,90%); Axis 5: Technical assistance (3.74%).

With regard to Axis 1, financial aid to modernisation of vessels was gradually dropped out, and made conditional upon the improval of working conditions on board and the adoption of selective fishing techniques. Financial aid to construction of new vessels, had already been abolished in 2004[415], in line with the 2002 reform of the Common Fisheries Policy. Scrapping and temporary cessation were maintained, instead. Compared to the FIFGs, the total amount of funds allocated to fleet measures was substantially reduced, since scrapping and temporary cessation together accounted only for 25% of the total EFF budget.

Despite the implementation of the EFF led the Community fleet to decline at a rate between 2% and 3% annually, the European Commission, in the *Report to the European Parliament and the Council on Member States' efforts during 2011 to achieve a sustainable balance between fishing capacity and fishing opportunities* stressed that the overall capacity was 'too high'. The report highlighted, in particular, that across several Member States many vessels were underutilised, had too small revenues to make necessary investments such as modernisation of vessels and gears and, furthermore, were dependent on overfished stocks. As a general statement, the Commission concluded that the fleet management policy 'had failed to bring fleets into balance with the resources they exploit'.

This was mainly due to the fact that the classical indicators used at the national level to measure fishing effort (i.e. the number of vessels, the vessels tonnage and the engine power) do not measure the effective fishing power (and therefore the fishing pressure on stocks), insofar as several additional indicators should be taken into account, and namely: the size of the vessels, the fishing techniques used, the intensity of fishing activities (i.e. the number of vessels operating in a fleet and the days at sea), the level of technological improvements that compensate the nominal reduction of the fishing effort.

In addition, in its *Fifth annual report on the implementation of the European Fisheries Fund (EFF)*the Commission highlighted that public funds supporting withdrawal had been granted 'not so much by the need to adapt the fleet to the resources available but by the economic difficulties of fleets, irrespective of the situation of stocks [..] In some fishing effort adjustment plans, permanent cessation is explicitly presented as a tool to compensate for the reduction of fishing opportunities and to improve the economic viability of the remaining vessels. As a result, permanent cessation is often not targeted on the vessels which exert the most pressure on the stocks

[415] See Council Regulation (EC) No 2369/2002, of 20 December 2002, amending Regulation (EC) No 2792/1999, **laying down the detailed rules and arrangements regarding Community structural assistance in the fisheries sector.**

but on those with the worst financial prospects, which limits the effectiveness of the capacity adjustment it generates.'[416]

The Commission stressed that also the European Court of Auditors (ECA) in its Special Report of December 2011 on how the EU measures have contributed to adapting the capacity of the EU fishing fleets found that 'despite support for decommissioning, the effective fishing capacity of the EU fleets in the period 1992-2008, taking into account the impact of technological improvements, is estimated to have increased by 14%".[417]

On the basis of this assessments, a new fund for the 2014-2020 programming period, the European Maritime and Fisheries Fund (EMFF), was proposed, in order to accompany the implementation of the reform of the Common Fisheries Policy. The EMFF is a combination of several financial instruments. It is a continuation of the European Fisheries Fund (EFF), along with the financial dimension of the Common Market Organisation (previously supported under the Agricultural Guarantee Fund – EAGF) and of the (new) Integrated Maritime Policy. With regard to subsides, the primary aim of the new legislative framework is to further reduce or eliminate those forms of support which can undermine sustainable exploitation of fisheries resources (capacity-enhancing subsidies) and, at the same time, to maintain the forms of financial assistance that are expected to reduce fishing capacity and promote economic diversification of fisheries-dependent areas.

More specifically, according to Article 11of the EMFF are not anymore eligible for public financing '(a) operations increasing the fishing capacity of a vessel or equipment increasing the ability of a vessel to find fish; (b) the construction of new fishing vessels or the importation of fishing vessels; (c) the temporary or permanent cessation of fishing activities, unless otherwise provided for in this Regulation; (d) exploratory fishing; (e) the transfer of ownership of a business; (f) direct restocking, unless explicitly provided for as a conservation measure by a Union legal act or in the case of experimental restocking. The EMFF, therefore, introduces changes in all the traditional components of the EU fleet policy, which are essentially: (a) construction and modernisation of vessels, (b) permanent cessation (scrapping) and (c) temporary laying-up[418].

As for point (a), direct subsidies for construction of fishing vessels, eliminated in 2004, have not been reintroduced under the EMFF, since the past experience has shown that this kind of aid has contributed considerably to overcapacity. The reasons of the 'failure' of this instrument in achieving

[416] See the Report of the European Commission, of 12 December 2012, COM (2012) 747 final, p. 8.
[417] See the Special Report of the Court of Auditors No.12, of December 2011, Have the EU measures contributed to adapting the capacity of the fishing fleet to available fishing opportunities?, p. 17.
[418] For a comprehensive analysis of the effectiveness, suitability and critical aspects of the different types of subisidies to the fisheries sector see E. PENAS LADO, *op. cit.* p. 111 ff.

the targeted objectives are twofold. Firstly, financial aid to construction has been often managed in the past as not taking into account the implementation of the parallel financial aid to scrapping. When scrapping of old vessels and construction of new vessels are not in balance within the same fleet segment, the subsidies risk to lead to the enhancement of some (more powerful) fleet segments, while the real capacity reduction occurs in segments where it was not so necessary. Secondly, during the negotiation of the EMFF it was pointed out that aid to construction can result in overcapacity even if adequately balanced by scrapping. Although new vessels have the same nominal capacity (in terms of GT and engine power) of the older ones they replace, in fact, they are more efficient and operational, and can therefore produce much more fishing mortality.

Similarly, aid to modernisation of vessels has been significantly reduced, since it was seen as a tool stimulating overcapacity. Investments are permitted only when they contribute to the adoption of more selective fishing techniques, to the implementation of the discard ban, to mitigation of climate change or to the increase of healthy and safety conditions on board[419].

A good example is energy efficiency, i.e. the financial aid to replacement or modernisation of engines. Just like replacement of old vessels, also engine replacement can improve the productivity of the fleet in real terms, beyond nominal capacity. On the other hand, since it allows gain in fuel consumption and better safety conditions on board, this subsidy has been maintained, to a certain extent, among the measures eligible for financing under the EMFF.

Aid to engine replacement, in particular, is made conditional upon the length of the vessels, in order to sustain small scale coastal fleet and reduce subsidies to larger vessels (Article 41 (2) of the EMFF Regulation). The core idea is that financial support for technological innovation should be granted only in case of small fleets and under stringent conditions, in order to sustain artisanal fisheries and promote the development of coastal communities. In other words, aid to modernisation is acceptable whether in line with 'allowable technological innovation', meaning that modernisation must not result in a hidden enhancement of capacity[420]. Accordingly, engine replacement is allowed whether the new engine has a lower power than the replaced one, and, additionally, whether the

[419]For an evaluation of the correlation between modernisation and renovation aids and profitability and sustainability of fishing enterprises see J. C. SURÍS-REGUIERO, M.M. VALERA-LAFUENTE, CARLOS IGLESIAS-MALVIDO, *Effectiveness of the structural fisheries policy in the European Union*, in Marine Policy 27 (2003) 535 – 544.

[420]On this point see Dario Piselli, who stresses that the Court of Auditors in the above mentioned report has stated that vessels with efficient engines have an incentive to increase their fishing effort, for instance, by spending more hours at sea. See D. PISELLI, Changing Perspectives in CFP: Science-based policies to restore Mediterranean Fisheries, in Sustainable Development Solutions for the Mediterranean Region conference, Siena, July 2013, p. 3. See the Special Report of the Court of Auditors, of December 2011 on how EU measures have contributed to adapting the capacity of the EU fishing fleet.

vessels concerned belongs to fleet segments which are in balance with their fishing opportunities (Article 41).

Article 25 (2) of the EMFF Regulation, furthermore, states that "Operating costs shall not be eligible unless otherwise expressly provided for in this Chapter". Operating costs include, for instance, fuel subsidies, and it can be argued, hence, that such measures should not be supported through the EMFF, unless in the framework of energy efficiency measures (Article 1 (a))

As for scrapping and temporary laying-ups, Article 11 (c) of the EMFF Regulation includes them among the measures not eligible for financing. Scrapping premiums are subsides paid to vessels owners to cover the permanent cessation of their activity through vessels decommissioning. Since it involves the physical removal of the vessel, there is no doubt that such measure can give a valuable contribution to the reduction of fishing capacity. It is not clear, however, to what extent this has been true for the EU fishing fleet as a whole. Scrapping aids, in fact, have been introduced at the very beginning of the EU structural policy, but often they were not managed in a proper way. Firstly, over the last few decades funds were often allocated indiscriminately, not targeting the fleets segments that really needed to be adjusted. In other words, in many cases scrapping was granted to those fishers that wished to cease their business for whatever reason, but not necessarily to those whose vessels that were part of the fleets segments having higher overcapacity. Secondly, in many cases, the EU funds have been used for the scrapping of vessels that were already old and not very operational. The money granted for scrapping, in addition, was not rarely reinvested in construction and modernisation of new and more efficient vessels[421]. These arguments explain the reasons why financial aid to scrapping has been, in principle, removed from the EMFF[422].

As a matter of fact it can be argued, however, that this removal is partially mitigated by the exceptions provided for in Article 34. More specifically, Article 34 (5) envisages the possibility for the owners of a fishing vessel or for fishers working on board that have received aid for permanent cessation to re-enter into the fishing activity within a relatively short period of time, which is 2 years for fishers (Article 34 (3)) and 5 years for the owners registering a new fishing vessel (Article 34 (5)). In addition, support may be granted for permanent cessation without scrapping when the vessels is retrofitted for activities other than commercial fishing (Article 34 (6)) and in the case of traditional wooden vessels, with a view to preserving maritime heritage (Article 34 (6) (2)). This

[421]And even worse, in many cases vessels have received public funding for scrapping soon after receiving assistance for modernisation!.

[422] As stressed by E. CORDÓN LAGARES, GARCÍA ORDAZ, op. cit. a problem linked to scrapping aids it that EU Law does not provide harmonised rules for the treatment of fishing rights (cancellation, transfer or sale) after vessels decommissioning under public subsides. Whereas in certain Member States, such as Denmark and Spain, fishing rights can be transferred to other fishing vessels, in certain others, such as France and Poland, are cancelled. According to the authors, fishing rights transfer schemes in case of scrapping can encourage restructuring of the fleets, thus contributing to reduction of overcapacity.

makes an exception to the general principle according to which permanent cessation of the fishing activities can be financed only when it is achieved through the material scrapping of the fishing vessels.

On the other side, it is to be noted that scrapping aid under the EMFF is limited in time, amount and even in its conditions of eligibility. Firstly, financial support to permanent cessation can be granted until 31 December 2017, meaning that it shall be planned at the beginning of the programming period. Secondly, the overall fleet measures under the new CFP, including scrapping, may not exceed 15% of the total budget invested by every single Member State. Thirdly, prior to the granting of financial assistance, the Member States are required to present a scrapping plan, to ensure that the scrapping aid is directed to those segments of the fleets that exceed their fishing opportunities.

As for temporary laying-ups, Article 33 sets-out precise conditions under which it can be applied (emergency and conservation measures, non–renewal of fisheries partnership agreements, management and multiannual plans). Along with the provision of a maximum duration of six months per vessel, these pre-conditions are intended to ensure that aid to temporary cessation is used under the EMFF only in case of real urgencies or to tackle unforeseeable situations, and not as a permanent aid to fishermen. The extended and indiscriminate use of this instruments has in fact two main negative impacts. Firstly, acting as a social and economic safety net, it can prevent or delay the adoption of the real structural changes which are needed to adjust fleet capacity. Secondly, the use of temporary laying-ups as a regular tool for fisheries management contributes to make the EU fisheries a highly subsidied sectors. Beyond economic impacts, this is not positive for the public image of the Common Fisheries Policy itself, either in the eyes nor of the EU taxpayers, nor in the context of the EU international relations, as it is demonstrated by the fact that the too high subsidies to the EU fishing fleet have been criticised in many occasions by the World Trade Organisation (WTO).

As a whole, it can be argued that the2013 reform of the Common Fisheries Policy has made important efforts to overcome the subsidy-based approach which has for a long time enshrined the EU fleet policy. For many years, the abundant and continuous financial aid to the sector has created among operators a sort of ‘culture of dependency from the public aid’, which undoubtedly has not improved the competitiveness of the fishing industry as a whole. As highlighted by E. PenasLado in this respect

> ‘It is very common to hear, in meetings with stakeholders and fisheries managers, that when the Commission suggests that public aid on certain kind of investments should be discontinued, this idea is immediately presented as the Commission wanting to ‘ban’ such

investments. This shows a state of mind where certain investments are only conceivable if there is European structural money behind them. And it shows the commonplace that investment in the fisheries sector is not possible without subsidies'.

What is more, often subsidies have been used to solve short-term problems, or not targeting the fleet segments that really needed an adjustment of their capacity. This can suggest that, in many circumstances, public funding to the fisheries sector could have been used much more for political needs, rather than be employed to reduce the amount of fish caught.

The main challenge of the European Maritime and Fisheries Fund (EMFF) in this field is to produce a real change in attitude. All the classical instruments of the EU fleet policy have been questioned and reformulated in this view. As a result, they can now be activated essentially by way of exceptions, and they are made conditional upon the pursuing of the general objectives of the common fisheries policy.

Along with qualitative change, the overall amount of budget dedicated to fleet policy has been significantly reduced, since a financial cap corresponding to 15% of the total investment by a Member State is now imposed for fleet-related measures. Under the FIFG I, funds allocated to fleet policy accounted for 50% of the total investment, whereas in FIFG II for the 30%. This demonstrates that the financial side of the common fisheries policy has deeply evolved over time. Whereas once fleet related measures formed its main pillar, the EMFF now promotes a reorientation of public funding towards a wider range of political objectives, in consistency with the broader action of the common fisheries policy[423]. The simultaneous adoption of the EMFF and of the CFP Basic Regulation has undoubtedly facilitated this approach. One can say that the EU, at present, has very limited tools to adjust its fleet capacity compared to the past. Nonetheless, fleet policy maintains a special place in the general context of the CFP, due to its historical importance and its economic and social relevance for the operators of the sector. The gradual assimilation of the

[423]Asunderlined by M. VARELA LAFUENTE and J. SURÍS REGUEIRO ' Si losprincipiosclásicos de gestión en la Europa Azul se han mantenido, lasexpectativas de países, pescadores y ciudadanos se orientanahorasobretodo a la definiciónque se puedahacer de nuevosobjetivos (sobretodo en lo que se refiere a aspectosambientales y gestión del desarrollosostenible) y de losinstrumentos de gestiónfinanciaera (en la medida en quedelimitaráel campo de lasestrategiasposibles). Y en el Fondo Europeo de Pesca se entrecruzan de forma significativa ambascuestiones. [..]. Y si nos paramos en la definición de lascincoprincipalesprioridades o ejes de actuación, podemos separar, por un lado, lasdosque se pueden considerar de continuidad (elajuste y adaptación de la flotapesquera, y elapoyo a la acuicultura, transformación y comercialización), y, por otrolado, tres de nuova definición(el impulso a proyectos de interéscolectivo o social, elapoyo a iniciativasquerefuerceneldesarrollosostenible de laszonascosteras a través de la diversificaciónsocioeconómica, y losprogramas de asistenciatécnica). See M. VARELA LAFUENTE and J. SURÍS REGUEIRO, *Aproximación a la futura reforma de la PolíticaPesqueraComún. Consideraciónespecial de la política de estructuras*, Noticias de la Unión Europea, PolíticaComún de Pesca, Año XXVIII, Marzo 2012.

changes introduced by the last reform of the CFP and, consequently, by the EMFF Regulation, would depend, above all, from them, and especially from the youngest among them.

IV. 5. Multi-fund approach in the new programming period: financial tools to foster the economy of fishing enterprises and coastal fishing communities

In consistency with the reformed framework of the EU Cohesion policy described above[424], the Member States, while implementing the fisheries and maritime policies by way of the European Maritime and Fisheries Fund (EMFF), are expected to develop projects that can be funded under different EU operational programmes. It can be argued, in this respect, that the 'multi-fund approach' is a cornerstone of the new model of territorial governance promoted by the European Union in the 2014-2020 programming period and can offer interesting opportunities to enterprises engaged in the fisheries sector.

In the context of employment and territorial cohesion (Union Priority 4 of the EMFF Regulation) sustainable development of fisheries communities can be supported, for instance, through projects aimed at implementing 'Community-led local development (CLLD) strategies' (Articles 60 – 64 of the EMFF Regulation). The 'CLLD strategies' are carried out by the 'GALs', i.e. local actions groups (Fisheries Local Action Groups (FLAGs) in the case of the EMFF), composed of local representatives from various sectors (public, socio-economic sectors, civil society), which are in charge of jointly design projects and initiatives focused on specific local needs[425].

The development of the CLLD strategies must be viewed in the context of the so-called 'LEADER approach' (acronym which stands for 'Liaison Entre Actions pour le Développement de l'Economie Rurale'), which has been a pillar of the EU rural development policy over the last 20 years.

The LEADER approach was extended for the first time to the fisheries and maritime sector under the 2007-2013 programming period, when it was covered by Priority Axis 4 of the European Fisheries Fund (EFF)[426] . In the Common Provisions Regulation adopted in the framework of the

[424]See Paragraph 2 in this Chapter.
[425]See the factsheet of the European Commission, *Cohesion Policy 2014-2020: Community-led local development*, March 2014, p. 3, available at the link:
http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/community_en.pdf
[426] See Articles 43 – 45 of the Regulation (CE) n. 1198/2006, of 27 July 2006, on the European Fisheries Fund (the EFF Regulation). Since 2007, over 300 FLAGs have been established across 21 EU Member

reformed EU Cohesion Policy, the rules for CLLD (Articles 32 – 35) now cover all the European Structural and Investment Funds and are further detailed in the each Fund specific Regulation[427].

A single local community-led strategy could, therefore, be financially supported through an integrated, multi-fund approach, strengthening linkages between urban, rural and fisheries areas.

At the time of writing, a first transnational seminar 'Implementing CLLD across the ESI Fund'[428] has been organised by the FARNET Support Unit of the European Commission[429], bringing together the representatives of the national Managing Authorities of the different European Structural Investment Funds across the Member States, in order to share experience and best practices.

