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The Role of Regional Advisory Councils in the European Common Fisheries Policy: Legal Constraints and Future Options

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Abstract
One of the outcomes of the reform of the European common fisheries policy (CFP) in 2002 was the establishment of Regional Advisory Councils (RACs) to enable the European Commission to benefit from the knowledge and experience of stakeholders in the formulation and implementation of fisheries management measures by the European institutions. RACs are now in operation for the Baltic Sea, the North Sea, North-Western Waters, South-Western Waters, the High-Seas/Long-Distance Fleet, Pelagic Stocks, and the Mediterranean Sea. The CFP will be subject to further reform in 2011. This article reviews the legal constraints and future prospects for enhancing RAC participation in decision-making within the European institutions in light of the Commission's proposals tabled in the 2009 Green Paper on Reform of the CFP and changes to European law resulting from the Lisbon Treaty.

Keywords
common fisheries policy; Regional Advisory Councils (RACs); stakeholder participation in European fisheries management; Lisbon Treaty; Treaty on the Functioning of the European Union; 2009 Green Paper on Reform of the Common Fisheries Policy (CFP)

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Introduction

The common fisheries policy (CFP) is one of the longest established and some may say one of the most controversial policies emanating from the European Union (EU).[2] The CFP traces its roots back to the early 1970s. Traditionally, the policy has followed a top-down approach to fisheries management with the European Council of Fisheries Ministers often reduced to protracted debate at the highest political levels on the most menial of management decisions concerning the technical aspects of fisheries conservation measures.[3] This approach is soon to change as a result of a root-and-branch reform process, commenced by the European Commission in 2009, which is scheduled for conclusion with the adoption of a new basic regulation for fisheries management underpinning the CFP by late next year.[4] As the reform process gathers momentum, it is evident that one of the hot topics on the agenda is how to introduce a bottom-up approach to fisheries management in the EU by enhancing the role of stakeholders in decision-making within the European institutions regarding the formulation and implementation of the CFP. This is not entirely a new initiative when one considers that the topic of stakeholder participation in decision-making has been at the top of the international environmental law agenda for nearly two decades. One only needs to point to Principle 10 of the 1992 Rio Declaration on Environment and Development which provides that environmental issues are best handled with the participation of all concerned citizens.[5] Similarly, Agenda 21 identi-

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[2] Where possible, the term "European Union" is used in this article in preference to the "European Community" in line with the changes brought about by the Treaty on European Union (TEU) which states in Art. 1 that the "Union shall replace and succeed the European Community". The Treaty of Lisbon amends the TEU and the Treaty establishing the European Community (EC Treaty) and was signed by the representatives of the 27 Member States of the EU in Lisbon on 13 December 2007. The Treaty came into force on 1 December 2009. Under the Lisbon Treaty, the EC Treaty is renamed as the Treaty on the Functioning of the EU (TFEU). The TEU, the TFEU and the Charter of Fundamental Rights constitute the EU's treaty structure. A copy of the Consolidated Treaties is published in the Official Journal of the European Union at OJ C 306/50, 17.12.2007. An electronic copy is available at: htpp://europa.eu/lisbon_treaty/full_text/index_en.htm.

[3] See the example cited by the Rt. Hon. Huw Irranca-Davies MP, Minister for the Marine and Natural Environment in the United Kingdom (UK), wherein the Council discusses the statutory process that ought to be followed by fishermen when repairing a square mesh panel on towed fishing gear for use in the Baltic Sea. Paper delivered at the Inter-RAC Conference, Merchants Hall, Edinburgh, 4 November 2009; available at: http://www.defra.gov.uk/corporate/about/who/ministers/speeches/irranca-davies/hid091104.htm.

[4] See http://ec.europa.eu/fisheries/reform/.

[5] United Nations Conference on Environment and Development: Rio Declaration on Environment and Development, 14 June 1992 (1992) 31 *International Legal Materials* 874.

fies stakeholder participation in decision-making as one of the fundamental prerequisites for the sustainable development and management of resources in the 21st century.[6] Today the call for improving the role of stakeholders in decision-making permeates a whole raft of ocean governance initiatives and is identified by the International Union for Conservation of Nature (IUCN) as one of the 10 principles of modern ocean governance.[7] This approach is also evident in Principle 6 of IUCN's "Principles for High Seas Governance" which stresses that decision-making ought to be transparent, accountable and inclusive and calls upon regional and global organizations to promote the meaningful participation of all stakeholders in managing high-seas resources.[8]