In Puglia (Italy), for instance, some GALs (local groups related to agriculture) and FLAGs (local groups related to fisheries) have established, already under the EFF, a local cooperation project with a view to designing and implementing common strategies for the promotion and selling of local products, improving direct sales to consumers and strengthening the role of farmers and fishers in the food chain[430].

States, with more than 6.000 projects financed. On this point see the FARNET Support Unit Magazine, *Putting learning into practice*, No. 10, Spring-Summer 2014, p.3.

[427] Compared to the 2007-2013 programming period, several changes in the structure and functioning of the FLAGs have been introduced. With regard to the FLAGs membership and decision making procedures, for instance, according to the new rules 'neither public authorities, nor any single interest group represent more than 49 % of the voting rights' (Article 32 (2) (b) of the Common Provisions Regulation), whereas before representatives of the fisheries sector, of public authorities and of civil society must not represent less than 20% and more of 40% of the total FLAG membership. In addition, the sub-regional area covered by the strategy shall now account not less than 10 000 and not more than 150 000 inhabitants (Article 3 (6) of the Common Provisions Regulation), whereas before it was defined as 'smaller than the NUTS level 3 of the common classification of territorial units for statistics' (Article 43 of the EFF Regulation). Under the new programming period, moreover, the Member States' Managing Authorities can establish National Networks (NNs) of FLAGs in order to enhance FLAGs' capacity building and facilitate transnational cooperation among them. Finally, support from the ESI Funds concerned can now cover the costs of the so-called 'preparatory support' for FLAGs, consisting in capacity building, training and networking activities aimed at initiating the implementation of CLLD strategies (Article 35 (1) of the Common Provisions Regulation).

[428] The seminar was held in Edinburgh (Scotland) on 9 – 10 December 2015.

[429] The FARNET Support Unit is a Brussels-based team of ten experienced staff, backed up by twenty-one country experts, which has been established by the European Commission to assist the Member States Managing Authorities and the FLAGs in the implementation of measures related to CLLD. For further information on the FARNET Support Unit activities see the website of the European Commission: https://webgate.ec.europa.eu/fpfis/cms/farnet/.

[430] As stressed by R.KAMINSK with regard to partnership between GALs and FLAGs 'Sometimes this cooperation is difficult, either because of an imbalance of power (e.g. a very small fisheries community trying to work with a larger rural community), or because of rivalry between individuals or organisations, which can cause even the best local initiatives to fail. During the preparatory phase of local strategies and programmes, it is important to speak openly about the interests of all stakeholder groups. When the FLAG deals with a wide range of different actors, it must take account of potential conflicts of interest'. See on this point the document of the FARNET Support Unit, *Multi-funded CLLD – a chance for more integrated local development*, March 2015, Brussels. For further information of the project developed by Puglia's local GALs and FLAGs, whose name is 'VeDiPuglia', see the Summary Report of the seminar '*Implementing*

In this way, the CLLD can make a valuable contribution to the achievement of the objectives of the common fisheries policy. As stressed in Chapter 3[431], the 2013 reform of the CFP has put strong emphasis on the development of local fishing coastal communities in Europe. CLLD strategies can create new jobs and complementary activities in the coastal areas, gathering different stakeholders around the same projects and developing, therefore, a culture of cross-sectoral entrepreneurship in those communities[432].

Taking into account the various CLLD projects currently under way across several regions of the European Union it can be see, in this respect, that FLAGs can contribute to: data collection and fish stock monitoring[433], the preservation of traditional fisheries habits and culture[434], eco-certification and traceability of products[435], production and marketing and differentiation of local products[436], to economic incomes and diversification of skills and fisheries related activities[437], to

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Community-led Local Development across the European Structural and Investment funds', held in Edinburgh on 9 – 10 December 2015, available at the link: https://webgate.ec.europa.eu/fpfis/cms/farnet/implementing-clld-across-esi-funds-edinburgh-uk-8-10-december-2015, p. 5.

[431] See Paragraph....

[432]On the concept of 'smart specialisation' , intended as development of regional strategies that generate unique assests and capabilities based on a region's distinctive industrial structure and knowledge base and that emphasize the significance of learning processes involving entrepreneurial actors see F. PECK, S. CONNOLLY, J. DURNIN, K. JACKSON, Prospects for 'place-based' industrial policy in England: the role of Local Enterprise Partenership, in Local Economy 28 (7-8), 2013.

[433] In France (Brittany), Under Axis 4 of the EFF, a CLLD project has been developed, consisting in the establishment of an e-technology system that provides real-time data to local fisheries and aquaculture administrations in order to facilitate the monitoring of the sector's activities and to allow the prompt adoption of suitable fisheries management measures. Further information on the implementation of this project and on its further development under the EMFF are available at the link: https://webgate.ec.europa.eu/fpfis/cms/farnet/telecap%C3%AAche-0

[434]MediterRadio is a project financed in Puglia (Italy) in the framework of a broader cooperation project aiming at promoting the image of fishing and of the coastal culture of the Mediterranean. In this perspective, a dedicated online radio station has been established to give a voice to ideas, news, culture and activities related to fisheries and the sea.
For further information: https://webgate.ec.europa.eu/fpfis/cms/farnet/mediterradio

[435]Fiskonline (Sweden) is an online platform where fishermen receive advice from **scientists and local authorities to improve the environmental sustainability of their products as well as** assistance in preparing applications to have local fish certified.
In more details: https://webgate.ec.europa.eu/fpfis/cms/farnet/fiskonline-pathway-eco-certification-1.

[436]VianaPesca PO is a project launched in the North of Portugal by a local Producer Organisation with the aim of enhancing the added value of local fish products (mackerel and sardine) through innovative processing strategy accompanied by a specific marketing campaign. Firstly, taking into account the demand of low priced fish, a market study was realised to identify the best way to add value to the local products. Since a growing demand for high quality ready-to-eat seafood products was observed, the PO decided to enhance the production of canned fish range. As a second step, a new packaging for the products was developed, graphically representing the PO and its fishermen. The accompanying marketing campaign was designed to stress the quality, safety and sustainability aspects as well as the "human" story behind the product. For a fuller account on this project, see the link: https://webgate.ec.europa.eu/fpfis/cms/farnet/vianapesca-po-product-placement-%E2%80%93-promoting-canned-fish-story.

the flourishing of tourism activities[438], to the development of aquaculture and to the creation of new employment opportunities, especially for women[439]. FLAGs strategies are therefore important tools to promote the sustainable development of the fisheries areas, since they are instruments by which a wide range of projects involving environmental, economic and social objectives are put in place, in consistency with the local needs.

In addition, the implementation of Community-led local development can serve the Common Fisheries Policy's objective of promoting a participatory, multi-level governance in fisheries management, allowing the involvement into local strategies of a larger range of partners and funding sources.

As observed in Chapter II, the Common Fisheries Policy was established from its inception as a 'centralised, hierarchical policy' designed by the European Commission and decided by the Member States in Brussels within the Fisheries Council by means of political compromise. Criticism from external stakeholders, together with internal acknowledgement of failures, have led progressively to the emergence of a more participatory approach in fisheries management, culminating in the establishment of Regional Advisory Councils (RACs) within the 2002 CFP reform[440].

It can be argued, in this regard, that the strengthening of the role of the RACs (see chapter II), of the role of the Producers Organisations (see Chapter III), and of the role of the FLAGs, are all examples of the same 'co-management approach', aiming at promoting decentralisation, subsidiarity and involvement of stakeholders in the fisheries sector. Differently from Producer Organisations, however, FLAGs are composed by representatives of the fishing industry but also

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[437]In order to enhance fishermen' skills, awareness of the CFP rules and of fisheries business related opportunities, the Educational Center of Larnaca, in Cyprus, has organisedatraining programme of 180 hours for professional fishermen, which includedalsoan educational trip. The main topics addressed in the seminars were marketing, communications, promotion, new technologies and computers, logistics, legislation, and health and safety legislation. At the end of the training, one of the participants launched a pesca-tourism activity, while many others increased their income through the development of direct sales activities. See the link: https://webgate.ec.europa.eu/fpfis/cms/farnet/fishermen-acquire-new-knowledge-skills

[438]In Spain (Asturias) a local fishermen organisation, the Nuestra Señora de la Atalaya cofradía, has equipped the local auction house with guided tours and educational activities. In this way, visitors (especially students from schools, children and families) can experience and learn about the every-day fishermen life, the sustainable fishing practices and traditional techniques, as well as the problems and challenges of the sector. In the future this project, which has become an important tourism attraction in the area, will be further developed by integrating excursions on fishing boats. For further information: https://webgate.ec.europa.eu/fpfis/cms/farnet/vega-fishing-port-auction-open

[439]A French woman entrepreneur, thanks to cooperation with local fishermen and designers, has developed a fish skin tanning process to realise different kinds of accessorizes by using processed fish skin. In more details: https://webgate.ec.europa.eu/fpfis/cms/farnet/femer-peau-marine-0.

[440] For an extended traitment of this topic see J. L. HATCHARD, T.S. GRAY, *From RACs to Advisory Councils: Lessons from North Sea discourse for the 2014 reform of the European Common Fisheries Policy*, in Marine Policy 47 (2014) p. 88.

from a wide range of different actors. Differently from RACs, furthermore, FLAGs are initiatives developed at the local, and not at the regional level.

The special connection of FLAGs with territory and local challenges, together with their broader composition, offers therefore the prospect of a better alignment of the fisheries policy with the real needs of the interest groups involved. Diversity between the EU coastal communities should be considered, in this perspective, as 'a key step to start learning processes, based on the argument that there is no such thing as a single European fisheries sector, but rather a variety of different sectors across sea basins, countries and regions, with specific local contexts of fishing communities'[441].

It is worth to note, however, that the broadening of stakeholders participation implies also several risks and challenges. Firstly, a more holistic strategy can result in too vague and broad objectives and therefore in less effective action. Controversies and conflicts of interests among local actors can emerge in the context of FLAGs, requiring the adoption of internal procedures, informal 'code of honours' and negotiation practices in order to transform conflicts into cooperation[442]. In addition, especially in the case of a single integrated CLLD strategy funded by several funds, FLAGs should have an appropriate institutional structure (for instance a unique decision making committee), as well as a single set of rules for audit and reporting activities[443]. Another important aspect, in addition, is the level of expertise and qualification of the staff, especially in relation to the setting up of strategies and management functions. Strategies should be drawn-up, in particular, by experts able to identify local needs and potentials and to exploit the coordination and synergies between the several funds which could be involved in the project[444].

A conclusive remark on FLAGs is that, as emerged during the negotiation of the EMFF, there is a certain reticence by the fishing industry of some Member States to accept that the budgetary resources traditionally devoted to the catching sector are now devolved to more comprehensive 'coastal communities' , involving a wider range of interest groups and economic

[441] See S. LINKE, K. BRUCKMEIER, *Co-management in fisheries – Experiences and changing approaches in Europe*, in Ocean & Coastal Management 104 (2015), p. 178.
[442]See R. KAMINSK, op. cit. p. 3.
[443] See the Summary Report of the seminar '*Implementing Community-led Local Development across the European Structural and Investment funds'*, op. cit. p. 3.
[444] Local development strategies shall contain all the elements listed by Article 32 in the Common Provision Regulation. They are then submitted to a committee created by the Management Authority which select them in accordance with selection criteria established at the national level. The first round of selection must be completed within two years from the date of the approval of the Partnership Agreement between the Commission and the Member State. The Managing Authority can select additional strategies, but not later than 31 December 2017 (See Article 32 of the Common Provision Regulation).

actors[445]. Once again, the innovations introduced by the reform of the common fisheries policy would generate a real and effective change depending on the capacity of the sector to assimilate and understand the need of a new approach to fisheries management.

As for CLLD, this implies the awareness that, in order to promote a sustainable and profitable fisheries industry in the future, the EU funds shall be now be allocated not only to the traditional beneficiaries of the old EU fleet policy, which has proven to be highly subsidied and less productive, but to a wider range of actors and initiatives conceived to foster development of coastal areas. This challenge would be even greater in relation to multi-fund projects, that would involve not only people and associations operating in fisheries and aquaculture, but, more broadly, in other sectors equally relevant for local economies. This highlights how the practical application of the CLLD should be also accompanied and supported by an effective communication campaign organised both at the EU and national (and mostly local) level.

In addition to Community-led local development, the 2014-2020 programming period offers other multi-fund financial tools that can be used to achieve the common fisheries policy objectives. Through Integrated territorial Investments (ITIs), for instance, Managing Authorities of the Member States can implement the Operational Programmes by combining funding from different sources, in order to develop strategies for a specific geographical area in an integrated way (Article 36 of the Common Provisions Regulation). Although ITIs are mainly used for urban development strategies, they can be complemented by financial support from the EMFF to sustain enterprises' investments in renewable off-shore energy, sustainable tourism and diversification of economic activities in coastal areas[446]. In the context of the Integrated Maritime Policy, moreover, ITIs can be used to back the implementation of maritime strategies through the use of several ESI Funds.

In addition, due to the small dimension of the majority of the enterprises engaged in the sector (micro-enterprises) which often do not have enough capital for big investments, more favourable loans and guarantees can be activated under the EMFF in the form of financial instruments (FIs).

[445] On this point see the analysis of E.PENAS LADO, which reports that an official of a Member State administration once told him ' fishermen think that fleet policy money is for them, but that Axis 4 money is for their wives'.

[446] See the fact sheet of the European Commission, *How to explore synergies and combine Funds in the 2014-2020 period,* available at the link: https://ec.europa.eu/fisheries/sites/fisheries/files/docs/body/synergies-and-coordination-with-other-funds_en.pdf

More specifically, there are three categories of FIs (Article 37 of the Common Provisions Regulation): equity (or quasi-equity) investments, loans and guarantees[447]. Loans (characterised by lower interest rates, longer repayment periods or fewer collateral requirements) can be used to support fishermen, and especially family businesses, to diversify sources of income through angling tourism or fisheries-related business such as restaurants, creation of start-up by young fishermen and the acquisition of a first vessels, investment on board to improve energy efficiency and selectivity of fishing techniques. In a similar way, micro-credits (smaller loans) can facilitate access to finance for small fishermen or support projects in the framework of community-led local development.

Guarantees are well suited to sustain projects that lending institutions would normally consider too risky, for instance innovation in processing sector, conservation of marine biological resources or aquaculture. In the guarantees scheme, a lender receives assurance that the capital will be repaid in the case of borrower default.

Also 'Equity' can be used to finance bigger and risky operations, especially in the early stage of the lifecycle of a business, such as the developing of innovative sustainable technologies in the aquaculture or processing sector. The investor can, in this case, assume some management control of the company or have access to a share of the company's profits.

In 2007-2013, FIs have been implemented significantly in only two Member States: Latvia and the Netherlands. In the programming period 2014-2020, however, they have been extended to all the 11 thematic objectives outlined in the Common Provisions Regulation. A single operation can therefore receive support through a financial instrument by channelling resources from different ESI funds.

Finally, the EMFF can be coordinated with a wide range of other EU financing instruments, such as the programme 'LIFE', in the field of environmental, nature conservation and climate action; with the EU's 2014-2020 programme for research and innovation (Horizon 2020), which includes *marine* and *maritime* and inland water research; with the programme for the *Competiveness* of *Enterprises and Small and Medium-sized Enterprises (COSME*), aimed at strengthening the competitiveness and sustainability of the European enterprises, particularly SMEs; and, finally, with the programme *Connecting Europe Facility (CEF)*, that supports projects in the field of energy, transport and telecommunications, also in the maritime dimension.

[447] For an extended description and analysis of the characteristics and possible uses of FIs in the several ESI Funds see the on-line platform developed by the European Commission in partnership with the European Investment Bank (EIB), available on the website: https://www.fi-compass.eu/.
With special reference to the use of Financial Instruments under the EMFF, see in particular the *Scoping Study for the use of financial instruments under the EMFF and related advisory support activities*, of June 2015.

Chapter V

The external dimension of the Common Fisheries Policy

V.1. Introduction

From ancient times, the maritime projection has played a crucial role in shaping the European history, culture and identity. Surrounded by the Mediterranean, the Baltic, the North Sea, the Black Sea and by two oceans, the Atlantic and the Arctic, the European Union always had a special relationship with seas and oceans and is nowadays increasingly dependent on the growing interconnectedness of maritime policies. In the ever-changing landscape of international maritime relations, the external fisheries policy of the European Union has, by tradition, a particularly incisive role to play.

This is because through its long-distant fishing fleets and investments, the European Union has nowadays an influential presence in all the oceans in the world. It represents one of the most important markets and the largest importer of fish products, consuming 11% of the global fish production in terms of volume and importing 24% of fisheries products in terms of value[448]. The exclusive competence of the Union in the conservation and management of marine living resources, in addition, is not restricted to the waters under the sovereignty of its Member States, but extends to the activities carried out by the Union fishing vessels[449] in the waters under the jurisdiction of third countries or in the high seas[450].

In view of its relevance as a key fisheries actor, the Union bears, therefore, a special responsibility in promoting and enhancing sustainable and responsible fisheries at international level. At the same time, the external dimension of the CFP is a valuable tool to provide unity, consistency and effectiveness in the broader framework of the EU Foreign Policy.

Whenever an internal Union exclusive competence in a specific field is reflected in the external exclusive competence to conduct international relations, as it is in the case of fisheries, the development of an external action in such field become particularly important and strategic to reinforce, and better define, the legal status of the European Union at the international level.

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[448] See the Communication from the Commission to the European Parliament, to the Council, the European Economic and Social Committee and the Committee of the Regions, of 13 July 2011, *The External Dimension on the Common Fisheries Policy*, COM (2011) 424 final, p. 2.

[449] In accordance with Article 4 (1) (5) of the CFP Basic Regulation 'Union fishing vessel' means a fishing vessel flying the flag of a Member State and registered in the Union.

[450] On this point see J.M. SOBRINO HEREDIA, G.A. OANTA, "Los Acuerdos Internacionales de Pesca instrumentos indispensables de la Política Pasquera Común de la Unión Europea", in *Noticias de la Unión Europea*, n° 326, 2012, p. 51.

In accordance with Article 47 of the Treaty on the European Union (TEU), the Union shall have, in fact, "legal personality", meaning that it is committed to "reinforce the European identity and independence" in the international legal order[451].

The external dimension of the Common Fisheries Policy contributes to this objective through a legal and institutional framework which is articulated around three main pillars: the bilateral agreements established by the EU with third countries; the participation of the EU in global intergovernmental organisation dealing with fisheries (UN, FAO, OECD); the participation in specialised multilateral bodies, i.e. the so-called Regional Fisheries Management Organisations (RFMOs).

In order to assess the impacts and the relevance of the external dimension of the CFP on the activities performed by EU fisheries enterprises in the areas beyond EU maritime boundaries, the above mentioned strands of the CFP will be analysed in this Chapter. Firstly, having regard to the bilateral dimension of the CFP, the analysis will focus on the changes introduced by the 2013 reform in relation to the official agreements concluded by the Union with third countries (Section 2), and notably to the impacts on EU fisheries enterprises of the "human rights" clause to be inserted in such agreements (Section 3). Secondly, the increasing importance of fisheries private agreements concluded directly by EU operators with third countries will be taken into account, stressing the efforts made by the EU in order to reinforce the control over its external fleet, especially in the context of the reform of the Fishing Authorisation Regulation (FAR) which is currently underway (Section 3). Thirdly, the analysis will concentrate on the international legal framework governing fisheries activities in the high seas, with particular reference to the role of the EU in Regional Fisheries Management Organisation (RMFOs) as well as in international *fora* and international organisations (Section 4). Particular attention will be paid, in this context, to the EU regulatory framework to combat Illegal, Unreported and Unregulated (IUU) fishing, given that fisheries activities conducted in contravention of national and international laws adversely affect legal operators, and represent a major problem to be addressed in the development of a global fisheries governance (Section 5). Finally, the fisheries dimension of international trade relations will be analysed, especially with regard to the consistency among WTO rules and EU measures to tackle illegal, unreported and unregulated (IUU) fishing (Section 6).

[451] See J.M. SOBRINO HEREDIA, G.A. OANTA, *op. cit.* p. 52.

V.2. The bilateral dimension of the EU External Fisheries Policy in the light of the 2013 CFP reform: Sustainable Fisheries Partnership Agreements (SFPAs)

The concept of fisheries access agreements stems from Article 62 of the United Nations Convention on the Law of the Sea (hereinafter the UNCLOS)[452], which sets out that when a coastal States 'does not have the capacity to harvest the entire allowable catch [in its exclusive economic zone] it shall, through agreements or other arrangements [..] give other States access to the surplus of the allowable catch'.

The need of distant-water fishing nations to negotiate bilateral agreements to secure continuous access to fisheries resources, is a relatively recent principle in the international law of the sea. Traditionally, maritime interests of nations were primarily focused on navigation, given that, in the past 'la mer, source de richesse, était considérée comme un vivier de poissons inépuisable […] et une conception horizontale du milieu marin (superficie et masse des eaux) prévalait, en tant qu'espace ou voie de communication pour le commerce, la colonisation, et la stratégie militaire'[453]. As a consequence, up to the half of 20th century, fisheries was not considered as an essential part of the international law of the sea[454]. Coastal States were not used to claim jurisdiction over marine living resources contiguous to their coast, until the 1945 Truman Proclamation[455] initiated this practice.

Nevertheless, as some remarkable examples show, a very limited exercise of (not only bilateral) treaty negotiation in fisheries was performed since the 19th century[456]. Hereinafter,

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[452] In this sense see, among others, W.R. EDESON, J.F. PULVENIS, "Bilateral and Joint Venture Fisheries Agreements", in *The Legal Regime of Fisheries in the Caribbean region*, Vol. 7, 1983, p. 93.

[453] See R. CASADO RAIGÓN, "Le droit de la mer jusqu'à la conférence de Genève de 1960", in R. CASADO RAIGÓN, G. CATALDI (sous la direction de), *L'évolution et l'état actuel du droit international de la mer : mélanges de droit de la mer offerts à Daniel Vignes*, Bruxelles, 2009, p. 101.

[454] The situation was different with regard to navigation and maritime trade. After the discovery of the Americas, several maritime nations called into question the legitimacy of the exclusive rights claimed by Spain and Portugal over the new lands discovered, leading to a theorization of the principle of the freedom of the seas. For a fuller account on this point see Section III in this Chapter.

[455] See the US Presidential Proclamation 2668, of 28 September 1945, *Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas.*

[456] See, in particular, the Convention respecting fisheries, boundary and the restoration of slaves between the United States of America and the United Kingdom of Great Britain and Ireland, also known as the London Convention of 1818. Furthermore, on 6 May 1882, the United Kingdom, Belgium, Netherland, Denmark, Belgium and France signed a multilateral agreement, the International Convention for regulating the police of the North Sea fisheries outside territorial waters, also called North Sea Fisheries Convention. For a comprehensive account of fisheries laws and agreements in force before the 1945 Truman Proclamation see R. CASADO RAIGÓN, op. cit. p. 101; L. LUCCHINI, M. VCELCKEL, *Droit de la mer, Délimitation, Navigation et Pêche*, Paris, 1996, p. 391 – 410.

arrangements with coastal States continued to be signed over time, in order to secure logistic support to fishing operations carried out by external fleets in coastal State's adjacent waters[457].

Around the 1970s, when coastal States, and especially developing States, began to extend their jurisdiction over natural resources beyond 12 nautical miles, till unilaterally declaring exclusive economic zones of 200 nautical miles[458], the EEC started to conclude bilateral fishing agreements with the coastal States concerned in order to preserve fishing opportunities for the EEC fishing vessels outside the EEC waters. In particular, with the Council Resolution of 3 November 1976 on certain external aspects of the creation of a 200-mile fishing zone in the Community, it was agreed that the Member States would have, as from 1 January 1977, extended the limits of their fishing zones to 200 miles off the North Sea and North Atlantic coasts. As such, the EEC Member States gave full recognition to the principle asserted within the first sessions of Third United Nations Conference on the Law of the Sea, recognising that coastal States are empowered to declare exclusive economic zones[459].

As a consequence, it was established that the exploitation of fishery resources in these zones by fishing vessels of third countries, as well as the regulation of fishing rights of Community fishermen in third countries waters, shall be governed by agreements directly concluded between the Community and the third countries concerned.

This principle is mirrored, nowadays, in article 3 (1) of the Treaty on the Functioning of the European Union (TFEU), which states the Union 'shall have exclusive competence in the [..] conservation of the biological resources under the common fisheries policy'. As ruled by the Court of Justice in this respect, in fact, whenever the Treaties confer to the Union the power to legislate in a specific area, this turns automatically in the external competence of the Union to negotiate international agreements with third countries in the area concerned[460].

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[457] On this point see E. WITBOOI, "The infusion of sustainability into bilateral fisheries agreements with developing countries", in *Marine Policy*, n° 32, 2008, p. 672; W.L. BLACK, "Soviet Fishery Agreements with developing countries: benefits or burden?", In *Marine Policy*, Vol. 7, Issue 3, 1983, p. 163 – 174.

[458] For a fuller account on this topic and especially on the impacts of EEZ declarations on the evolution of the international law of the sea see Chapter I, Section 3. On the origins, developments and legal regime of the exclusive economic zone see A. DEL VECCHIO, voce dell'Enciclopedia del diritto, Giuffré, 1993.

[459] In this respect, see A. DEL VECCHIO, "Sull'incidenza della normativa comunitaria sui trattati in materia di pesca fra Stati membri della CEE e Stati terzi", in *Rivista di diritto internazionale*, 1982, p. 571 – 582; T. TREVES, "La Comunità economica europea e la Conferenza sul diritto del mare", in *Rivista di diritto internazionale*, 1976, p. 445 – 467.

[460] See the **Judgment of the Court of Justice, of 31 March 1971, Commission of the European Communities vs Council of the European Communities, On the European Agreement on Road Transport (ERTA), Case 22-70. For extended treatment on this point see R.CASADO RAIGÓN, "La dimension internationale de la compétence de l'Union européenne en matière de pêche", in *Collected Studies in Honour of Professor DJAMSHID MOMTAZ*, 2017, p. ; T. TREVES, "La Comunità europea, l'Unione europea e il diritto del mare : recenti sviluppi", in A. DEL VECCHIO (directed by), *La politica marittima comunitaria*, Roma, 2009, p. 188.**

With regard to the impacts of the agreements entered into by the Community on the (multilateral and bilateral) agreements reached by the single Member States before 1977 (which was before the exercise of the exclusive competence for fisheries agreements by the Community), it can be noted, as a first remark, that the commitments existing before 1977 (especially under the 1964 London Fisheries Convention) were not consistent with the new rules arising from the fisheries agreements concluded by the Community on behalf of the Member States after 1977, given that the exclusivity character of treaty making power conferred to the EEC implied the exclusion of third-countries fishing rights in Community waters[461].

This conflict between the older international agreements and the new Community rules could have been solved in the framework of the Vienna Convention on the Law of the Treaties[462]. In particular, Article 30 (3) of the Convention sets out that when all the parties to the earlier treaty are parties also to the later treaty, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty. Given the incompatibility of previous international agreements with the new Community agreements in place after 1977, therefore, the latter prevailed on the first. Conversely, according to Article 30 (4) of the Convention, when the parties to the later treaty do not include all the parties to the earlier one, the treaty to which both States are parties continue to govern their mutual rights and obligations.

A case where these last circumstances could have occurred, was the infringement of the London Fisheries Convention and of the Franco – Spanish bilateral agreements of 1967 *committed by France in order to apply Community law* (case *Arbelaiz-Emazabel). However, due to the accession of Spain to the Community, the question of any international responsibility of France was never raised in practice.*

As for the fisheries bilateral agreements concluded by the Community since 1977 on behalf of the Member States[463], they have been negotiated in the general legal framework provided for by

[461] On the incompatibility between the Community law arising from the agreements signed after the 1976 Council Resolution and the international rules previously in force, with particular reference to the 1964 London Fisheries Convention and the Spain/France Fisheries Agreement, of 22nd March 1967, see A. DEL VECCHIO, *Sull'incidenza della normativa comunitaria sui trattati in materia di pesca fra Stati membri della CEE e Stati terzi,* op. cit. p. 573-575. In the same view, see U. VILLANI, *Sui rapporti tra la C.e.e. e la Spagna in materia di pesca*, in *La politica mediterranea della C.e.e*., Napoli, 1981, p. 470 ff.; GONZALES CAMPOS, "Las relaciones entre Espana y la C.e.e. en materia de pesca", in F. LEITA, T. SCOVAZZI (directed by) *Il regime della pesca nella Comunità Economica Europea*, Milano, 1979, p. 157. Otherwise, in favour of the compatibility between the two systems, see SOUBEYROL*,* "Les droits de pêche des espagnols dans les zones maritime gérées par la C.e.e.: État actuel et perspectives", in *Rivista trimestrale di diritto europeo*, 1978, p. 193 – 203.

[462] A. DEL VECCHIO, *Sull'incidenza della normativa comunitaria sui trattati in materia di pesca fra Stati membri della CEE e Stati terzi,* op. cit. p. 582.

[463] The first agreements of the EEC have been concluded with: the United States of America, on 15 February 1977; Denmark and Faeroe Islands, on 15 March 1977; Sweden on 21 March 1977; Spain on 23 September

the UNCLOS. On the one hand, the UNCLOS recognises the possibility of each coastal State to extend its sovereignty rights within 200 nautical miles from the baselines delimiting the territorial sea. On the other, it requires the conclusion of international agreements to regulate the access of foreign vessels to fish stock surplus not used by the coastal states' local fleets.

At the present time, there are 2 main categories of fishing bilateral agreements used by the European Union, the main features of which is worth to be briefly described here. Under the so-called **'Fisheries partnership agreements'** (FPAs) the European Union provides the third State with financial and technical support in exchange for fishing rights. This kind of agreements, that generally are concluded with African, Caribbean and Pacific (ACP) countries[464], was introduced by the 2002 reform of the Common Fisheries Policy (CFP), taking into account the outcome of the World Summit on Sustainable Development held in Johannesburg in 2002. As stressed by the Commission in its Communication on an integrated framework for fisheries partnership agreements with third countries, these agreements are expected to provide a mutual benefit, consolidating partnership between the EU and the third countries concerned, with the purpose of developing a sustainable exploitation of marine living resources and, at the same time, of enhancing the value of fisheries products[465].

These objectives are pursued by exchanging access rights in the third State's EEZ with a 'financial contribution' which is paid in part by the European Union and in part through fees from ship owners. The underlying idea is that the financial contribution allocated to the third State is not merely a 'payment', but a contribute to investments in sustainable fisheries practices and policies[466]. Under this perspective, the financial amount provided for by the Union includes, in addition to compensation for fishing rights, also a 'sectoral support'[467] aimed at financing a various measures, such as scientific assessment of fish stocks, research, implementation of technical conservation measures, control and monitoring of fishing activities, follow-up and evaluation of sustainable

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1978; Canada on 4 December 1979; Norway on 27 June 1980. For a full account see T. SCOVAZZI, "Problemi della regolamentazione comunitaria della pesca marina", in *Rivista di diritto internazionale,*, 1978, pp. 28 - 43.

[464] At this time, the European Union has concluded thirteen SFPAs with the following ACP countries: Cape Verde, Comoros, Ivory Coast, Gabon, Kiribati, Guinea-Bissau, Madagascar, Mauritius, São Tomé, Seychelles, Senegal, Mauritania and Liberia.

[465] See the *Communication from the Commission on an integrated framework for fisheries partnership agreements with third countries, of 23 December 2002, COM (2002) 637 final, p. 4.*

[466] On the changing of the compensatory nature of the EU financial contribution, in connection with the 2002 CFP reform see C. TEIJO GARCÍA, "Una aproximación a la práctica convencional de los acuedos de asociación pesquera suscritos por la Comunidad Europea", in PUEYO LOSA, J. URBINA (directed by), *La cooperación internacional en la ordenación de los mares y océanos*, Madrid, 2009, p. 263.

[467] See article 32 (2) of the CFP Basic Regulation.

fishing practices[468]. Both the compensation and the sectoral support are set-out in the Protocols and Annexes attached to the Agreement[469].

Geographically, FPAs have been concluded for tuna fisheries (Cape Verde, Comoros, Cook Islands, Ivory Coast, Gabon, Kiribati, Liberia, Madagascar, Mauritania, Mauritius, Mozambique, São Tomé and Principe, Seychelles, Senegal and the Solomon Islands), and for mixed fisheries (Greenland, Morocco and Guinea-Bissau)[470].

Differently from FPAs, the so-called 'northern agreements' concern a limited number of countries (Norway, Iceland and Faeroe Islands)[471]. Historically, they started to be developed when the Member States of the EEC bordering the Atlantic Ocean declared their respective EEZs, and it was therefore necessary to negotiate the management of shared resources with EEC neighbours. The principle of northern agreements is to ensure the joint management of shared (migratory) resources and exchange of fishing rights in the Parties reciprocal waters, especially when the fleets of different countries are not interested in the same stocks.

In recent years, fisheries bilateral agreements, especially those concluded with developing States in Africa, have been often subjected to criticism from NGOs, public opinion, Member States administrations and even from the European Commission. In addition to complaints about the high cost on the EU budget, it was noted that, from the ecological point of view, the biological basis for the adoption of these agreements was very weak.

Under Article 62 of the UNCLOS, it is up to the coastal State to assess the existence of a fish stock surplus in its EEZ. In many cases, however, the capacity of developing States to assess stocks is not adequate and these countries are tempted to declare surplus despite uncertainty about the real status of stocks. In this respect, it has been alleged that overexploitation of third countries'

[468] See E. WITBOOI, op. cit, p. 673.
[469] Each FPA is composed by a general Framework Agreement complemented by a renewable Application Protocol and Annexes, that set-up the practical conditions for the implementation of the framework outlined in the Agreement, and namely: the agreed fishing opportunities, the amount of financial contribution granted by the Union, the fishing zones covered by the Agreement, its duration, the reciprocal obligations of the Parties, the conditions for the revision, suspension and denunciation etc.
[470] See the website of the European Commission, at the link:
https://ec.europa.eu/fisheries/cfp/international/agreements_en
[471] As for Russia, following the accession to the Union of Poland, Estonia, Latvia and Lithuania in 2004, a process of negotiation was initiated in order to replace the International Baltic Sea Fisheries Commission (a multilateral body) with a bilateral agreement between Russia and the Union. However, a final agreement on quota allocations was not reached, since the Union advocated the transfer of the allocations agreed within the IBFC in the new agreement, whereas Russia considered these quotas no longer applicable. For a fuller account on this topic see E. PENAS LADO, *The Common Fisheries Policy: the Quest for Sustainability*, 2016, Brussels, p. 163.

resources by EU fleets could result in 'a discrepancy between the Community's commitment to sustainable fishing in its own waters and in waters beyond its jurisdiction'[472].

Given the significance of fisheries in many developing coastal States economies, the depletion of fish stock caused by EU fleets was therefore considered inacceptable, because detrimental to living conditions of local fishermen. This idea was reinforced when considering the low level of social benefits provided for by Community funds for people living in coastal communities in the third States concerned.

The Community has progressively addressed these arguments, acknowledging the need to incorporate sustainability into fisheries agreements. Already in the 2002 reform of the CFP, many efforts were made to improve consistency between the basic principles of the common fisheries policy valid for internal waters and its external pillar.

In this vein, the financial contribution paid by the EU in exchange of fishing rights in the EEZs of third countries started to be delivered with a view to strengthen the administrative and scientific capacity of these States of developing and implementing sustainable fishing policies. In the FPAs, therefore, the financial amount is clearly subdivided into a 'compensation' for fishing opportunities and an amount dedicated to 'partnership' activities, such as resource monitoring and evaluation, inspections, installations of vessels monitoring system, safety of local small scales fisheries etc.

Additionally, as stressed by the Council Conclusions on the Commission Communication on an Integrated Framework for Fisheries Partnership Agreements[473] the impacts assessments related to the potential environmental and socio-economic impacts of fisheries agreements shall be conducted before starting negotiations[474].

In continuity with this approach, the 2013 CFP reform has further strengthen the role of sustainability in the EU's bilateral fisheries relations. Firstly, for the first time ever, the external pillar of the common fisheries policy is now formally incorporated in the general framework of the CFP. More precisely, Part VI of the new Basic Regulation is expressly dedicated to the 'external aspects' of the common fisheries policy[475]. This means, in other words, that the CFP external

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[472] E. WITBOOI, op. cit. p. 673.