From a European fisheries management perspective, one of the ways in which legal substance is given to the hortatory nature of these obligations is through the progressive establishment, since 2002, of Regional Advisory Councils (RACs) as one of the principal means to involve a broad range of stakeholders in the formulation and implementation of the rules governing the CFP. The primary task of the RACs is to advise the Commission on decisions concerning fisheries management in respect of certain sea areas or fish stocks.[9] In undertaking this task, RACs must contribute to the objectives of the CFP which aim to ensure the sustainable exploitation of living aquatic resources and incorporate an approach to fisheries management that is based on the ecosystem approach and the precautionary principle.[10] Despite the rather open-ended nature of this exercise, the current arrangements for stakeholder participation in the CFP are quite impressive and RACs are now in operation for the Baltic Sea, the North Sea, North-Western Waters, South-Western Waters, the High-Seas/Long-Distance Fleet, Pelagic Stocks, and the Mediterranean Sea (see Fig. 1).[11]

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[6] See Agenda 21, Chapter 17, paragraph 23.2, in UN Doc. A/CONF.151/26/REV.1, Vol. 1, 12 August 1992.

[7] See D. Freestone, 'Principles Applicable to Modern Oceans Governance' (2008) 23(3) *IJMCL* 385–391.

[8] Adopted at the IUCN World Conservation Congress, Barcelona, in 2008. Available at: www.iucn.org. For commentary, see D. Freestone, 'The Modern Principles of High Seas Governance. The Legal Underpinnings' (2009) 39(1) *International Environmental Policy and Law* 44–49.

[9] Art. 31(1) of Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the CFP. OJ L 358/59, 31.12.2002.

[10] Art. 2(1) of Council Regulation (EC) No. 2371/2002, in *ibid.*

[11] The precise geographical coverage of RACs is set out in Annex 1 to Council Decision 2004/585/EC of 19 July 2004 establishing Regional Advisory Councils under the Common Fisheries Policy. OJ L 256/17, 3.8.2004.