[473] See the Council Conclusions 11485/1/04, of 15 July 2004, on the Commission Communication on an Integrated Framework for Fisheries Partnership Agreements with Third Countries, Brussels, p. 8.

[474] While in the past negotiations of the agreements were conducted on an *ad-hoc* basis, without a common, comprehensive and predetermined policy framework, since the 2002 reform the content of each agreement is pre-set should include at least the setting of the EU's fishing opportunities, precise allocation of the amounts, procedures for implementation, monitoring and review of the Agreement.

[475] See Articles 28 – 32 of Regulation (EU) No. 1380/2013, of 11 December 2013, on the reform of the Common Fisheries Policy.

dimension is now an integral part of the CFP, and that the EU is equally committed to sustainability in both internal and external waters.

Secondly, in order to stress the emphasis on sustainability, fisheries partnership agreements (FPAs) are renamed 'Sustainable Fisheries Partnership Agreements' (SFPAs). It is worth noting, in this respect, that these agreements are expected to 'establish a legal, environmental, economic and social governance framework for fishing activities carried out by Union fishing vessels in third country waters' (Article 31 (1)). This framework may include development and support for scientific and research institutions, for monitoring, control and surveillance capabilities and, more widely, for 'other capacity building elements concerning the development of a sustainable fisheries policy of the third country', including an obligation for EU vessels to employ local fishermen, as well as incentives to land catches for processing in the country.

The alignment with the general objectives of the CFP is highlighted by the need to introduce in the SFPAs a landing obligation for the EU vessels fishing in third States waters (Article 31 (3)). In addition, it is clearly established that the fish stock surplus in the EEZs of third countries must be determined 'in a clear and transparent manner, on the basis of the best available scientific advice and of the relevant information exchanged between the Union and the third country about the total fishing effort on the affected stocks by all fleets' (Article 31 (4)). In this way, the scientific basis for the adoption of decisions has been improved, helping third countries in assessing the amount of fish to be caught by EU vessels. Additionally, the new agreements may include an obligation for EU vessels to employ local fishermen, encourage them to land catches in the country for processing or promote the establishment of joint enterprises.

An important aspect of SFPAs is that such agreements can contain specific clauses that regulate the activities of EU operators fishing in their framework. Beyond the human rights clause (see the following section) there are two important clauses which should (but not mandatorily) be included in SFPAs, that are particularly relevant for the EU fishing enterprises: the so-called 'exclusivity clause' and the clause prohibiting the granting of more favourable conditions to non EU-fleets.

On the basis of the exclusivity clause, EU fishing vessels are allowed to fish in the waters of the third country with which a SFA is in force only whether they are in possession of a fishing authorisation which has been issued in accordance with that agreement (Article 31 (5) of the Basic Regulation). The exclusivity clause, which is a quite recent practice in EU fisheries, aims to prevent that EU fishing vessels operating under a SFPA might conclude, once that fishing quotas established under the SFPA are reached, a private fishing agreement in order to continue to fish in

that waters. In case of reflagging to circumvent this obligation, the vessel is no longer allowed to fish in the EEZ of the country concerned.

In this respect, as clearly stated by the Court of Justice of the European Union in a preliminary ruling concerning the interpretation of the last agreement concluded between the Union and Morocco[476], a EU fishing vessel cannot ' be able to access Moroccan fishing zones in order to carry out fishing activites throught the conclusion of [..] an arrangement with a Moroccan company holding a licence issued by the Moroccan authorities [..] or by using any other legal instrument [..] outside the scope of the Agreement, without the intervention of the competent European Union authorities'.

In this vein, in the framework of the 2013 CFP, the Fishing Authorisation Regulation[477] has been revised, in order to reinforce EU's capacity to *monitor, control and survey* Member States' external fleets and prevent cases of abusive reflagging, as well as to simplify the regulatory framework of fishing licenses by removing inconsistencies and legal uncertainties.

Regarding the clause prohibiting the granting of more favourable conditions to non-EU fleets operating in the waters of a EU coastal partner country, it should be stressed that these conditions concern the 'conservation, development and management of resources, financial arrangements, fees and rights relating the issuing of fishing authorisation' (Article 31 (6) (a) of the Basic Regulation). This is an important provision, aiming at protecting the interests of the EU fishing industry in comparison with those of foreign fleets operating in the same EEZs.

It should be kept in mind, in fact, that the fisheries policies of non-EU nations, if compared to the EU external fisheries policy, are often more geared towards short-term profit agreements, and less inclined to support the development objectives and the local needs of the coastal States. This requires efforts and commitment from the side of the EU operators, that are compensated, through this clause, by the provision of conditions (at least) equal to those ensured to other countries' fishers.

A last aspect that deserves attention, is that in accordance with the CFP Basic Regulation, each SFPA clearly states in the Protocol the precise amount of the EU financial compensation to be paid for access to the third countries' surplus resources. As aforementioned, part of this assistance is paid directly by the Union's vessels owners. In this respect, the reform provides, on the one hand, that the 'sectoral support' offered by the EU to sustain development of the fisheries sector in the

[476] See the judgment of the Court of Justice, of 9 October 2014, in the Ahlström and Others case (C-565/13), paragraphs 33-35.

[477] Council Regulation (EC) No 1006/2008, of 29 September 2008, concerning authorisations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters, amending Regulations (EEC) No 2847/93 and (EC) No 1627/94 and repealing Regulation (EC) No 3317/94.

partner country (i.e. the public component of the financial compensation) shall be 'clearly decoupled from payments to access to fisheries resources' (Article 31 (2) of the Basic Regulation). On the other, it provides for a 'greater responsibility'[478] of the private sector, by increasing the part of the total contribution provided by the fishing industry (especially in relation to tuna agreements). This rule aims to partially mitigate the critics of NGOs, which stressed that using public funds to secure the access of private operators to fisheries resources in third countries is as a sort of hidden subsides. The clear separation between financial compensation to access fisheries resources and the sectoral support provided for development aims, allows in addition an improved targeting and monitoring of sectoral support utilisation by the partner country. The more the component of sectoral support in the financial compensation under a SPA is independent and well defined, the more the Union can require the achievement of specific results as a condition for payments and closely monitor the progress accomplished.

V. 3. The human rights clause in SFPAs and its impacts on EU fisheries enterprises

It could be argued that the 2013 CFP reform has introduced major changes in the conception and delineation of international fisheries agreements, that produce significant impacts on the EU fishing enterprises, namely on ship-owners and fishermen whose vessels fish in third countries waters in the framework of these agreements. Firstly, in accordance with the reform, Fisheries Partnership Agreements (FPAs) have been renamed as 'Sustainable Fisheries Partnership Agreements' (SFPAs) in order to stress their focus on sustainability goals, embracing now two essential dimensions: the environmental sustainability and the "humanitarian" sustainability, the latter by the mandatory insertion of a "human rights clause" into bilateral fisheries agreements. Secondly, the 2013 reform promotes, compared to the past, a closer interaction between the external dimension of the CFP and the Development Cooperation Policy of the European Union. Here we analyse these changes and we will assess the way they affect the EU fisheries sector.

We mentioned that SFPAs shall include a clause concerning respect for democratic principles and human rights, as a fundamental element of the Agreement which can lead to its suspension in case of infringement. This is undoubtedly a major change introduced by the recent CFP reform, given that 'human rights clauses' are often inserted in many of the agreements related to other EU external policies, such as trade, development and investments, but not yet for fisheries.

[478] See the Communication of the Commission on the External Dimension of the Common Fisheries Policy, op. cit. p. 11 -12.

Nevertheless, in many developing countries, human rights issues are of a crucial importance for the development of sustainable fisheries policies. An analysis of the fisheries sector in Cambodia, Ecuador, Ghana, India, Indonesia, Malawi, the Philippines, Thailand, Tanzania, and many other countries, in fact, shows that several violations of human rights are committed in connection with fisheries.

Poor fishing communities, for instance, are often victims of forced evictions. This occurred for example in Ecuador and Bangladesh, where common property mangrove forests used by local fishers and foragers have been massively converted into private commercial shrimp farms. In addition, in the Mekong river basin, rivers and floodplains used by small fishers and farmers have been irreversibly modified to promote large-scale irrigated agriculture and hydropower. In many cases, forced evictions affecting fisheries communities are practiced in order to create conservation areas (such as marine protected areas and national parks), or to promote coastal modernisation, residential development and tourism.

Furthermore, in many regions of the world, when crossing maritime boundaries across the States, fishermen are exposed to the risk of imprisonment without trial or even occasional killing, when boundaries delimitations are contentious. The long list of human rights violations connected to fisheries include also child labour (on board of fishing vessels, in processing sector, in aquaculture), forced labour, gender-based discrimination (especially in relation to a 'culture of acceptance' of women subordination in fisheries business), and lack of personal safety, since small boats are often exposed to accidents, acts of violence at sea and vandalism committed by larger vessels[479].

In the light of this, the 2013 reform of the CFP has tried to overcome the approach adopted in the past, when fisheries agreements between the EU and third countries were negotiated only on the basis of commercial interests.

While FPAs agreements under the 2002 CFP reform paved the way for the inclusion of ecological issues into fisheries agreements, the SFPAs under the 2013 CFP reform go further, promoting a wider concept of sustainability, which includes not only environmental aspects but also improvement of human living conditions.

In particular, in its Communication on the External dimension of the CFP the European Commission has stressed that 'International agreements between the EU and individual third countries should remain the framework for fishing activities of the EU fleet in third-country waters'

[479] For a comprehensive analysis of the issues related to human rights violations in fisheries sector see, among others, B. RATNER, B. ÅSGÅRD, E.H, ALLISON, "Fishing for rights: human rights, development and fisheries sector reform", in *Global Environmental Change* 27 (2014), p. 120 – 140; E. BENNETT, "Gender, fisheries and development", in *Marine Policy* 29 (2005) p. 451 - 459.

but 'in future, the EU should make the respect of human rights an essential condition for concluding and maintaining the agreement'. As a consequence 'A human-rights clause should be inserted in all agreements [...] so that breaches of essential and fundamental elements of human rights and democratic principles would ultimately result in a suspension of the protocol to the agreement'[480].

This principle is reflected in the provisions of the CFP Basic Regulation, and especially in Article 31 (6), that expressly requires the Union to 'ensure that Sustainable fisheries partnership agreements include a clause concerning respect for democratic principles and human rights, which constitutes an essential element of such agreement'.

As for the structure of the human rights clause to be inserted in the SFPAs, it has been highlighted that this is generally composed by two sub-clauses: one making reference to the obligation to respect human rights and democratic principles, which is referred as an essential element of the Agreement, and the other authorising one of the Parties to take appropriate measures in case of violation of such general obligation by the other (the so-called 'non-execution clause)[481]. This is, at least, the so called 'Cotonou Model' of Human Rights Clause, that the Communication of the European Commission on the External Dimension of the CFP indicates as the model to follow in fisheries partnership agreements signed with African, Caribbean and Pacific (ACP) countries[482]. A peculiar aspect of the 'Cotonou Model' is that, once that a breach of the essential obligation by either Party has been ascertained, a mechanism of a preventive nature can be activated before suspending the execution of the agreement[483].

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[480] See the Commission communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, of 13 July 2011, on the External Dimension of the Common Fisheries Policy, COM (2011) 424 final, p. 4.

[481] See M. ARENAS MEZA, "The human rights clause in the Sustainable Fisheries Partnership Agreements between the European Union and non-EU countries: an analysis of the practice", in A. DEL VECCHIO (directed by), *International Law and Maritime Governance: current issues and challenges for regional economic integration organisations*, Napoli, 2016, pp. 147 – 169.

[482] It is worth recalling that all the fisheries agreements entered into by the Union with the ACP countries are concluded in the framework of the so-called **Partnership agreement between the members of the African, Caribbean and Pacific (ACP) Group of States on one hand, and the European Community and its Member States on the other, which was signed in Cotonou on 23 June 2000, also known as the "Cotonou Agreement", O***J L 317, 15.12.2000.* In particular, Article 53 of the Cotonou Agreement allows for the conclusion of fisheries partnership agreements in the framework of economic cooperation between the EU and third countries.

[483] The procedure outlined in Article 96 of the Cotonou Agreement states, firstly, that formal consultations between the Parties can take place only when a process of 'political dialogue' among them has failed. As stated in several agreements, consultations can be then carried out in the framework of a Joint Committee which is generally established under the SFPA (but this does not apply in all cases). After a maximum period of 60 days, if an amicable settlement is not reached, the Party that alleges the violation of the 'essential elements' of the agreement can adopt 'appropriate measures', the content of which is not clearly specified in the Cotonou model. The sole measure expressly provided for is the suspension of the agreement (non-execution clause). Beyond such measure, which must be in any case proportional to the violation and consistent with International Law, the vast majority of Protocols provide for the suspension or review of the

In others models of human rights clause, more emphasis is put on principle of market economy and suspension in cases of special urgency (Bulgarian model of Human Rights Clause), or on the Universal Declaration of Human Rights of 1948 (Moroccan Human Rights Clause), or on the principles of EU Law (such as in the Greenland Agreement, which refers to Article 6 of the Treaty on the European Union)[484].

As a whole, it should be stressed that an important outcome of the 2013 CFP reform is that all the SFPAs recently concluded by the Union integrate, at varying degrees, human rights issues in their reference framework. Given the initiatives undertaken by the international community at the multilateral (global) level to address the same challenges, especially in the context of the Food and Agricultural Organisation (FAO)[485], it can be reasonably expected that this trend will be reinforced in the years to come.

There are, however, several problematic issues that still need to be addressed as far as the structure of the human rights clause is concerned. In a number of Protocols currently in force, for instance, the scope of application of the clause is not well clarified, generally referring to the breaching of 'essential and fundamental aspects of human rights and democratic principles'[486]. In addition, it is not specified what is meant by 'appropriate measures' that one of the Parties can take, with exception of the suspension of the agreement. Furthermore, these measures are supposed to be applied just in exceptional circumstances, as measures of a last resort, after the failure of consultations. Even when they could be immediately applied, it is not stated what shall be intended for "case of urgency". Nevertheless, it is worth noting that a more rigid and fixed scheme could be counterproductive, since the human rights clause needs to be flexible to be adapted to political conditions and situations which vary from country to country.

Another important aspect of the change of direction promoted by the 2013 reform is the alignment of the EU fisheries international policy with other external policies of the EU, and especially with the Development Cooperation policy.

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financial compensation paid by the European Union to the third State in case of violation of the essential element of the agreement by the latter. The decision to suspend the application of the agreement shall, in any case, be notified to the other Party at least three months before its coming into force. If an amicable settlement is reached after suspension, Protocols generally facilitate the immediate reapplying. In addition, in case of (not clearly specified) 'special urgency' or when the consultation process is rejected, the Party alleging the violation of human rights can directly adopt the necessary 'appropriate measures' without embarking a consultation process. For a full analysis of these procedures and mechanisms see M. A. MEZA, op. cit. pp. 154 – 160.

[484] M. ARENAS MEZA, op. cit. .

[485]See in particular the FAO Voluntary Guidelines for Securing Small-Scale Fisheries in the context of food security and poverty eradication, Rome, 2015 (the SSF Guidelines), developed as a complement to the 1995 FAO Code of Conduct for Responsible Fisheries.

[486] On the violations of 'democratic principles' alleged by the Polisario Front to object the validity of the fisheries agreement concluded by the EU with Morocco, see R. CASADO RAIGÓN, op. cit.

Traditionally, fisheries and development have always been considered separated, or even conflicting[487]. Bilateral fisheries agreements are regarded, in general, as the appropriate forum to address fisheries issues, while cooperation and development policies in third country mainly focus on agriculture.

Fisheries has, however, an important role to play in the framework of development policies. In many ACP countries, this sector offers great opportunities in terms of food security, poverty eradication, employment, economic growth and international trade.

The reform of the CFP, therefore, aims at making the financial support provided for under SFPAs agreements consistent with development projects promoted by the Union in third countries. From the technical and operational point of view, this means that fisheries needs to be inserted among the national priorities outlined in the National Indicative Programmes (NIPs) established by the third countries under the European Development Fund (EDF). Each NIP has, in particular, a section which is dedicated to agriculture and food security, in which fisheries and aquaculture could be integrated. Secondly, DG MARE and DG DEVCO, i.e. the Directorates-General of the European Commission respectively in charge of fisheries and development policies, must reinforce their cooperation and coordination. This has been initiated in recent times at the organisational level, by employing in DG DEVCO officials tasked with fisheries and aquaculture issues. In addition, officials working in the several geographical departments of the DG DEVCO, as well as in the EU Delegations, are now involved in the evaluation of SFPAs as well as in monitoring the implementation of IUU fisheries rules[488]. Most of all, DG DEVCO representatives are increasingly included in the negotiations of fisheries agreements, as well as in multilateral *fora* related to fisheries.

[487] As stressed by C. TEIJO GARCÍA, in the past many commentators pointed out that fisheries agreements, especially before the 2002 CFP reform, were not consistent with the general principles of Community law, since they were mainly focused on the need to preserve the interests of the EU fishing fleets, without taking into account development cooperation goals that, as requested by Article 178 of the Treaty establishing the European Community, shall be integrated in the implementation of all European policies. See, in this respect, TEIJO GARCÍA, "Pesca y cooperación al desarrollo en el marco de las relaciones Unión europea – ACP", in *Revista de Derecho Comunitario Europeo*, nº 12, 2008, pp. 743-771. On the divergence of interest between the two policies see also A. ACHEAMPONG, "Coherence between EU Fisheries Agreements and EU Development Cooperation: the case of West Africa", ECDPM Working Paper No. 52, Maastricht, 1997.

[488] See the interview with Fernando Frutuoso de Melo, Director-General for Development Cooperation at the European Commisssion, avaible at the link: http://agritrade.cta.int/Fisheries/Topics/Interview-points-of-view-from-ACP-EU-stakeholders/An-interview-with-Fernando-Frutuoso-de-Melo-Director-General-for-Development-Cooperation-at-the-European-Commission.

As for the impacts of the framework above described on the EU fishing enterprises, it should be stressed that many representatives of the EU fisheries industry have expressed some concerns about the translation into practice of the new objectives of the CFP[489].

It is worth recalling, in fact, that SFPAs should be consistent with developments goals, but should not be transformed into international development agreements. Despite Article 7 TFEU requires to promote coherence between the policies and activities of the EU which are interlinked and need therefore to be coordinated, fisheries agreements have their legal basis in Article 3 (1) (d) of the TFEU, concerning the conservation of living marine resources, that is an exclusive competence of the EU. Development agreements, instead, have their own legal basis in Article 4 (4) TFEU, concerning development cooperation and humanitarian aid, which is a shared policy between the EU and the Member States[490].

In parallel, the human rights clause should not alienate SFPAs from those that are the primary objectives of the CFP as outlined in Article 39 TFEU and in the Fisheries Basic Regulation, namely to increase fishing productivity, promote technical progress, ensure sustainable fishing and aquaculture production, ensure that food supplies reach consumers at reasonable prices. Thus, the main beneficiary of SFPAs must remain the fishing industry[491].

In this respect, it is our view that it is possible to find a compromise between the need to enlarge the scope of SFAs in order to reinforce sustainability (both at the environmental, social and human levels) and the need to preserve the primacy of fisheries interests in bilateral agreements.

This can only be achieved whether the idea of 'human rights', 'democratic principles' and 'development goals' underpinning the current text of SFPAs is interpreted in a restrictive way, focusing on concerns, challenges and policy objectives that arise exclusively from fisheries related issues.

As stated above, for instance, the formulation of the human rights clause to be inserted into SFPAs is vague, since it does not clearly state what exactly is meant for 'human rights', 'democratic principles', 'rule of law', 'good governance', whose violation may lead to the suspension of the agreement (with inevitable consequences on the business of EU fishers operating in the coastal State's waters).

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[489]In this respect see, as an example, the written observations of the Shipowners' Association of Vigo Harbour, i.e. a Spanish association of ship-owners which includes among its members many ship-owners fishing under SFPAs. The related documents are available at the link: http://www.arvi.org/politica-pesquera-comun/reforma-y-desarrollo.html

[490] See J. M. SOBRINO HEREDIA, G.A. OANTA, "The Sustainable Fisheries Partnership Agreements of the European Union and the Objectives of the Common Fisheries Policy: Fisheries and/or Development?" in *Spanish yearbook of international law*, nº 19, 2015, p. 62.

[491] J. M. SOBRINO HEREDIA, G.A. OANTA, ibid. p. 81.

Or, it has been stressed that in many development countries local fishing communities are often poor, marginalised and subjected to various forms of oppression and abuse. Possible lines of actions to reduce the incidence of human rights violations affecting these communities include strengthening the mechanism for access to justice as well as reinforcing the role of civil society advocacy groups in developing countries[492]. Since these elements are essential to allow the inclusion of fishing communities in development processes that affect them, they could be used as criteria to assess the fulfilment of obligations arising from the human rights clause inserted in SFPAs.

In other words, since the CFP reform requires, on the one hand, the respect of human rights as a precondition for the conclusion of SFPAs, and, on the other, it requires more coherence between fisheries and development policies, the vagueness in the formulation of the human rights clause might be addressed by assessing whether the third country has implemented appropriate judicial and advocacy mechanisms at the disposal of its fisheries communities.

This would be consistent with the general objectives of the CFP, since the Union is now committed to preserve its core principles (among which the sustainable development and well-being of coastal communities) also in the waters of third countries. At the same time, it is consistent with development goals and human rights issues, but with a clear focus on the fisheries dimension, which preserves the interests of the EU fishing industries from the risk of a political strumentalisation of fisheries agreements.

V. 4. Private fisheries agreements concluded by EU fisheries enterprises: the invisible component of the EU (bilateral) fishery policy

Outside the framework of the agreements concluded by the Union with third countries, many private agreements are concluded directly by EU companies with coastal States. Such private agreements are allowed when there is no a Sustainable Fisheries Partnership Agreement (SFPA) with exclusivity clause in place between the EU and the country concerned[493].

Furthermore, EU companies can enter into chartering agreements under which EU flagged vessels have access to a coastal State's EEZ in collaboration with local companies. Under this scheme, coastal States authorise, in other words, national fishing enterprises to charter foreign

[492] B. RATNER, B. ÅSGÅRD, E.H, ALLISON, "Fishing for rights: human rights, development and fisheries sector reform", in *Global Environmental Change* 27 (2014), p. 125.
[493] For an interpretation of the exclusivity clause in this sense see the judgment of the Court of Justice in the the Ahlström and Others case (C-565/13) abovementioned.

vessels[494]. Chartering may take the form of either a demise (or bareboat) involving only the vessel, or a temporary charter including both the vessel and its crew.

A third aspect of the private dimension of bilateral fishing relations is the establishment of joint ventures between EU fishing companies and local companies. This implies the transfer of EU fishing vessels to the fleet of the coastal State (reflagging)[495] with subsequent loss of fishing rights in EU waters and allocation of new fishing opportunities in third country EEZ.

Since the mid-1990s, the creation of joint ventures has received financial support from the EU, allowing the establishment of more than 300 mixed enterprises, the majority of which in Africa (237 vessels, especially in Morocco, Senegal, Namibia, Mozambique and Angola) and South America (123 vessels, especially in Argentina, Chile and the Falkland Islands)[496]. As for the Mediterranean, the conclusion of bilateral agreements related to fisheries is an long-standing practice, initiated by Spain and Italy even before that the EEC began to exercise exclusive competence over fisheries. Nevertheless, in the Mediterranean, the promotion of joint ventures (as well as of bilateral agreements with North-African partners) has often proven to be difficult for several reasons[497].

In recent times, some have argued that the Union competence to negotiate international fisheries agreements should be re-nationalised, meaning that it would be up to Member States to conclude such agreements, or privatised. This because not all the Member States benefit from these agreements. Taking Italy as an example, the fact that EU partnerships agreements are mainly focused on countries on the Atlantic coasts (Cape Verde, Ivory Coast, Gabon, Guinea-Bissau, Liberia, Mauritania, Morocco e Senegal), and not in the Mediterranean, leaves Italian fishing vessels unprotected and at risk to be seized by Tunisia and Lybia or Egypt, with which the EU has

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[494] In chartering agreements EU vessels usually can keep their flag of origin, but reflagging is sometime requested by coastal States.

[495] Differently from chartering agreements, the establishment of joint-ventures implies the reflagging of EU vessels.

[496] The most important joint-venture, co-founded with Argentina, was in operation between 1994 and 1999 and exported 32 European fishing vessels, whose catches were prevalently imported by the Community (95%). See on this point the document of the European Parliament, "Beyond the European Seas: The external dimension of the Common Fisheries Policy", November 2015.

[497] Many projects for the establishment of joint-fishing ventures have failed even before their practical implementation. This occurred for both MAROPECHE, an Hispano-Moroccan company founded in 1969 and STIPEC, which was established under an agreement between the government of Tunisia and Italian private enterprises. For a comprehensive analysis on these issues see A. DEL VECCHIO, "Joint Ventures in Fisheries Established by Mediterranean States, with Special Reference to Italy", in PHARAND, LEANZA (directed by), *The Continental Shelf and the Esclusive Economic Zone,* Dordrecht 1993, pp. 287 – 290. For an in-depht analysis of the legal issues relating to fisheries in the Mediterranean see R. CASADO RAIGÓN, *El regimen jurídico de la pesca en el Mediterráneo. La aplicación de la Política Pesquera de la Comunidad Europea*, Sevilla, 2008; A. DEL VECCHIO, "Il principio dello sviluppo sostenibile nello sfruttamento delle risorse biologiche del Mediterraneo", in AYMARD, MAFFETTONE, BARBERINI (a cura di), *Il Mediterraneo: ancora mare nostrum?*, in *Il Mediterraneo: ancora mare nostrum?*, Roma, 2004, pp. 27-40.

not entered yet any agreement[498]. In parallel, whereas the structural support to develop sustainable fishing sector in third countries through SFPAs principally supports the countries that have an interest in selling their technology, such as Germany, the geographical distribution of SFPAs is in the general interest of distant waters fishing nations, such as Spain. This explains why some Member States, especially the United Kingdom, Swede and Denmark have often criticised the high costs that the SFPAs imposes on EU budget, compared with the limited revenues that these countries receive in return.

It could be argued, however, that the re-nationalisation and/or privatisation of bilateral fisheries agreements would entail significant economic or practical disadvantages. As for re-nationalisation, it should be stressed that the negotiation and conclusion of fisheries agreements by the Union is, as noted above, a direct consequence of the Union exclusive competence in the conservation of marine biological resources established under Article 3 (1) of the TFEU. Therefore, any retrocession of Union competences to the Member States in this field would be a breach of the general principles of EU Law, requiring not only a change of the CFP framework but of the Treaties themselves. Secondly, there is a strategic interest of the European Union as a whole, in maintaining operational its external fleet, in order to ensure the supply of the European fisheries market (which is strongly dependent on imports from third countries), to combat abusive market prices and internationalise the principles of the CFP, by promoting them also in external waters[499].

Private agreements, in contrast, can be much more profit-oriented and less consistent with the CFP aims of promoting sustainable fishing and local development objectives. Apart from joint ventures supported in the framework of SFPAs concluded by the Union[500], the information on activities performed by vessels fishing under private agreements are in fact very scarce.

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[498]The specificity of the Mediterranean stems from the jurisdictional regime of its waters, from the status of stocks, which are neither abundant nor of high commercial value, from the diversity of Mediterranean States in terms of social, economic development, political systems, cultural and religious traditions, despite their geographical and historical proximity. For a full account on the fisheries legal regime in the Mediterranean, with particular reference to the challenges faced by the Mediterranean States, and later on by the Community, to conclude international fisheries agreements see A. DEL VECCHIO, "Dal regime degli accordi bilaterali al regime comunitario della pesca nel Mare Mediterraneao", in U. LEANZA (a cura di), Atti del Seminario di Studi Anacapri, 29-30 giugno 1992, pp. 105-113. On the disadvantages linked to geographical distribution of SFPAs for Italy see F. CAFFIO, "Mare: un'opportunità per l'Italia e per l'UE", in *Affari Internazionali*, December 2016. Available at:http://www.affarinternazionali.it/articolo.asp?ID=3732

[499] See on this point J. M. SOBRINO HEREDIA, G.A. OANTA, "The Sustainable Fisheries Partnership Agreements of the European Union and the Objectives of the Common Fisheries Policy: Fisheries and/or Development?", op. cit. p. 84.

[500]In the contexts of new SFPAs, under which particular importance is conferred to sectoral support, joint ventures can be used as valuable means to transfer capital, technology and technical knowledge to be provided to third countries.

Although these vessels fly the flags of EU member States and have access to EU market in the same way as vessels fishing under SFPAs, they are not required to provide the flag State with relevant information concerning target species, fishing areas, time at sea, type of gears used. As a consequence, it is very difficult to determine the number of EU vessels benefitting from these agreements and, more important, there is not a regulatory framework to ensure that the activities they carry on comply with EU laws and CFP standards[501].

In the context of the CFP reform, therefore, it has been pointed out that 'efforts shall be made at Union level to monitor the activities of Union fishing vessels that operate in non-Union waters outside the framework of Sustainable partnership agreements' (Article 31 of the Basic Regulation).

To this aim, in April 2013 the Commission has launched a consultation on the revision of the Fishing Authorisation Regulation[502], concerning authorisations for fishing activities carried out by the Union's vessels fishing outside EU waters and by third countries' vessels in Union waters. The consultation document accompanying the legislative review emphasises that in third countries' waters outside the framework of Fisheries Partnership Agreements and in the high seas not covered by any RMFO 'The quantity and quality of the data currently required from Member States are highly variable and some data has proved to be unreliable'[503]. In addition, the repetitive reflagging of the EU vessels[504] and the necessity to regulate fisheries activities under private authorisations are highlighted as major problems to be tackled. It is also worth nothing that the fisheries authorisation regime currently in place only apply to vessels exceeding 24 metres in length, when not covered by SFPAs or RMFOs. Furthermore, an additional regulatory gap is that there is no mechanism to ensure EU operators that the authorisations them extended by third countries authorities are issued

[501]For a full analysis of the problems arising in relation to management and control of such agreements see, among others, the paper prepared by the Environmental Justice Foundation, *European vessels fishing under the radar The need to regulate private and chartering agreements for access to external waters*, November 2016. On the control system established in the internal waters of the EU see, among others, G. SPERA, *Il regime della pesca nel diritto internazionale e nel diritto dell'Unione europea*, Torino, 2016, pp. 191 – 231.

[502] See the Council Regulation (EC) No 1006/2008, of 29 September 2008, concerning authorisations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters, amending Regulation (EEC) No 2847/93 and (EC) No 1627/94 and repealing Regulation (EC) No 3317/94, also known as Fishing Authorisation Regulation (FAR).

[503] See the Consultation document of the European Commission concerning the possible revision of the Fishing Authorisation Regulation (FAR), p. 3.

[504] Due to the lack of control over the EU external fleet, EU vessels can reflag towards third countries with more permissive rules and procedures related to IUU fisheries and, after a while, reflag again in the EU in order to benefit from access agreements concluded by the Union and from Union's subsides.

through valid and reliable procedures. Finally, the legal regime of fisheries licences authorisations does not cover chartering agreements[505].

The proposal for a revised Regulation drafted by the Commission has been voted by the Committee on Fisheries of the European Parliament on 5 December 2016[506]. The new proposed rules set-up a system for fishing authorisations applicable to all EU vessels fishing outside EU waters, including those fishing under private agreements, and to foreign vessels fishing in the EU waters. The main innovations are the provision of eligibility criteria and the institution of a common electronic register for all authorisations.

In practice, any EU vessel wishing to fish outside EU waters, irrespective whether in the framework of a SFPA, RMFO or private arrangement, will need to obtain an authorisation by its flag Member State. The authorisation will be delivered on the basis of a number of eligibility criteria to be checked by the flag State, and namely: - the administrative information provided on the vessel and the master; - the assignment of a unique vessel identification number by the International Maritime Organisation (IMO), where this is required by Union legislation; - the ownership of a valid fishing license; the verification that the vessel is not included in an illegal fishing (IUU) vessel list adopted by a RFMO and/or by the Union.

In addition, an EU electronic fishing authorisation register, partially accessible to the public, will be set up, registering data as the IMO number, the details of the company and beneficial owner and the kind of authorisation and fishing opportunities. Finally, in order to keep reflagging operations under strict control, it has been established that in case of application of a vessel to be registered again in the EU register after it has left the Union and it has been reflagged in a third country during the previous two years, the flag State will verify, as a pre-condition for the authorisation, that in such period the vessel neither engage in IUU fishing activities, nor operated in a non-cooperating country or a third country identified as allowing non-sustainable fishing[507].

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[505] Up to now, an effort to regulate the impacts of chartering agreements has be made in the context of the International Commission for the Conservation of Atlantic Tunas (ICCAT). In particular, according to the "Recommendations on Vessels Chartering" of the ICCAT, catches of chartered vessels are to be counted against the national quota of the chartering State. In addition, vessels shall not be authorised to fish under more than one chartering arrangement at the same time. The chartering State is also required to report to ICCAT several information such as details of the vessel, the vessel's owner, species covered by the charter, and duration of the agreements. See the ICCAT Recommendations available at the link: http://www.iccat.int/Documents/Recs/compendiopdf-e/2013-14-e.pdf

[506] See the Report of the European Parliament, of 9 December 2016, *on the proposal for a regulation of the European Parliament and of the Council on the sustainable management of external fishing fleets, repealing Council Regulation (EC) No 1006/2008*, A8-0377/2016.

[507] See the Press Release of the European Parliament, *More transparency and accountability for EU vessels fishing outside the Union*, of 5 December 2016.

V.5. The European Union and multilateral fisheries governance: new prospects in the light of the CFP reform

In the context of multilateral relations the European Union plays a crucial role, as a major player in the development of global fisheries governance. This occurs for both economic and juridical reasons. Firstly, the Union's prominence stems from the fact that the EU is the world's biggest importer of fish and its fleets carry-out fishing activities almost in every sea and ocean. Secondly, as a supranational organisation, the EU represents a large number of countries. Hence, its role is particularly significant, especially when a minimum number of ratifications is required for the entering into force of an international convention[508].

The European Union, in particular, takes part in the international governance of fisheries through three main lines of actions: (1) through the adherence to multilateral treaties; (2) in the context of intergovernmental organisations; (3) as a member of Regional Fisheries Management Organisations (RMFOs).

Many of the international obligations arising from these strands are those that restrict, in practice, the scope and the purpose of the ancient high seas freedom, as it was formulated at the dawn of the international law of the sea.

As for multilateral conventions, some practical problems may arise as regards the distribution of competences between the Union and the Member States.

It is worth noting that the European Union, beyond the UNCLOS, is a Contracting Party to multilateral treaties related to fisheries to which several Member States are Parties too. This is the case, for instance, of the 1995 United Nations Fish Stock Agreement (UNFSA), that is an implementing agreement of the UNCLOS which applies to straddling fish stocks and highly migratory fish stocks, the 1993 Convention on Biological Diversity including the Cartagena protocol on bio-safety, the 1994 United Nations Framework Convention on Climate Change. Both the UNCLOS and these agreements are "mixed", meaning that the issues they regulate fall partially within the shared competence between the Union and the Member States and partially within the exclusive competence of the EU or of the Member States. This explains why the act of accession of the EU to these agreements includes, in accordance with article 5 (1) of the Annex IX to the

[508] This is true for agreements covering areas of shared competences between the Union and the Member States, such as the UNCLOS (mixed agreements). Otherwise, when the agreement falls within the exclusive competence of the Union, as in the case of the FAO Port State Agreement, the Union ratification accounts only for one vote. See on this point E. PENAS LADO, op. cit. p. 146.

UNCLOS[509], a declaration of competence by the EU. Assuming the participation of the Union to the UNSFA as an example, such declaration states that in the field of conservation and management of marine living resources "it is for the Community to adopt the relevant rules and regulations (which the Member States enforce) and within its competence to enter into external undertakings with third States or competent organisations". At the same time " measures applicable in respect of masters and other officers of fishing vessels, for example refusal, withdrawal or suspension of authorisations to serve as such, are within the competence of the Member States in accordance with their national legislation. Measures relating to the exercise of jurisdiction by the flag State over its vessels on the high seas, in particular provisions such as those related to the taking and relinquishing of control of fishing vessels by States other than the flag State, international cooperation in respect of enforcement and the recovery of the control of their vessels, are within the competence of the Member States in compliance with Community law"[510].