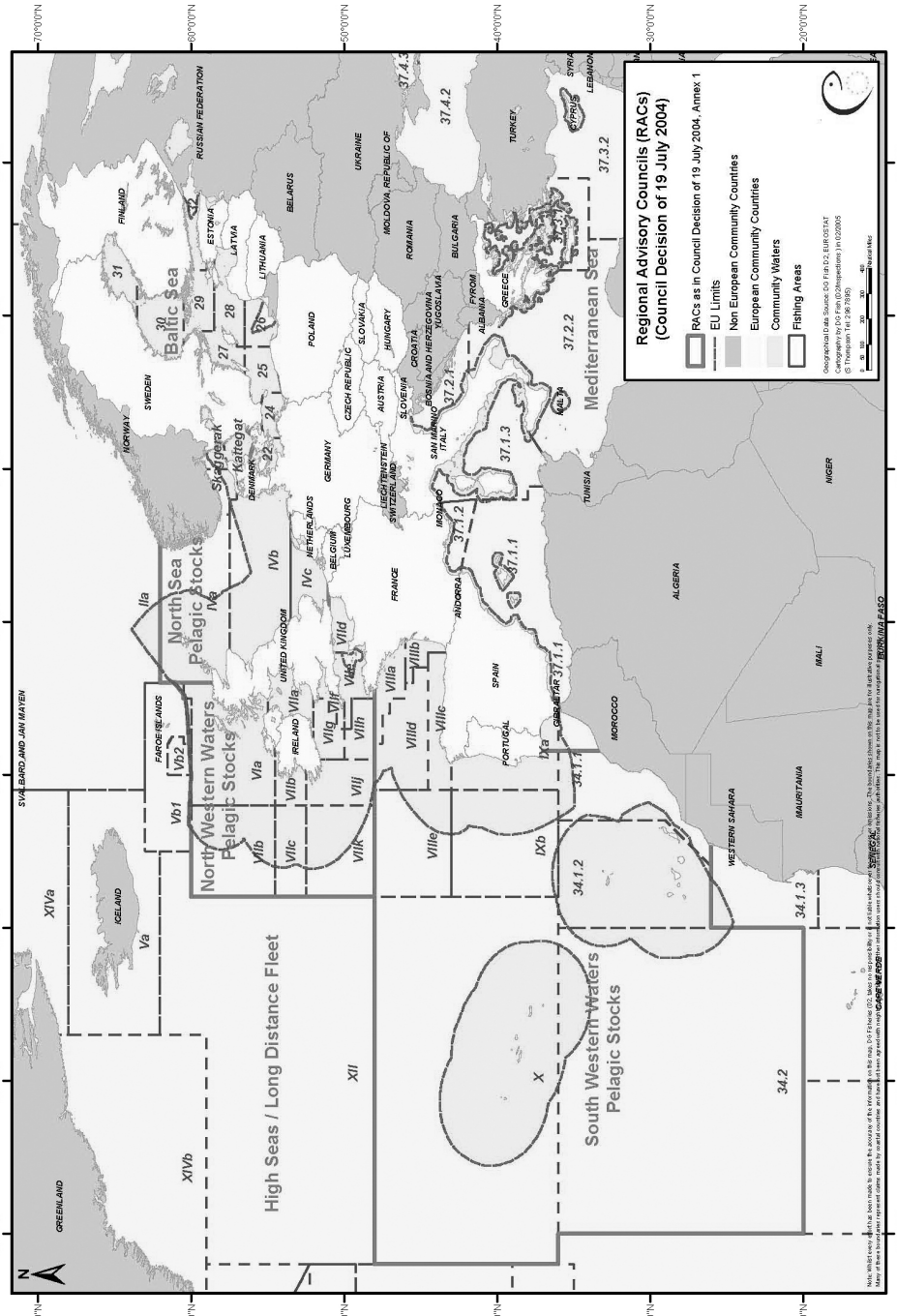

Fig. 1. Geographical coverage of the RACs as set out in Annex 1 to Council Decision 2004/585/EC.

One distinctive feature of the new structures is that they have a broad constituency which is composed of representatives of the fishing industry and other parties concerned with the CFP, such as environmental organisations, aquaculture producers, consumers and recreational fishermen. They are stakeholder-led organisations, where the status of representatives of the Commission and national/regional administrations is limited to the role of "active observers" at meetings of the various working groups which deliberate on draft legislative proposals tabled by the Commission prior to their ultimate adoption by the European Council of Fisheries Ministers and, since the ratification of the Lisbon Treaty in 2009, by the European Parliament. For this reason, RACs are perceived as one of the most significant developments in European fisheries governance since the CFP was first agreed in the early 1980s.[12] On a similar note, stakeholder consultation is now viewed by the European institutions as a central pillar in the CFP and a prerequisite for good ocean governance.[13] Indeed, the basic regulation governing fisheries management in the EU expressly provides that broad involvement of stakeholders at all stages of the CFP, from conception to implementation, is one of the core principles of the CFP.[14]

From an international law perspective, this transparent and inclusive approach to fisheries management is fully consistent with the Food and Agriculture Organization's (FAO) Code of Conduct for Responsible Fisheries and with the commitments set down in a broad range of international treaties which are legally binding on the EU and the Member States.[15] In particular, it embodies the spirit of the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation

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[12] See, *inter alia*: D. Uyttendaele, 'Regional Advisory Councils for Fisheries Management and their Relation to the Marine Strategy', European Environment and Sustainable Development Advisory Councils' Roundtable on the Common Fisheries Policy, Berlin, 5 October 2004. Available at: http://www.eeac-net.org/conferences/twelve/Presentations/Roundtable_CommonFisheriesPolicy_Uyttendaele.ppt; and the sources cited at note 20 *infra*.

[13] Recital 4 of Council Decision 2007/409/EC of 11 June 2007 amending Decision 2004/585/EC establishing Regional Advisory Councils under the Common Fisheries Policy. OJ L 155/68, 15.6.2007.

[14] Art. 2(2)(c) of Council Regulation (EC) No. 2371/2002, *op. cit., supra* note 9.

[15] See, for example, Art. 6.13 of the FAO Code of Conduct for Responsible Fisheries which provides that: "States should, to the extent permitted by national laws and regulations, ensure that decision-making processes are transparent and achieve timely solutions to urgent matters. States, in accordance with appropriate procedures, should facilitate consultation and the effective participation of industry, fishworkers, environmental and other interested organizations in decision-making with respect to the development of laws and policies related to fisheries management, development, international lending and aid". The FAO Code of Conduct is available at www.fao.org.

in Decision-making and Access to Justice in Environmental Matters (referred to as the "Aarhus Convention").[16] As noted in the preamble of that Convention, "improved access and public participation in decision-making enhance the quality and the implementation of the decisions."[17] In a similar vein, the Almaty Guidelines on the implementation of the Aarhus Convention emphasise that decision-making processes in international fora are enhanced by the participation of an informed, knowledgeable public, representing diverse constituencies.[18]

Clearly, there is a solid legal basis for the establishment of stakeholder consultative bodies for sector policies such as fisheries in a number of international and European legal instruments. Nevertheless, the impact so far of the RACs on decision-making within the CFP is less striking than their organisational structure and continues to be the subject of on-going debate among the various interest groups concerned with fisheries management in the EU.[19] On the one hand, there appears to be a general consensus within the European institutions that RACs are playing a significant part in several important aspects of policy development within the CFP, including submitting recommendations and suggestions on matters relating to fisheries management, as well as on the enforcement of European rules.[20] There are several instances, on the other hand, where the Commission has not followed the

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[16] Art. 1 of United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 25 June 1998; done at Aarhus, Denmark, 25 June 1998; entered into force on 30 October 2001; 2161 *UNTS* 447; 38 *ILM* 517 (1999).

[17] Recital 9 of the Preamble to the Aarhus Convention. The EU approved the Convention on 17 February 2005 and many of its provisions are now reflected in many European legal instruments adopted pursuant to Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters. OJ L 124, 17.5.2005, pp. 1–3.