Conversely, the distribution of competences should not pose any problem with regard to those agreements falling within the exclusive competence of the EU, such as the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas and the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing. The participation of the EU to these agreements, however, has raised difficulties about the division of powers between the Commission, which is a supranational body, and the Council, which is an intergovernmental institution.

The Commission, in particular, has brought an action for annulment before the Court of Justice concerning the decision of the 'Fisheries' Council of 22 November 1993 giving the Member States the right to vote in the United Nations Food and Agriculture Organisation (FAO) for the adoption of the 1993 Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas. It should be noted that in this case the Court has stressed that "the essential object of the draft Agreement submitted for adoption by the Conference of the FAO was the compliance with international conservation and management measures by fishing vessels on the high seas". Hence, so far this matter had fallen within the

[509] Article 5 (1) clearly states that 'The instrument of formal confirmation or of accession of an international organization shall contain a declaration specifying the matters governed by this Convention in respect of which competence has been transferred to the organization by its member States which are Parties to this Convention".

[510] See the Declaration concerning the competence of the European Community with regards to matters governed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, of 3 July 1998, OJ L189, 17.

exclusive competence of the EU, the Council wasn't empowered to authorise the Member States to vote for the adoption of the drafted agreement[511].

Beyond multilateral treaties, another important sphere of action of the Union in fisheries global governance is the participation in intergovernmental *fora* and international organisations. European Union's representatives took part in the Earth Summit in Rio in 1992, in the World Summit on Sustainable Development in 2002, in the Rio+20 Summit on Sustainable Development in 2012[512]. All these international summits have contributed to the setting, at the international level, of key priorities and objectives which have been fully integrated in the last reforms of the CFP, such as sustainable development of fisheries and aquaculture, Maximum Sustainable Yield (MSY), commitment to reduce fleet overcapacity, environmental and biodiversity conservation[513].

As a full member of the Food and Agriculture Organisation (FAO), in addition, the European Union sits in the FAO's Committee on Fisheries and Aquaculture (COFI), contributing to the elaboration and implementation of international fisheries law developed in this field[514]. This includes soft law agreements such as the FAO Code of Conduct for Responsible Fisheries, the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing, the 2005 Rome Declaration on Illegal, Unreported and Unregulated Fishing, the Voluntary Guidelines on Flag States performance, the Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication**.**

Having regard to the work of the FAO, a significant contribution is provided by the EU to the implementation of the International Plans of Action (IPOAs), that have inspired several initiatives and measures taken at the EU level in the fields of protection of species (sharks, seabirds), IUU fishing, fleet policy.

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[511] See the judgment of the Court of Justice, of 19 Mars 1996, Commission vs Conseil, (Case C-25/94).

[512] On the role played by the EU in the context of World Summits, with particular reference to its contribution to the normative elaboration of the concept of sustainable development see S. LIGHTFOOT, J. BURCHELL, "The European Union and the World Summits on Sustainable Development: Normative Power Europe in Action?" In *Journal of Common Market Studies*, Vol. 43, Issue 1, March 2005, pp. 75 – 95. G. SPERA, *Il regime della pesca nel diritto internazionale e nel diritto dell'Unione europea*, Roma, 2010, pp. 18 – 113. For a thorough analysis of substantive rules and principles of international environmental law see A. DEL VECCHIO, A DAL RI JÚNIOR, *Il diritto internazionale dell'ambiente dopo il Vertice di Johannesburg*, Napoli, 2005; R. CASADO RAIGÓN, *Derecho Internacional*, Madrid, 2012, pp. 362 -386.

[513] As stressed by A. DEL VECCHIO "La Comunidad ha procedido a identificar los esfuerzos de cooperación a nivel internacional y en su esfera de competencia ha puesto particular atención en la ejecución y aplicación de numerosas normas internacionales promulgadas en materia ambiental y sobre todo en el sector de pesca". On the implementation of International principles into EU fisheries law see A. DEL VECCHIO, La *gestion de los recursos marinos y la cooperación internacional*, Actas del Seminario Santiago de Chile, 22 – 23 de marzo de 2004, p. 22 – 26.

[514] On the activites of the Food Agriculture Organisation (FAO) in fisheries-related issues see A. DEL VECCHIO, "La réglementation de la pêche en Méditerranée dans le contexte du droit international", in *Revue du Marché Unique européen*, 2 – 1998, pp. 17 – 19.

Furthermore, EU and FAO are engaged in technical cooperation and partnerships through a number of programmes implemented in Africa, Asia, Europe, the Near East and Latin America, with the core aim of eradicating poverty and hunger, including through the promotion of an improved global fisheries governance.

The Union is, in parallel, involved in the work of the Organisation for Economic Co-operation and Development (*OECD*) and of its different bodies, including the Committee on Fisheries[515].

In addition to intergovernmental contexts, such as multilateral treaties, global summits and international organisations[516], the European Union plays a crucial role in the framework of the so-called Regional Fisheries Management Organisations (RFMOs). The RFMOs are regional organisations responsible for the management of fisheries in those maritime spaces that are outside the national jurisdiction of coastal States, belonging therefore to what under the UNCLOS is defined as the "high seas".

At present there are, as a whole, three different types of RMFOs, which are considered as the main vehicle for international cooperation in the high seas: (1) the general RMFOs, whose scope is very wide, have competence on all fisheries resources in a given area which are not expressly excluded from their field competence[517]; (2) the tuna RMFOs, have a narrower legal mandate restricted to tuna and tuna-like species but cover larger areas, in so far as they deal with highly migratory fish stocks [518]; (3) the specialised RMFOs, dealing with specific types of fisheries or species, address several issues as they arise and do not have a specific geographical scope[519].

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[515] For an extended analysis of the functions and activities performed by the European Union in multilateral organisations such the FAO and the OECD see C. CARLETTI, *Il regime giuridico della pesca e dell'acquacoltura alla luce del diritto internazionale del mare e dell'Unione europea: Profili normative, strutturali e operative nella dimensione multilivello*, Napoli, 2016, pp. 49 – 73.

[516] Several intergovernmental organisations established at regional level include fisheries among their field of activities. For a thorough analysis of this topic see J. M. SOBRINO-HEREDIA, *Les organisations d'intégration économique régionale et les politiques de pêche*, in A. DEL VECCHIO (directed by), *International Law and Maritime Governance: current issues and challenges for regional economic integration organisations*, Napoli, 2016, pp. 33 – 53.

[517] At present, there are 8 General RFMOs: The Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR); The General Fisheries Commission for the Mediterranean (GFCM); The North East Atlantic Fisheries Commission (NEAFC); The North Pacific Fisheries Commission (NPFC); The Northwest Atlantic Fisheries Organization (NAFO); The South East Atlantic Fisheries Organisation (SEAFO); The South Indian Ocean Fisheries Agreement (SIOFA); The South Pacific Regional Fisheries Management Organisation (SPRFMO).

[518] The main tuna RFMOs are: the Commission for the Conservation of Southern Bluefin Tuna (CCSBT); the Indian Ocean Tuna Commission (IOTC); the International Commission for the Conservation of Atlantic Tunas (ICCAT); The Inter-American Tropical Tuna Commission (IATTC); the Western and Central Pacific Fisheries Commission (WCPFC).

[519]See, for instance, the North Atlantic Salmon Conservation Organization (NASCO); the North Pacific Anadromous Fish Commission (NPAFC) and the Conservation and Management of Pollock Resources in the Central Bering Sea (CCBSP).

The tasks, fields of competence and geographical mandates vary across different RFMOs, but all these organisations fulfil two basic conditions. Firstly, RFMOs have legal competence to adopt legally binding conservation and management measures. Secondly, the maritime area covered by their mandate necessarily includes a part of the high sea[520].

The European Union is represented in RMFOs by the Commission and it is currently part of six tuna organisations (the International Commission for the Conservation of Atlantic Tunas, ICCAT; the Indian Ocean Tuna Commission, IOTC; the Western and Central Pacific Fisheries Commission, WCPFC; the Inter-American Tropical Tuna Commission, IATTC; the Agreement on the International Dolphin Conservation Programme, AIDCP; the Commission for the Conservation of Southern Bluefin Tuna, CCSBT). It is a member of nine general RMFOs (the North-East Atlantic Fisheries Commission, NEAFC; the Northwest Atlantic Fisheries Organization, NAFO; the North Atlantic Salmon Conservation Organisation, NASCO; the South-East Atlantic Fisheries Organisation, SEAFO; the South Indian Ocean Fisheries Agreement, SIOFA; the South Pacific Regional Fisheries Management Organisation, SPRFMO; the Convention on Conservation of Antarctic Marine Living Resources, CCAMLR; the General Fisheries Commission for the Mediterranean, GFCM; the Convention on the Conservation and Management of Pollock Resources in the Central Bering Sea, CCBSP) and of and two specific RMFOs with a purely advisory role (the Western Central Atlantic Fisheries Commission and Fisheries Committee for the Eastern Central Atlantic)[521].

One of the core aim of the CFP reform is to promote the objectives of the CFP at the international level. This can be achieved by ensuring that the activities of the Union vessels fishing outside EU waters are based on the same principles and standards as those applicable under Union law, through the development of a level–playing field for Union operators and third-country operators. In this context, for the Union is of a paramount importance to strengthen the global

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[520] For an extended treatment of this issue see E.M. VÁZQUEZ GÓMEZ, "Las Organizaciones Regionales de Ordenación Pesquera y la reforma de la Política Pesquera Común", in *Noticias de la Unión Europea*, No. 326, 2012, pp. 79 – 88.

S. ÁSMUNSSON, *Regional Fisheries Management Organisations (RFMOs): Who are they, what is their geographic coverage on the high seas and which ones should be considered as General RFMOs, Tuna RFMOs and Specialised RFMOs?,* available at the link https://www.cbd.int/doc/meetings/mar/soiom-2016-01/other/soiom-2016-01-fao-19-en.pdf

[521] Given that the legal mandate of such organisations usually refers to the conservation and management of fisheries resources, only the European Union is part of these organisations, on behalf of all the Member States. There are however four RMFOs in which both the EU and some individual Member States are parties, in relation to overseas territories that are no part of the EU waters. This happens, for instance, for France, which is a member of the ICCAT and of the IOTC on behalf of *territoires d'Outre-mer*. See in this respect the document of the Parliament, *Beyond European Seas*, op. cit. p. 8.

architecture of fisheries governance, by enhancing the role of RMFOs and improving their effectiveness [522].

A first step in this direction is the increase the EU's investment in RFMOs' scientific activities, data collection and applied research, in order to improve scientific and technical advice underpinning RMFO's decisions. In this vein, the CFP Basic Regulation provides that "The positions of the Union in international organisations dealing with fisheries and in RFMOs shall be based on the best available scientific advice [..]. The Union shall seek to lead the process of strengthening the performance of RFMOs so as to better enable them to conserve and manage marine living resources under their purview " (Article 28 (2)).

Secondly, a crucial issue concerning RFMOs is the allocation of fishing rights. In this respect, it should be pointed out that a precondition for a good fisheries management is to find a balance between opposite and legitimate interests of developing States and developed States. On one side, developing States aim at supporting their national operators in internal waters and high seas, but usually they do not have neither the tradition of long-distant fishing, nor the capitals, technology and know-how required to actually carry-on this. Conversely, developed countries have these capacities, but are unwilling to transfer their fishing rights to new entrants. In the eyes of EU operators, this raises a clear contradiction: in domestic waters, they see their requests for higher fishing opportunities restricted by the principle of relative stability, in external waters, they are asked to re-negotiate their acquired rights[523]. To address this challenge, the 2013 Basic Regulation sets-out, in rather vague terms, that "The Union shall actively support the development of appropriate and transparent mechanisms for the allocation of fishing opportunities" (Article 29 (2)).

As for decision-making process, it should be noted that the consensus procedure which is generally applied in the large majority of RFMOs can undermine the effectiveness of such organisations, since the adoption of important decisions risks to be paralysed by the objection of a single member. In this respect the European Commission, in the communication on the external dimension of the CFP, has stressed that the EU should advocate a reform of decision-making systems in RFMOs. It has been suggested, in particular, to extend the use of procedures similar to those adopted in the framework of the High Seas Fishery Resources in the South Pacific Ocean (SPRFMO) to other RFMOs. In the SPRFMO, in fact, decisions on questions of substance are taken by consensus, but when all efforts have been exhausted without result they are taken by a

[522] For a full analysis of the role of the European Union in the context of RFMOs under the 2013 reform of the CFP see J. PUEYO, LOSA, M.T. PONTE IGLESIAS, "Unión Europea y Organizaciones Regionales de Ordenación Pesquera. Gestión sostenible de las pesquerías, enfoque ecosistémico y proteccíon de la biodiversidad marina", in J. PUEYO LOSA, J. J. URBINA (bajo la dirección de), *La gobernanza maritime europea. Retos planteados por la reforma de la política pesquera común*, Navarra, 2016, pp. 205 – 235.
[523] See E. PENAS LADO, op. cit. 158

three fourths majority of members. As a mitigation, an "objection procedure" to review the decision after adoption can be activated by each Member States within 60 days from the notification of the contested decision[524].

Another important contribution of the CFP reform to the functioning of RFMOs is the enhancement of enforcement systems. One of the most critical aspect in the work of such organisations is that they generally do not have the coercive powers to ensure that their decisions are fully implemented and that their recommendations are effectively put into practice. In that regard, the CFP Basic Regulation establishes that the Union shall 'promote the establishment and the strengthening of compliance committees of RFMOs, periodical independent performance reviews and appropriate remedial actions, including effective and dissuasive penalties, which are to be applied in a transparent and non-discriminatory manner' (Article 28 (f)).

The Communication on the External dimension of the CFP, specifies that, to remedy to the current situation of poor compliance of members with RMFOs' obligations, the reviews should take place at regular intervals (ideally 3 to 5 years), and they should identify the reasons for the lack of compliance (for instance lack of capacity in developing countries) and address these failures in a specific and appropriate manner. This includes also the provision of transparent and non-discriminatory sanctions, in order to penalise those member States not complying with the RMFO standards[525].

Another challenge concerns the fact that some RMFOs have a close membership, meaning that their statute does not admit new members or that new members are admitted upon decision taken by consensus. The necessity of consensus can lead, in these circumstances, to arbitrary decisions, given that some States wishing to enter in a RMFO may be excluded for political reasons, that go well beyond the scope of fisheries management[526]. This situation is obviously contrary to international law of the sea, and especially to the duty of cooperation in the conservation and management of marine living resources in the high seas stemming from Article 118 of the UNCLOS. In addition, the 1995 UNFSA Agreement clearly states that "Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks [..] States having a real interest in the fisheries concerned may become members of such organisation or participants in such arrangement. The terms of participation in such organisation or

[524] For a fuller account on the functioning and extendibility of this procedure see R.CASADO RAIGÓN**, "La dimension internationale de la compétence de l'Union européenne en matière de pêche" op. cit. p. .**

[525] See the Communication of the European Commission on the External Dimension of the Common Fisheries Policy, op. cit. p. 8 – 9.

[526] R.CASADO RAIGÓN, ibid. p.

arrangement shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned" (Article 8).

As a final remark it should be noted that in the Communication on the external dimension of the CFP the Commission has proposed the establishment of a pay-for-access regime for operators fishing the flag of a RMFO member, as compensation for their access to fisheries resources in the high seas. This proposal is in consistency with the political objectives pursued by the CFP reform in the framework of bilateral agreements, where the contribution of ship owners to the costs of access to third-country waters has been increased and clearly decoupled from sectoral support. In the context of RMFOs, the proposal was intended both to strengthen the financial base of such organisation and to promote the responsible use of fisheries resources by the operators fishing in the high seas under RMFOs agreements. Nevertheless, this idea has not been kept in the 2013 CFP Basic Regulation.

V. 6. Illegal, unreported and unregulated fishing (IUU): EU rules and flag State's responsibility

The development of global fisheries governance by means of multilateral conventions, international organisations and RFMOs, undoubtedly affects the EU fishing enterprises, because this international legal framework governs the activities of EU vessels engaged in fisheries beyond Union waters. When EU enterprises operate in the high seas or in waters under third States jurisdiction, such as exclusive economic zones of third States, it must be ensured that vessels not engage in **illegal, unreported and unregulated fishing (IUU). Conversely, adequate measures need to be developed to prevent that foreign enterprises perform illegal activities in waters under the EU's jurisdiction. The issue of IUU fishing deserves a specific attention in the framework of the external dimension of the CFP because the fight against these practices is one of the most important commitment that the European Union has taken in the context of multilateral fisheries governance within the 2013 reform of the common fisheries policy. Additionally, the responsibility of flag States, and of the Union as an international organisation, for the activities conducted by national vessels in third States' exclusive economic zones has been the subject of a recent case submitted to the International Tribunal for the Law of the Sea, that clarified the status of international law on this point.**

In the last few decades, IUU fishing has been recognised within the UN as well as within several RMFOs as a major threat to sustainability of fisheries resources and food security[527]. Since IUU vessels often catch non-target species, use prohibited gears and unsustainable fishing techniques and cause irreparable damages to reefs, seamounts and other fragile marine ecosystems, IUU fishing represents, firstly, a major threat to the environment. From the economic point of view, in addition, IUU fishing distorts competition, putting operators complying with rules in an unfair disadvantage. This occurs because IUU vessels fish avoid the normal costs, such as licenses, and other restrictions, which are imposed on legal fishers in the framework of established policies and laws.

Despite the gravity of this practice, a legal definition of IUU fishing is neither included in the UNCLOS nor in the UNFSA Agreement. A description of IUU fishing activities is provided in the International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing (IPOA- IUU), approved within the FAO in 2001, which is, in spite of its voluntary nature, the most significant legal instrument addressing IUU fishing at international level.

In the context of the European Union's legal system, the first step was the "European Community Plan of Action for the Eradication of IUU Fishing" adopted in 2002 in response to the call by the IPOA-IUU. While the Plan of Action was mainly focused on the need to secure the implementation by EU vessels of flag States obligations under international law, the "EU Strategy to combat IUU fishing" subsequently developed by the Union since 2007, focuses on the need to control fish products entering in the EU market to secure they are not obtained from IUU fishing activities[528].