[18] Para. 38 of the Guidelines adopted by the second meeting of the parties at Almaty, Kazakhstan, in May 2005. United Nations Economic and Social Council Doc. ECE/MP.PP/2005/2/Add.5, 20 June 2005. Available at: http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf.

[19] Report of an Inter-RAC Conference hosted by the Scottish Government and jointly funded by Marine Scotland and DEFRA on "Decision-Making in the Reform of the Common Fisheries Policy", Merchants Hall**,** Edinburgh, 3–4 November 2009. Available at: http://www.nsrac.org/wp-content/…/11/Inter-RAC-CFP-Edinburgh-Report.pdf.

[20] See, *inter alia*: Communication from the Commission to the Council and European Parliament, Review of the Functioning of the RACs, COM (2008) 364 final. Brussels, 17.6.2008. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0364:FIN:EN:PDF. Also, E. Penas, 'The Fishery Conservation Policy of the European Union after 2002: Towards Long-term Sustainability' (2007) *ICES Journal of Marine Science* 64: 588–595 at 592; M. Sissenwine, D. Symes, *Reflections on the Common Fisheries Policy* (2007)

advice of the RACs on the grounds that that the proposed recommendations were inconsistent with the broader conservation objectives of the CFP.[21] In this context, it is important to keep in mind that despite the legitimacy that RAC participation brings to the formulation of the legal rules underpinning the CFP, they remain in essence consultative bodies with a mandate that is clearly restricted by European law to the provision of advice. At the time of their establishment, however, they were considered to be legal entities that would develop over time on the basis of experience.[22]

In order to assess the scope for the future development of the RACs as one of the key consultative bodies concerned with the CFP, this article reviews a number of normative constraints imposed by the European legal order, including the treaties, as well as the future prospects for enhancing their participation in decision-making within the European institutions under a reformed CFP. The article is divided into three parts to facilitate this exercise. The first part provides some contextual background information on the historical development of the CFP and mentions some of the current difficulties encountered in European fisheries management. The second part reviews the origins and legal basis for the establishment of the RACs and outlines a number of key features regarding their structure and composition. The third part examines the legal constraints and future possibilities for enhancing RAC participation in decision-making in light of the current reform proposals tabled by the Commission in the 2009 Green Paper on the Reform of the CFP (referred to as the "2009 Green Paper" hereinafter).[23] Mention is made of one alternative theoretical reform option which is not addressed specifically in the 2009 Green Paper but is advanced here for the sake of completeness. Throughout this discussion, specific reference is made to a number of provisions in the Lisbon Treaty and the Treaty on the Functioning of the EU (TFEU) which will shape the outcome of the CFP reform process in 2011.

At the outset, it ought to be noted that the RACs are not the only form of stakeholder participation in the CFP or indeed the only form worth discussing here. This is clearly not the case: many other legal entities play an important role in the functioning of the CFP, such as the Advisory Committee on

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pp. 66–68. Available at: http://www.greenpeace.org/raw/content/denmark/press/rapporter-og-dokumenter/reflections-on-the-common-fish.pdf.

[21] See, for example, the North Sea RAC recommendations on the recovery of plaice and sole stocks were not accepted by the Commission; Penas, *ibid.*, at 593.

[22] Proposal for a Council Decision establishing Regional Advisory Councils under the Common Fisheries Policy. COM(2003) 607 final. Brussels, 15.10.2003, at 3. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0607:FIN:EN:PDF.

[23] Green Paper, Reform of the CFP, COM(2009) 163 final, Brussels, 22.4.2009. Available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0163:FIN:EN:PDF.

Fisheries and Aquaculture, which is mentioned in further detail in part two below. That being said, the important role played by the RACs in the policy process ought not to be underestimated, as they have many unique features as consultative bodies. To begin with, as creations of European law, they are the first "formal attempt to generate a network of multi-national, multi-interest advisory organisations with a strong regional focus" within the CFP.[24] Notably, as "grass roots" organisations, their role is not limited to the provision of advice on tentative fisheries management measures, but extends to providing advice on all aspects of the CFP, including enforcement and compliance. Moreover, the geographical remit of the RACs extends to all waters under the sovereignty and jurisdiction of the Member States, the high seas, and covers the activities of the European long-distance fleet even where these vessels operate in sea areas under the jurisdiction of third countries. From an organisational perspective, they are innovative bodies which, in the words of the Commission, "have already made a positive contribution to the development of the CFP".[25] Similarly, the UK House of Lords Select Committee on the EU views the establishment of the RACs as the most positive development to flow from the reform of the CFP in 2002.[26] These findings are unsurprising and accord with the increased awareness at an international level of the importance of stakeholder participation in natural resource management, as shown by the decision of the Nobel Prize Jury to award the 2009 Economics Prize in part to Professor Elinor Ostrom for her work on common-pool resources.[27] Her research demonstrates that one of the key features in implementing successful governance over natural resources is the active participation of users in creating and enforcing a system of oversight for resource utilisation.[28] In the context of the current debate about the future of

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[24] Sissenwine and Symes, *op. cit., supra* note 20 at 67.