In this context, the Council Regulation (EC) No. 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing (hereinafter the IUU Regulation), states the adoption of stringent trade measures on fishing vessels and foreign

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[527] On the negative impacts of IUU fishing see among others, FAO, "The State of World Fisheries and Aquaculture (FAO 2014)", 131, available at the link: http://www.fao.org/3/a-i3720e.pdf ; A. LEROY, F. GALLETTI, C. CHABOUD, "The EU restrictive trade measures against IUU fishing", in *Marine Policy*, Volume 64, February 2016, pp. 82–83; I. BOTO, C. LA PECCERELLA, S. SCALCO, M. TSAMENYI, "Fighting against Illegal, Unreported and Unregulated (IUU) Fishing: Impacts and Challenges for ACP Countries", Brussels Briefing No 10, Resources on Illegal, Unreported and Unregulated (IUU) Fishing, Brussels, 29 April 2009, available at the link: https://brusselsbriefings.files.wordpress.com/2012/10/reader-br-10-iuu-fisheries-eng.pdf
UNGA, 'Oceans and the Law of the Sea: Report of the Secretary General' (1999) UN GAOR 54th Session UN Doc A/54/429, 42.

[528] On this point see M. TSAMENYI, M. A. PALMA, B. MILLIGAN, K. M. MFODWO, "The European Council Regulation on Illegal, Unreported and Unregulated Fishing: An International Fisheries Law Perspective", in *The International Journal of Marine and Coastal Law,* 25, 2010, p. 13.

States not complying with IUU rules[529]. The measures to be undertaken to this aim include, in particular: control and inspections over third-country fishing vessels seeking access to the ports of EU vessels; catch certification requirements to prevent the importation into the EU of fisheries products derived from IUU activities; establishment of a Community IUU vessel list; establishment of a list of non-cooperating third countries.

As for the IUU vessel list, it is worth noting that such list contains information on the vessels identified by the Union, the Member States or RFMOs as not complying with international obligations related to IUU fishing. The actions that the Member States are expected to take against the listed vessels include refusal of port access or other services, ban on the import of fisheries products, confiscation of the catches or fishing gears. As regards the list of non-cooperating third countries, a State may be included in such list whether it fails to comply with international obligations as a flag, port, coastal or market State, and whether it omits to take action to prevent, deter and eliminate IUU fishing activities according to the criteria laid down in Article 31 of the IUU Regulation.

Among the penalties imposed on non-cooperating third countries in accordance with the IUU Regulation it is worth to mention the prohibition of importing fishery products caught by the vessels flying the flag of the country concerned, the non acceptance of catch certificates related to these products, the denunciation by the EU of SFPAs in place with these countries or the refusal to enter into negotiations, as well as the prohibition to conclude private fisheries agreements between EU nationals and non-cooperating country's authorities[530].

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[529] The Regulation provides a clear definition of IUU fishing activities. Under article 2, in particular: 'illegal fishing' are the fishing activities: (a) conducted by a national or a foreign fishing vessel in maritime waters under the jurisdiction of a State, without the permission of that State, or in contravention of its laws and regulations; (b) conducted by a fishing vessel flying the flag of a State that is a contracting party to a relevant RMFO, which operates in contravention of the conservation and management measures adopted by such organisation and by which the flag State is bound; or (c) conducted by a fishing vessel in violation of national laws or international obligations, including those undertaken by cooperating States to a relevant RFMO.

As for "Unreported fishing", is this about the fishing activities: (a) which have not been reported, or have been misreported, to the relevant national authority, in contravention of national laws and regulations; or (b) which have been undertaken in the area of competence of a RFMO and have not been reported, or have been misreported, in contravention of the reporting procedures of that organisation.

Finally, "Unregulated activities" are those carried out in the area covered by a RFMO by a fishing vessel without nationality flying the flag of a State not party to that RMFO or by any other fishing entity, in a manner that is not consistent with or contravenes the conservation and management measures of that organisation; or conducted in areas outside RMFO in a manner that is not consistent with State responsibilities for the conservation of living marine resources under general international law (see Article 2 of the IUU Regulation).

[530]For a full description of the European Union's system to prevent, deter and eliminate IUU fisheries see, among others, G.A. OANTA, "The European Union's system to prevent, deter and eliminate illegal, unreported and unregulated fishing", in SOBRINO HEREDIA, J. M. (coord.), *Sûreté maritime et violence en mer / Maritime Security and Violence at Sea*, Bruxelles, 2011, pp. 103-114.

This framework is supplemented by other three regulations recently adopted by the EU in relation to IUU fishing, namely: **Council Regulation (EC) No 1006/2008, concerning authorisations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters (the Fisheries Authorisation Regulation); Commission Regulation (EC) No 1010/2009, laying down detailed rules for the implementation of Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing; C**ouncil Regulation (EC) No. 1224/2009, establishing a Community control system for ensuring compliance with the rules of the common fisheries policy.

In line with this orientation, the 2013 reform of the CFP pays particular attention to the fight against IUU fishing. Firstly, with a view to strengthening the legal framework in this field, the new CFP Basic Regulation provides that the fishing authorisation to access to the third country waters in the context of a Sustainable Fisheries Partnership Agreements (SFPAs), shall not be granted to a fishing vessel that has left the Union fishing fleet register and that has subsequently returned to it within 24 months, unless the owner of the vessel can prove to the competent authorities of the flag Member State that, during the period in which vessel was not registered in the EU, it was not engaged in IUU fishing activities (Article 31 (9)).

Secondly, it is established that whether the coastal State granting the flag during the period in which the EU vessel was off the Union fishing fleet register is included in the EU list of IUU non-cooperating States, the fishing authorisation shall be granted to the EU vessel only if evidence has been provided that the vessel's fishing operations ceased and that the ship-owner took immediate action to remove the vessel from the register of that State.

In addition, the Basic Regulation places the fight against IUU fishing at the heart of the external CFP in its multilateral dimension. In this regard it is provided that "The Union shall [..] cooperate with third countries and international organisations dealing with fisheries, including RFMOs, to strengthen compliance with measures, especially those to combat IUU fishing" (Article 28 (2) (e)).

In recent times, the relevance of IUU fishing has emerged as a key issue in the development of the international law of the sea. On 2 April 2015, the International Tribunal for the Law of the Sea (ITLOS) has been called upon to give an advisory opinion on a request submitted by the Sub-Regional Fisheries Commission, i.e. a regional fisheries organization of seven West African States[531].

[531] For a full analysis of the advisory opinion released by the Tribunal see, among others, G. NICCHIA, Pesca illegale, Non Dichiarata e Non Regolamentata (INN): considerazioni a margine del Parere consultivo

The request presented to the ITLOS concerned the extent of obligations of the flag State for illegal, unreported and unregulated (IUU) fishing activities conducted by vessels sailing under its flag in the EEZ of other States and, more generally, of the liability of flag States for IUU fishing activities conducted by its vessels. In parallel, the request concerned also the obligations and liability of a flag State or of a RMFO when the violation of coastal State fisheries legislation is committed by vessels fishing under a licence issued in the framework of an international agreement with the flag State or within the RMFO concerned. The Tribunal was finally requested to specify the rights and obligations of coastal States in ensuring the sustainable management of shared stocks and stocks of common interest in their respective EEZs.

Regarding the coastal States rights and duties, firstly, the ITLOS has concluded that in the EEZ is primarily up to the coastal State to prevent, deter and eliminate IUU fishing. On the one hand, article 62 (4) and 73 of the UNCLOS set-out the coastal States' sovereign rights to take the measures, including boarding, inspection, arrest and judicial proceedings "as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with the Convention". On the other, articles 61 and 62 of the UNCLOS outline the coastal States' duty to promote the conservation and optimal utilisation of marine living resources. Based on these provisions, the Tribunal has stressed that every coastal State shall "mandatorily" establish proper 'conservation and management measures' and policies to prevent over-exploitation of living marine resources in the EEZ, including measures aimed to prevent and combat IUU fishing[532]. Nevertheless, in the real world, coastal States encounter many difficulties in effectively enforce laws in their EEZs. Developing States, in particular, often not have the real capacity to detect and deter IUU fishing operators, which are generally well organised and aware of the coastal State's weaknesses. This highlights the importance of the answers provided by the Tribunal in relation to the flag States' obligations.

The first is that the flag States, in the enjoyment of their freedoms in the seas, must respect the jurisdictional competences of the coastal States (Articles 58 (1) and 87 of the UNCLOS). When entering in a coastal State's EEZ, therefore, foreign vessels are submitted to the coastal State's laws and regulations. In this respect, each flag State has the duty to control that its vessels do not engage in IUU fishing activities in the EEZ of other countries. The Tribunal has considered, however, that concept of 'responsibility' of the flag State must be kept separate from the concept of 'liability'.

N° 21 ITLOS, in A. DEL VECCHIO (directed by), *International Law and Maritime Governance: current issues and challenges for regional economic integration organisations*, Napoli, 2016, p. 55 – 78. R. RAJESH BABU, "State responsibility for illegal, unreported and unrelated fishing and sustainable fisheries in the EEZ: some reflections on the ITLOS Advisory Opinion of 2015", in *Indian Journal of International Law*, 55 (2), 2015, pp. 239–264.

[532][532] ITLOS Advisory Opinion No 21, par. 106.

As for responsibility, the flag State exercises an 'exclusive jurisdiction' over the ships flying its flag, and its specific duties are detailed in Article 94 of the UNCLOS. Specifically, every State shall effectively exercise "its jurisdiction and control in administrative, technical and social matters over ships flying its flag". This includes, of course, ensuring compliance by its vessels with the relevant conservation measures, law and regulations adopted by the coastal State, especially in the field of IUU fishing. Nevertheless, according to the Tribunal, such obligation 'to ensure' shall not be intended as an obligation 'to achieve' compliance, but as an obligation 'to deploy adequate means, to exercise best possible efforts, to do the utmost' to obtain this result. It is, in other words, an obligation 'of conduct', or 'due diligence obligation.'[533] To satisfy this obligation the flag State, in addition to exercise jurisdiction and control in 'administrative, technical and social matters' must adopt necessary measures to: prohibit its vessels from fishing in the EEZ unless so authorized by the coastal State; a ensure that vessels flying its flag comply with the protection and preservation measures adopted by the coastal State; ensure that the vessels flying its flag are properly marked; include in the flag State's laws, enforcement mechanisms to monitor and secure compliance; investigate on IUU fishing matters and, if appropriate, take any action necessary to remedy the situation as well as inform the reporting State of that actions; cooperate with other States in cases of alleged IUU fishing activities.[534]

Referring to "flag State liability" the Tribunal has specified that this may arise as a consequence of the breach of the "due diligence" obligation. Specifically, based on the general rules on State responsibility as laid down in Article the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (ILC Draft Articles), the "liability" in this context is to be intended as the obligation to pay compensation or make reparations when a State occurs in international responsibility (Article 31 (1)).

The Tribunal has stated, in this respect, that the liability of the flag State does not arise when its vessels do not comply with coastal State law and regulations, as 'the violation of such laws and regulations by vessels is not *per se* attributable to the flag State.' It arises, instead, when the flag State omits to comply with the "due diligence" obligation aforementioned, i.e. when it omits to deploys all the best possible efforts to contrast IUU fishing activities of its vessels[535].

As for the liability of an international organisation for the violations committed by vessels holding fishing license issued by such organisation, the Tribunal has concluded, in analogy, that the violations of a fishing license conditions is not directly attributable to the organisation (or to the flag State when the licence is issued in the context of an international agreement). First of all, the

[533] ITLOS Advisory Opinion No 21, par. 129.
[534] See, in more details, the ITLOS Advisory Opinion, par. 134 – 140.
[535] ITLOS Advisory Opinion No 21, par. 146 – 149.

liability of an international organisation, according to the Tribunal, is linked to the competence transferred to this organisation by its Member States. In particular, in those cases in which the international organisation has competence over management of fisheries resources and to conclude fisheries access agreements on behalf of it members, the "obligation of the flag State become obligation of the international organisation". This means, in other words, that the international organisation has a "due diligence" obligation to ensure that vessels flying the flag of any of its Member State comply with the coastal State's fisheries legislation[536].

This is particularly significant in the case of the European Union, that is the only international organisation empowered with exclusive competence in the conservation and management of fisheries resources. According to the ITLOS opinion, in so far as the EU has acquired such competence, the EU is responsible at international level to ensure that vessels flying the flag of any of its Member State comply with the national fisheries law of the coastal States[537]. This obligation undoubtedly extends to coastal States' legislation adopted in the framework of IUU fisheries. It is therefore the EU, rather than its Member States, that will be held liable for any breach of the due diligence obligation to prevent and combat IUU fishing activities carried out by vessels flying the flag of any of the EU Member States.

V. 6. Global trade of fisheries products: the consistency between WTO's rules and the EU trade-related measures to address IUU fisheries

Fisheries and aquaculture products are nowadays among the most highly traded food commodities in the world. Although seafood has always been traded across national borders, in recent decades international exchanges have grown consistently[538], driven by a number of factors such as technological improvements, changes in distribution and marketing, liberalisation policies, development of new processing, packaging and transportation techniques. This has led to the emergence of "complex supply chains", in which products are often produced in one country, processed in another and consumed in a third[539].

In a global market, China, Norway, Viet Nam, Thailand, United States, Chile and India figure as the largest exporters of fish, whereas the EU (in the forefront), the United States and Japan

[536] See the ITLOS Advisory Opinion No. 21, par. 170 – 173.
[537] See the ITLOS Advisory Opinion No. 21, par. 62 – 63.
[538] It is estimated that from 1976 to 2014 world trade in fish has raised more than 245% in term of quantity (515% considering fish production destined to human consumption). See the document prepared by FAO, *The State of World Fisheries and Aquaculture 2016, Contributing to food security and nutrition for all*, Rome, 2016, p. 51.
[539] See C. BELLMANN, A. TIPPING, U. RASHID SUMALIA, "Global trade in fish and fishery products: an overview", in *Marine Policy*, 69, December 2015, p. 1.

are the three world major importers: their combined imports represent the 63% of value and the 59% of quantity of the total world imports[540]. Since 2009, the value of imports into the EU has steadily increased at an annual rate of 6%, attaining the amount of EUR 21 billion in 2014. In addition, the EU household expenditure was EUR 54,7 billion in 2013. It has been estimated, in this respect, that the continuous growing of imports value, although the per capita fish consumption has decreased from 26 kg in 2008 to 23,9 kg in 2012, reflects the fact that EU consumers buy less seafood but are available to spend more for it[541]. In parallel, EU exports (essentially consisting in captured fish, since aquaculture products are mainly consumed internally) have reached EUR 4,3 billion in 2014. As it can be noted, these data show that the Union domestic fish and aquaculture production is not sufficient to satisfy the EU internal demand. Specifically, in 2014 the EU trade balance deficit was EUR 16,6 billion (exports amounting to EUR 4,3 billion minus imports amounting to EUR 21 billion).[542]

In the context of the World Trade Organisation (WTO), fisheries products are regarded as industrial products subjected to a relatively lower level of tariff protection if compared to agricultural products. This special treatment is explained by a number of reasons. Firstly, since the access to fisheries resources is limited by national Economic Exclusive Zones (EEZs) and/or by RMFOs access agreements in the high seas, many States (especially developed countries) need to satisfy their internal demand of fish through international trade. In addition, a lower level of international tariff protection is preferred because many countries usually impose higher tariff on national fish processed products and lower ones on raw materials (a phenomenon known as "tariff escalation"), in order to protect their processing industries and enhance the value of national products. Thirdly, over the last few decades, tariff protectionism in the sector of fisheries has been progressively reduced by means of autonomous liberalisations policies or conclusion of numerous preferential trade agreements (including the so-called Regional Trade Agreements, RTA)[543].

As for the European Union, it should be stressed that trade regulations concerning tariff and non-tariff measures are within the scope of the EU's common commercial policy and not within the scope of the common fisheries policy. In particular, in accordance with the trade policy frame, a common tariff applies to all the Member States on imported seafood, ranging between 7% and 25% (the more the product is processed the more the rate is high). Nevertheless, a large number of fish

[540] FAO, *The State of World Fisheries and Aquaculture 2016*, op. cit. p. 54.
[541] The three-quarters of the total EU consumption is made by captured fish, with a recent increase of herring, salmon and a stabilisation of pangasius, and a parallel increased demand for organic aquaculture products.
[542] See the document of the European Market Observatory for Fisheries and Aquaculture Products (EUMOFA), *The EU Fish* Market, 2015, p. 2.
[543] C. BELLMANN, A. TIPPING, U. RASHID SUMALIA, op. cit. p. 3.

products imported from ACP countries receive duty-free access to the EU market under the 2000 Cotonou Agreement.

In addition, unilateral trade measures are at the disposal of the Union to ensure the supply of raw materials for EU processors (but not retailers). Anti-dumping, anti-subsides or safeguard measures based on WTO rules can be applied to protect the EU industry from harmful actions (up to now, such measures have been used only in relation to aquaculture imported products such as salmons and trouts). The EU legal framework also includes sanitary requirements, labelling and marketing standards aimed at safeguarding EU consumers[544]. Finally, as aforementioned[545], the fish caught by vessels flying the flag of a country included in the black list of non-cooperating countries under the IUU Regulation cannot be imported into the EU. In the same vein, reflagging of EU vessels in these countries or conclusion of private fisheries agreements with both public authorities and private operators are prohibited.

It can be argued that several aspects of the EU legal regime briefly outlined so far raise crucial questions about the compatibility of EU trade and fisheries regulations with the general World Trade Organisation (WTO) rules. It is sufficient to quote, in this respect, that the safeguard and anti-dumping measures adopted by the EU in relation to few farmed products have been successfully challenged by third States in the framework of the WTO's dispute settlement system[546]. Similarly, some bans on the sale of certain seal products in the EU market have been found inconsistent with the WTO principle of non discrimination in trade[547].

Nevertheless, the two main fields in which the issue of compatibility between EU and WTO laws needs to be specifically addressed are the fight against Illegal, Unreported and Unregulated (IUU) fisheries and the EU measures aimed to contrasting non-sustainable fishing practices from third countries. In particular, in the context of the IUU Regulation, the Union can impose commercial restrictions on third countries' fishing vessels included in the EU IUU vessel blacklist, which are banned from: receiving fishing authorisations and fishing in EU waters, participating in transhipment or joint fishing operations with EU vessels, accessing ports of Member States and be supplied in such ports with provisions, fuel or other services (except in case of force majeure or

[544] For a full description of the EU trade legal regime affecting the imports of fish products see L. MULAZZANI, G. MALORGIO, "Is there coherence in the European Union's strategy to guarantee the supply of fish products from abroad", in *Marine Policy* 52, 2015, p. 3 – 4.
[545] See Section 5 in this Chapter.

[546] See the dispute arisen between Norway and the EU concerning anti-dumping measures adopted by the EU on Farmed Salmon from Norway in the context of the Council Regulation (EC) No. 85/2006, of 17 January 2006, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of farmed salmon originating in Norway.
[547] See the 2009 EC – Seal products dispute, between Norway and the EU, on EU measures prohibiting the importation into the EU and the marketing of seal products.

distress); changing their crew, reflagging and entering into chartering agreements; importing their catches into the EU and re-exporting (Article 37 of the IUU Regulation).

In parallel, the EU actions against third countries included in the blacklist of IUU non-cooperating States include: ban on imports and purchase of fisheries products caught by vessels flying the flag of such countries, ban of reflagging, chartering, private agreements and joint ventures as well as of any form of exportation of EU vessels in such countries, denunciation of any standing bilateral fisheries agreement and obligation of the EU to not open negotiations for the conclusion of fisheries agreements with such countries (Article 38 of the IUU Regulation).

Beyond the violations of IUU rules, in addition, the Union can impose quantitative restrictions on imports of fish caught by vessels flying the flag of countries identified as "allowing non-sustainable fishing", restrict the access of such vessels to Member States' ports and prohibit any sort of private or semi-public agreement which might entail the engagement of EU operators in the fisheries of such countries (Article 4 of the Regulation (EU) No. 1026/2012).

As it can be seen, the EU legal regime is particularly severe. The newly established common fisheries policy makes an explicit reference to "availability of food supply" among its core objectives, which was not the case under the previous 2002 CFP Regulation. Although this indicates an increased importance of the commercial dimension of the CFP, it must be counterbalanced by the primary CFP objective to achieve an environmentally, socially and economically sustainable fisheries[548].

The WTO rules, conversely, are designed for regulating international trade and concentrate on the principle of non discrimination, that requires WTO members to accord the same trade treatment and advantages to all their trading partners (generally known as the "most favoured nation" principle) and to avoid discrimination between foreign and national operators.[549]

In light of this, one may wonder: can the EU impose unilateral trade restrictions for environmental purposes?. And, more provocatively: can trade measures be used by the EU to achieve the general CFP objectives?.

The answer could be affirmative, provided that the trade measures adopted by the EU fall within the scope of Article XX (b) and (g) of the GATT, concerning fisheries products. In particular, in accordance with these provisions a WTO member is allowed to impose restrictions to fisheries trade whether such measures are necessary "to protect human, animal, plant life or health" and to ensure "conservation of exhaustible natural resources", whether they are made effective "in

[548] See the Article 2 of the 2013 Basic Regulation.
[549] See Article 1 of the 1995 General Agreement on Tariff and Trade (GATT).

conjunction with restrictions on domestic production or consumption" (Article XX (a) and (b) of the GATT).

However, it should be stressed, in this respect, that although EU IUU fishing and sustainable management measures undoubtedly serve the objective of ensuring conservation of fisheries stocks, in WTO context a further assessment is required. Even though the purpose of the contested measures is fully legitimate, in fact, it shall also be ensured that they have not be undertaken with the real aim to favour domestic producers (a phenomenon generally known as "green protectionism").

It has been pointed out, in this respect, that this assessment requires a number of analytical steps that should be made taking into account the specificities of each concrete case. Firstly, it should be determined whether there is a material risk of damage to the interests protected through the measures contested, whether such measures are able to significantly contribute to tackle the problems concerned and whether they have been adopted at the lowest possible costs[550].

Secondly, once it has been ascertained that the measures in question fulfil the above mentioned criteria, it should be evaluated whether they have been applied "in conjunction with restrictions on domestic production or consumption", meaning that they impartially affect both EU and foreign operators. This is fully consistent with the general objectives of the reform of the CFP and, in particular, with the explicit engagement of the EU to observe the principles underpinning fisheries legislation in both internal and external waters, as a commitment that extends to all the strands of the CFP, including trade relations with coastal States and commercial partners beyond EU maritime borders.

[550] In this sense see R. M. FERNÁNDEZ EGEA, "La política comercial «ad extra» al servicio de la sostenibilidad pesquera en la UE" in J. PUEYO LOSA, J.J. URBINA (bajo la direccíon de). op. cit. pp. 309 – 317.

Conclusions

After examining how the EU fisheries enterprises acted throughout the history of the Common Fisheries Policy, how they have adapted to conservation policy, as well as the way they have been integrated into a new market oriented approach, a new financial framework and external dimension of the CFP, it could be concluded that the CFP reform of 2013 has marked an important step forward in achieving a more sustainable fisheries sector in Europe, in the environmental, economic and social dimension.

The analysis of the historical evolution of the Common Fisheries Policy has shown, firstly, that the CFP has evolved, over the last few decades, along with major developments occurred in international law of the sea and the Union enlargement process. In this context, EU fisheries enterprises have played their own crucial role in shaping the policy structure and identity, contributing to the establishment of several key elements and basic principles that have never been abandoned in successive reforms. It is the case, as we have seen, of the principle of equal conditions of access of Member States' vessels to Member States' waters, as well of its derogatory regime of historical rights, that both still apply to the today CFP. As in the past, fishing opportunities are allocated among the Member States on the basis of percentages of TACs fixed in line with the principle of relative stability, which rests fundamentally on historical quantities of average catches captured by the various national fleets. TACs and technical measures, in addition, have been consolidated over time and remain today the cornerstones of the conservation pillar of the CFP.

Not surprisingly, therefore, the CFP is a policy, by its very nature, entailing a conservative vision, not keen to changes. The world of fishermen itself is, as we have seen, a world where the value of tradition, continuity and customary behaviours are particularly strong. Throughout the policy history, many elements have been progressively added to the existing rules by means of political compromise, after long and difficult negotiations aimed at balancing the interests of the enterprises and industries of the various Member States. Every time that the CFP is revised, hence, widespread criticism against this policy is addressed by introducing new elements, rather than reopening what was tortuously agreed in the past.

In a context so resistant to changes, the ambitious objective of the 2013 CFP reform is to promote a change of mindset with regard to the finality and methods of fisheries. In other words a 'behavioural revolution', affecting the way in which fish is caught, processed, marketed and purchased by all economic operators involved in the chain. This apply, of course, to all the strands of the CFP, strengthening the importance of fisheries enterprises in policy implementation. Let's go to see, firstly, how this takes place in relation to the 'fish caught', which mainly concerns the fisheries operators involved in the catching side of the sector and therefore the conservation pillar of the CFP.

As a preliminary remark on conservation policy and its impacts on fisheries enterprises it should be stressed that, when addressing the fisheries policy, the Treaties of the European Union associate, even nowadays, the objectives of fisheries to those of agriculture, although agriculture is based on cultivation of lands and fisheries on catches of mobile, marine, trans-boundary resources. Traditionally, the three core dimensions of sustainability – environmental, economic and social – have been alternated in the structure of the CFP, in separated regulations or, more recently, combined together. In this respect, we have pointed out that the 2013 reform has made a clear choice prioritising ecological sustainability, not only intended as preservation of fish stocks but in an holistic vision for the protection of the whole marine ecosystem, as a basic premise for the future economic and social viability of the EU fishing industry. This philosophy has inspired the fundamental shift towards long-term approach to fisheries management, which underpins all the 2013 reform package, and notably the conservation policy which is at its core.

TACs and quotas, the most ancient conservation and management tools, have been preserved. But with the introduction of the discard ban, all the fish which is caught, and not anymore the fish which is landed, is to be counted against the quotas. This is completely in contrast with the previous regime of the CFP, where discarding over-quotas was allowed and, in case of undersized and over-quota captures (especially in mixed fisheries), even legally imposed.

At the same time, it is undeniable that, beyond legal requirements, the true challenge of the conservation policy established under the 2013 CFP is to achieve a progressive change in the mindset of fishermen. If a fisher is obliged through the discard ban to count all his catches against his quota, he will be encouraged to adopt more selective fishing techniques, in order to avoid any accidental capture subjected to the landing obligation. As a result, the second old feature of the conservation policy, namely the adoption of technical measures, can play its fundamental role in the light of a wider and renewed context. Innovation, technologies and new fishing techniques

encouraged through the EMFF, became the instruments of fishermen to adapt their fleets to more selective fishing while guaranteeing, at the same time, their individual economic revenues. In addition, because operators are expected to provide reliable documentation about their landings and the correspondence to catches, the industry is indirectly involved and interested in the improvement of data collection related to the *status* of stocks.

Secondly, the rigidity of TACs and quotas regime has been mitigated through more flexibility introduced in the rules governing the allocation of fishing opportunities. In economic terms, the transferability of individual quotas emphasises the role of the industry, enabling each fisherman to optimise the conduct of its own businesses. This serves, of course, also environmental objectives. In fact, whereas the discard ban entails the adjustment of quotas to catches through more selective fishing techniques, transferable fishing concessions entail the adaptation of catches to quotas, through fishing rights transferability. In addition, the fact that the industry is the component most represented in the Advisory Councils (ACs) responsible for setting multi-annual plans at regional level, reflects the need to bring long-term decision-making as closer as possible to the fisheries world. On the other hand, this reflects the importance of opening channels of dialogue and cooperation among the industry and other stakeholders, such as NGOs.

In summary, with regards to the conservation policy, the hope is that the efforts and sacrifices required to fishermen in moving towards a more environmentally sustainable fishing will be compensated, in the long term, by increased incomes, as a consequence of the increased productivity of *stocks.* Some potential negative impacts of discard ban (additional operational costs, reduction in catches, exit of many vessels from the market), of Transferable Fishing Concessions (creation of monopolies, privatisation of a common good, social losses) and of Maximum Sustainable Yield (reduction or even closure of fisheries activities) have been analysed in Chapter II.

As stressed by some representatives of the EU fisheries sector, notably the Spanish Fishing Cluster in the Cooperative of Ship-owners of Vigo Port, in this respect '*Imposing restrictions on fishing, banning discards and making it compulsory to achieve the MSY in the short term only pursue achieving environmental objectives. But they overlook or renounce the industry, the workers in the fishing industry, in processing and marketing, and in all the related sectors, forgetting the communities dependent on fishing, ignoring the fact that mankind needs fish as a renewable, healthy source of food. And now is not a good time for this kind of renouncement*'.

In accordance with these and many other statements of the sector, it could be argued that that changes to pursue environmental objectives in the CFP are necessary, but they should not take place without also considering their social and economic implications, that should at least entail some mitigation measures. Even though the primacy and urgency of environmental protection is unquestionable, the other two dimensions of sustainability should be incorporated, at least, in the process of CFP implementation. In other words, the CFP reform must be implemented with ambition, but also in accordance with reality. This can be achieved, primarily, through incentives and financial support to fishermen to facilitate compliance with obligations. Secondly, the achievement of the objectives linked to MSY and discard ban should be gradual and progressive, based on improved scientific advice, adaptation of the existing legislation to the evolving scenarios and the progressive education of fishermen to behave in accordance with the rules required by the new conditions.

With regard to the market dimension of the CFP, we concluded that the reform has the merit of having integrated in its reference framework the whole economic world connected to fisheries, encouraging synergies and linkages between all the enterprises involved in the supply chain, from fishermen, wholesaler, processors, retailers and caterers, up to consumers. This approach is particularly evident in relation to the Common Market Organisation for fisheries and aquaculture products (CMO), which has been profoundly renewed in comparison to the traditional management of fisheries market policy.

As highlighted in Chapter III, the fisheries industry has been entrusted with a higher responsibility in managing supply to demand, through a strengthened role of producers organisations and, at the same time, lower public financial support to the market intervention mechanisms used in the past. Organisations of fishermen are now expected to develop multi-annual production and marketing plans. This will help, on the one hand, to match supply to fluctuating demand, and to implement commercial tactics and strategies increasing the value of the products, on the other. The ultimate objective is economic (increasing the profits made by fishermen on their catches by focusing on the commercial side of the sector) and at the same time environmental (fish more efficiently).

As for the impacts of these new features on the sector, it can be argued that many aspects of the new market policy will likely contribute to achieve coherence with conservation objectives while supporting, at the same time, the viability of the EU fisheries industry. The promotion of common *fora* for meeting and dialogue among producers, processors and marketers, as well as

differentiation strategies through more sophisticated labelling requirements, are expected to add value to the 'product', reinforcing linkages and building channels of communication along the chain, as well as between companies and consumers. In addition, compulsory and voluntary information on fisheries and aquaculture products represent, in principle, an incentive to consumer to play a more incisive role in promoting sustainable practices through a selective and more informed choice in the shops and the fish markets. Nevertheless, it is important to ensure that the rules are adequate to reality and do not impose unjustified and discriminatory burdens. We pointed out, in this respect, that labelling requirements should be carefully targeted to the specific nature of the products (wild or farmed, fresh, frozen, prepared or canned etc), taking into account several aspects such as, for instance, the variety of ingredients of some precooked plats or the distance of the fishing grounds from the coasts (as relates the choice to indicate the date of capture or of landing).

With reference to the structural policy, we highlighted that, as a fundamental component of the reform package, the European Maritime and Fisheries Fund (EMFF) is the instrument allowing the translation into practice of the all CFP new political choices. From the procedural and administrative viewpoint, we stressed that the Fund is inserted in the common regulatory framework of the Europe 2020 Strategy for Growth as one of the five European Structural (ESI) Funds for the period 2014 – 2020, meaning that its implementation must be carried out through the mechanisms and procedures established in the Common Provision Regulation, which improves coordination and consistency among all the EU structural policies related to growth and sustainable development, including the common fisheries policy.

From the political point of view, it can be argued that the EMFF has marked a turning point in the structural side of the CFP. Whereas long time ago, at the very beginning of the CFP, fleet related measures were the essence of the policy itself, the Fund has made the access to classical forms of subsides more difficult to achieve for EU operators and, in parallel, has pushed towards a re-orientation of budgetary resources to pursue the general and broader political objectives of the CFP. The wide range of measures to promote sustainable fishing practice, scientific research, sustainable aquaculture, linkage between fisheries and the wider maritime economy are to be understood in this light. In addition, it is significant that in the new financial framework part of the resources traditionally devoted to the catching sector have been devolved to more comprehensive 'coastal communities', involving wider range of interest groups and economic activities, especially in the context of Community Local Development Strategies (CLLD) and synergies with other ESI Funds. Some issues of crucial importance for the sector, such as the development of the processing

industry and the social dimension of the CFP, would have deserved, in our opinion, more attention. As a whole, nevertheless, the EMFF is an unprecedented example of consistency between the political and financial sides of the CFP. The almost parallel timing of the adoption of the CFP Basic Regulation and the negotiation of the EMFF has facilitated, in fact, the discussion on the content of the budgetary plan in the light of its potential contribution to achieve the substantial changes introduced by the reform.

The CFP of today clearly acknowledges, finally, that in an even more interconnected, globalises world, maritime governance, including fisheries, is called to face major external challenges. This increases the importance of the external dimension of the Common Fisheries Policy. Vessels fishing outside EU waters, in both international waters and in waters under third States jurisdiction, must operate in accordance with the standards, principles and rules that underpin the policy in domestic maritime spaces. The new CFP requires respect for human rights in fisheries bilateral agreements concluded with third countries. It has been stressed that the world of fishermen in many countries across the world is scattered with human rights violations that cannot be ignored when entering into business agreements with these countries. Nevertheless, the scope of the human rights clause should be better defined to not undermine the legal and economic security in which EU companies need to operate. The CFP reform has made an important step forward in underlining that financial aid to development should be used for its scope, differentiating the component of 'sectoral support' in bilateral agreements from payments for access to fishing grounds, which falls upon the EU private companies, as well as reinforcing the follow-up of the sectoral support in order to assess its efficacy.

Important initiatives have been undertaken, in addition, to foster control over EU external fleet, especially for vessels operating in the context of private arrangements. That control is essential to secure fair competition as well as to improve knowledge of the real status of the EU fleets and their activities outside the EU waters.

It cannot be underestimated that private investments is usually based upon a considerable knowledge of the fisheries business in the countries concerned and that, if properly channelled, can represent an important asset for sustaining development in such countries. The Union system to deter and combat IUU fisheries is one of the most effective in the world, and the European commitment to global sustainability is strong and ambitious, despite the fact that EU fleets only account for up to 8% of global catches.

From the assessment of all the pillars - conservation, market, financial and external policies - underpinning the CFP it emerges therefore that the reform has made a clear choice in favour of the environmental protection as the primary dimension for a sustainable development, identifying the 'change in mindset' on the side of all EU operators as a key factor to achieve this objective. To translate this into reality, nevertheless, financial assistance should not only aim at the achieving environmental sustainability, but also at triggering economic and social development in both internal and external waters, in order to support a 'bottom up' transition towards the primacy of the environmental considerations.

The key challenge is to make the new paradigm acknowledgeable and acceptable in the view of operators. In other words, to 'accompany' the efforts and burdens of fishermen towards these objectives. Otherwise, the traditional and usually criticised 'top down' approach to the CFP will never be overcome. This point is of paramount importance to provide the reform, and consequently the EU itself, with credibility and trust. The implementation of the CFP requires rules based not on abstract theoretical principles, but actually enforceable and built on the real needs of the economic and social tissue.

In order to achieve responsibility and accountability in the challenging implementation process, several actors need to do a lot, and the diversified world of enterprises involved in the sector play a pivotal role therein. But the key of all solutions envisaged in the policy is that no aspect can be seen and tackled in isolation. Therefore, the final objective of a more sustainable fishery can only be achieved if all operators in the chain actually contribute to the conservation and right exploitation of marine living resources, and if at the same time consumers act consciously and responsibly when choosing products. That behaviour should be accompanied by the awareness of all stakeholders, and the public opinion, about the potential value of fisheries for development and sustainable economic growth.

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