[25] Review of the Functioning of the RACs, COM (2008) 364 final, *op. cit., supra* note 20 at 11.

[26] UK House of Lords Paper 146-I. European Union Committee. 21st Report. *The Progress of the Common Fisheries Policy*. Volume I: Report. Chairman: Lord Sewel. Session 2007–08, para. 136. Available at: http://www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/146/146.pdf.

[27] See: http://nobelprize.org/.

[28] See, *inter alios*: X. Basurto, E. Ostrom, 'The Core Challenges of Moving Beyond Garret Harding' (2009) 1(3) *Journal of Natural Resources Policy Research* 255–259*;* E. Ostrom, R. Gardner, J. Walker, *Rules, Games, and Common-Pool Resources* (Ann Arbor, MI: University of Michigan Press, 2009); E. Ostrom, 'The Value-added of Laboratory Experiments for the Study of Institutions and Common-Pool Resources' (2006) 2 *Journal of Economic Behaviour and Organization* 149–163; E. Ostrom, *Understanding Institutional Diversity* (Princeton: Princeton University Press, 2005); E. Ostrom, J. Walker, R. Gardner, 'Covenants With and Without a Sword: Self-governance Is Possible' (1992) 86(2) *American Political Science Review* 404–417; E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).

the CFP, it is important to keep in mind that the RACs are one of the principal means used by the Commission to obtain stakeholder advice concerning the functioning of the CFP. The scope for strengthening their *ex ante* influence on the adoption of European regulatory instruments therefore merits careful consideration.

Background Information on the Common Fisheries Policy

The CFP has been the subject of extensive scholarly research and the discussion here is limited to mentioning a number of key policy features in order to provide some background context for the discussion in the second and third parts of the article below.[29]

European Common Fisheries Policy

When viewed with the benefit of hindsight, it is clearly evident that the CFP has followed a rather complex route from an inauspicious beginning in the early 1970s to its present position as one of the longest established and perhaps the most contentious European policies. The CFP is referred to as a "common policy" because the EU exercises legal competence to regulate fisheries through the medium of European law. This includes all fishing activity in sea areas both within and beyond the jurisdiction and sovereignty of the Member States.[30] One surprising aspect of the policy is that the founding Treaty establishing the European Economic Community, the Treaty of Rome 1957, only addressed fisheries indirectly and through the rather circuitous and somewhat inappropriate provisions dealing with agriculture.[31] Right up

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[29] This overview is updated from R. Long, *Marine Resource Law* (Dublin: Thomson Round Hall, 2007). Available at: www.roundhall.thomson.com. There are a number of excellent academic studies on the CFP, including: R.R. Churchill, D. Owen, *The EU Common Fisheries Policy* (Oxford: Oxford University Press, 2010); which follows on from the acclaimed study by R.R. Churchill, *EEC Fisheries Law* (Dordrecht: Martinus Nijhoff, 1986). Also see: House of Lords, European Union Committee, 'European Union Fisheries Legislation: Report With Evidence' (London: Stationary Office, 2005); N. Wolff, *Fisheries and the Environment: Public International and European Community Law Aspects* (Baden-Baden: Nomos, 2002); C. Lequesne, *The Politics of Fisheries in the European Union* (Manchester: Manchester University Press, 2004). On enforcement and compliance, see, *inter alia*: R. Long, P. Curran, *Enforcing the Common Fishery Policy* (Oxford: Blackwell Science, 2000); A. Berg, *Implementing and Enforcing European Fishery Law: The Implementation and Enforcement of the Common Fisheries Policy in the Netherlands and the United Kingdom* (The Hague: Kluwer Law, 1999).

[30] Art. 1 of Council Regulation (EC) No. 2371/2002, *op. cit., supra* note 9.

[31] Arts. 32–38 of the EC Treaty.

to the 1970s, freedom of fishing applied in the North Atlantic in sea areas outside the territorial jurisdiction of coastal States, initially 3 but later extended to 12 nautical miles from the baselines of the Member States. Up to 1976, the management of fisheries in the North Atlantic was undertaken by two regional fisheries organisations which were largely ineffective in delivering sustainable fisheries, due to a range of counterproductive practices, including the setting of total allowable catches at too high a level, and through ineffectual procedures that allowed dissatisfied States to opt out of conservation measures.[32]

The first significant date marking the move towards a common policy was 20 October 1970, when the Council of Ministers adopted two regulations on the structural and market aspects of fisheries.[33] Incredibly, it took another thirteen years before the CFP was finally agreed in 1983. Two key features in the CFP were the establishment of the principle of relative stability, which provides for the allocation of fishing opportunities among Member States in fixed proportions based largely on past catches, and the adoption of specific measures aimed at protecting the particular needs of peripheral regions of the EU where local populations are especially dependent on fisheries and related economic activities.[34] The core of the CFP is made up of complex rules which regulate the quantities of fish caught by fishing vessels, the number of vessels which may have access to a fishery, the marketing of fishery products, rules on control and enforcement, and rules pertaining to the international dimension of the CFP.[35]

Since its agreement in 1983, the CFP has been subject to two major reviews, in 1992 and 2002, respectively. This process of ongoing reform was required under the regulatory instruments establishing the CFP. In addition, the CFP has had to respond to a multitude of considerations over the years, including the conservation of the resource, the preservation of the environment, the maintenance of economic activity in the peripheral regions of Europe which are particularly dependent upon fishing as an economic activ-

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[32] On the failure of the North-East Atlantic Fisheries Commission and the International Commission for the Northwest Atlantic Fisheries to deliver sustainable fisheries, see Churchill, *EEC Fisheries Law*, *op. cit., supra* note 29 at 5.

[33] Council Regulation No. 2141/70 laying down a common structural policy for the fishing industry. OJ L 236, 27.10.1970, p. 1. English Spec. Ed. (III) 703; and Council Regulation No. 2142/70 on the common organisation of the market in fishery products. OJ L 236, 27.10.1970, p. 5. OJ English Spec. Ed. (III) 707.

[34] Arts. 17(1) and 20(1) and Recitals 17 and 18 of Council Regulation (EC) No. 2371/2002, *op. cit., supra* note 9.

[35] M. Holden, *The Common Fisheries Policy: Origin, Evaluation and Future* (2nd ed., updated by D. Garrod; Oxford: Fishing News Books, 1996), *passim.*

ity, as well as very serious overcapacity in the fishing fleets in the Member States. These objectives made it difficult at times for the European institutions to articulate a coherent policy which satisfies the diverging interests of the various parties concerned with the CFP while at the same time ensuring the long-term viability of fisheries.[36] Moreover, it should not be forgotten that other factors outside the domain of the conservation policy have influenced CFP developments at a European level. In particular, the six enlargements of the EU, with the accession of new Member States, have had a profound impact on the geographical footprint of the CFP: the emphasis of the CFP has shifted away from the management of fisheries in the north-east Atlantic/North Sea and is now focused on a much broader geographical region, including the Baltic Sea, the Mediterranean Sea, and part of the Black Sea, as well as on sea areas under the sovereignty and jurisdiction of third countries where the EU has negotiated bilateral access agreements.[37] The complexity of the fisheries management task is further compounded by the prominent role played by the EU in the work of Regional Fisheries Management Organisations (RFMOs), such as the North-East Atlantic Fisheries Commission (NEAFC) and the International Commission for the Conservation of Atlantic Tunas (ICCAT),[38] as well as at a number of multilateral organisations, including the United Nations (UN).

The first major policy review in 1992 led to a number of important changes to the regulatory framework, including the introduction of measures to reduce the number of fishing vessels in the Member States, an elaborate scheme for the reduction of fishing effort, and a more robust system for law

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[36] J. Wakefield, 'Fisheries: A Failure of Values' (2009) 46 *Common Market Law Review* 431–470.

[37] The first enlargement took place in 1973 with the accession of Ireland, UK and Denmark. The second took place in 1981 with the accession of Greece and the third with Spain and Portugal in 1986. This was followed by the fourth enlargement in 1995 with Austria, Sweden, Finland and the fifth in 2004 with Malta, Cyprus, Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Slovenia, and Hungary. The sixth took place in 2007 with the accession of Bulgaria and Romania. At the time of writing, accession negotiations are underway with Croatia.

[38] The North-East Atlantic Fisheries Commission (NEAFC) comprises five Contracting Parties: Denmark (in respect of the Faroe Islands and Greenland), the European Union, Iceland, Norway and the Russian Federation. All are party to the Convention on Future Multilateral Cooperation in the North-East Atlantic Fisheries, adopted 24 October 1978, entered into force 1 January 1979, OJ L 227, 12.8.1981, p. 21. The International Commission for the Conservation of Atlantic Tunas (ICCAT) is responsible for the conservation of tunas and tuna-like species in the Atlantic Ocean and adjacent seas. The International Convention for the Conservation of Atlantic Tunas has 48 Contracting Parties including the EU; adopted 14 May 1966, entered into force 21 March 1969, OJ L 162, 18.6.1986, pp. 34–38.

enforcement.[39] In 2002, further reform ensued after a protracted round of Commission consultations with the Member States and the European Parliament which revealed that the CFP was not delivering sustainable fisheries.[40] The Commission identified several reasons for this failure, including: "the lack of participation by stakeholders in the decision-making process, resulting in poor commitment of fishers to the measures imposed".[41] The principal outcome of the reform process in 2002 was the adoption by the Council of a new management regulation for the CFP (referred to as the "Basic Fishery Management Regulation" hereinafter) which provided, *inter alia*, a legal basis for the establishment and operation of the RACs, as will be seen below.[42]

Since the reform of the CFP in 2002, a number of other important trends are evident in the CFP which will impinge on its future orientation. First and foremost is a major policy shift in recent years towards the adoption of a more sophisticated range of management measures that incorporates a strategy to protect the broader marine environment, as well as the ecosystem approach and the precautionary principle.[43] These include management measures aimed at conserving marine ecosystems, such as reefs, seamounts, deep-water corals, hydrothermal vents and sponge beds.[44] Second, the parent Directorate-General within the Commission, generally referred to as "DG

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[39] Council Regulation (EEC) No. 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture. OJ L 389, 31.12.1992, p.1 (since repealed); Council Regulation (EEC) No. 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy. OJ No L 261, 20. 10. 1993, p. 1 (since repealed).

[40] See, *inter alia*: Green Paper: *On the future of the Common Fisheries Policy* COM (2001) 131 final, Brussels, 20.3.2001, available at: http://europa.eu/documentation/official-docs/green-papers/index_en.htm; *Communication for the Commission on the reform of the Common Fisheries Policy ("Roadmap")* COM(2002) 181 final, Brussels, 28.5.2002, available at: http:// eur-lex.europa.**eu**/LexUriServ/LexUriServ.do?uri=COM:**2002**:0**181**:FIN:EN:PDF.

[41] Penas, *op. cit., supra* note 20 at 588.

[42] Council Regulation (EC) 2371/2002, *op. cit., supra* note 9.

[43] See, *inter alia*: European Commission, *Communication From The Commission to the Council and the European Parliament: Towards a strategy to protect and conserve the marine environment*, Brussels, COM(2002) 539 final, available at: http:// eur-lex.europa.**eu**/LexUriServ/LexUriServ.do?uri=COM:**2002**:0**539**:FIN:EN:PDF*; Communication From The Commission to the Council and the European Parliament: Application of the precautionary principle and multiannual arrangements for setting TACs*, COM(2000) 803 final, Brussels, 01.12.2000, available at: http:// eur-lex.europa.**eu**/LexUriServ/LexUriServ.do?uri=COM:**2000**:0**803**:FIN:EN:PDF; *Communication From The Commission to the Council and the European Parliament: The role of the Common Fisheries Policy in implementing an ecosystem approach to marine management*, COM(2008) 187 final and SEC(2008) 449, Brussels, 11.4.2008, available at: http:// eur-lex.europa.**eu**/LexUriServ/LexUriServ.do?uri=COM:**2008**:0**187**:FIN:EN:PDF;.

[44] See, for example, Commission Regulation (EC) No. 1475/2003 of 20 August 2003 on the protection of deep-water coral reefs from the effects of trawling in an area north-west of Scotland [2003] OJ L211/14, 21.8.2003.

for Maritime Affairs and Fisheries", has been reorganised on a regional basis and a new conservation policy which is more region-specific has been implemented gradually since 2003.[45] This process of regionalisation is best exemplified in the geographical footprint of the RACs and it will come as no surprise if this trend continues when the reform of the CFP is concluded by 2011. The third major policy development is the changes made to the organisational structures tasked with ensuring enforcement and compliance with European fishery law. These have been strengthened considerably through the work of the Community Fisheries Control Agency (CFCA) and through the adoption of a new regulation which seeks to harmonise sanctions at a European level and aims to foster greater collaboration among Member States in the practical and technical aspects of law enforcement on land and at sea.[46] The fourth major development is that the management of fisheries can no longer be viewed in isolation, but is now an important component of the European Integrated Maritime Policy and its environmental pillar which comes in the form of the Marine Strategy Framework Directive.[47] Both of these initiatives aim to address all marine and maritime issues in the EU in a holistic and integrated manner.[48] The future role of the RACs within a

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[45] See D. Symes (unpublished paper) who reviews several options in a paper entitled 'Regionalising the CFP: What Kind of Institutional Solution?' delivered at the Nordic Council of Ministers' Conference, 13 October 2009. Available at: http://www.cfp-regionalisation.eu/regionalisation.pdf.

[46] Council Regulation (EC) No. 1224/2009 of 20 Nov 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No. 847/96, (EC) No. 2371/2002, (EC) No. 811/2004, (EC) No. 768/2005, (EC) No. 2115/2005, (EC) No. 2166/2005, (EC) No. 388/2006, (EC) No. 509/2007, (EC) No. 676/2007, (EC) No. 1098/2007, (EC) No. 1300/2008, (EC) No. 1342/2008 and repealing Regulations (EEC) No. 2847/93, (EC) No. 1627/94 and (EC) No. 1966/2006, OJ L 343/1, 9; 22.12.2009. On enforcement and compliance see C. Johnson, 'Fisheries Enforcement in European Community Waters Since 2002—Developments in Non-Flag Enforcement' (2008) 23(2) *IJMCL* 249–270; and the Court of Auditors, Special Report No. 7/2007 on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources together with the Commission's replies (pursuant to Art. 248(4) second paragraph, EC) (2007/C 317/01). OJ C 317/1, 28.12.2007.

[47] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing the framework for Community action in field of marine environmental policy (Marine Strategy Framework Directive), OJ L 164, 25.6.2008.

[48] Communication from the Commission, Towards a Future Maritime Policy for the Union: A European Vision for the Oceans and Seas, Brussels, COM (2006) 275 final, 7.6.2006, p. 2, available at: http://eur-lex.europa.**eu**/LexUriServ/LexUriServ.do?uri=COM:**2006**:0**275**:FIN:EN:PDF. For discussion of the integrated maritime policy, see, *inter alia*: L. Juda, 'The European Union and Ocean Use Management: The Marine Strategy and the Maritime Policy' (2007) 38(3) *Ocean Development and International Law* 259–282; T. Koivurova, 'A Note

reformed CFP must therefore be set within the broader picture of stakeholder consultation and participation in the EU Integrated Maritime Policy.[49]

All of these changes have not ensured that the CFP delivers the fundamental objective of sustainable fisheries. Indeed, the Commission concluded in 2009 that European fisheries are now characterised by "overfishing, fleet overcapacity, heavy subsidies, low economic resilience and decline in the return for the industry".[50] The scientific picture is very grim: the Commission points out in the 2009 Green Paper that 88% of the fish stocks in European waters are being fished beyond their Maximum Sustainable Yield (MSY) and 30% of the overfished stocks are considered to be outside safe biological limits by the International Council for the Exploration of the Seas (ICES).[51] The scale of this disaster may be appreciated when one considers that catches by the European fleet have fallen to such an extent that Europe now relies on imports from third countries to meet the demands of two-thirds of consumers in the Member States.[52] This situation is all the more calamitous in light of the specific targets for fisheries management set down by the World Summit on Sustainable Development in 2002, including the restoration of fish stocks to MSY by 2015.

In a frank manner, the 2009 Green Paper suggests that the sorry state of European fisheries can be attributed to five main structural failings, namely: a deep-rooted problem of fleet overcapacity; imprecise policy objectives resulting in insufficient guidance for decisions and implementation; a decision-making system that encourages a short-term focus; a framework that does not give sufficient responsibility to the industry; and lack of political will to ensure compliance by Member States with their legal obligations as well as poor compliance by the industry.[53] In light of these findings, we must now turn to the second part of this article and see how the RACs are involved in the practical aspects of decision-making within the European institutions concerning the CFP and what options are available for improving their participation in European fisheries management when the reform of the CFP is completed next year.

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on the European Union's Integrated Maritime Policy' (2009) 40(2) *Ocean Development & International Law* 171–183.

[49] COM(2008) 395 final, Brussels, 26.06.2008 at p. 11, available at: http://eur-lex.europa.**eu**/LexUriServ/LexUriServ.do?uri=COM:**2008**:0**395**:FIN:EN:PDF. Also see L. van Hoof, J. van Tatenhove, 'EU Marine Policy on the Move: the Tension Between Fisheries and Maritime Policy' (2010) 34 (1) *Marine Policy*, in press.

[50] Green Paper, Reform of the CFP, COM (2009) 163 final, *op. cit., supra* note 23 at 4.

[51] *Ibid.*, at 7.

[52] *Ibid.*

[53] *Ibid.*, at 8.

Regional Advisory Councils

Origins of the RACs

The origin of the RACs may be traced back to a diverse range of consultation practices on fisheries management in the Member States, as well as to a number of formal and informal consultative bodies relied upon by the Commission for the provision of advice on the CFP within the European institutions. Indeed a brief review of state practice reveals that stakeholder consultation in fisheries management is not entirely a new phenomenon in the Member States of the EU.[54] One only needs to point to the United Kingdom and the Netherlands, which both have a high level of administrative decentralization and well-organised industry representative structures working at national and European levels.[55] A sophisticated approach is also evident in Denmark, which has a long tradition of industry consultation regarding the content and implementation of EU legislation.[56] Other Member States, such as Spain, use structures and procedures for consultation with those responsible for fisheries management in the autonomous regions: for this reason the central government department with responsibility for fisheries matters in Madrid (the Ministry of Agriculture, Fisheries and Food) places considerable emphasis on strong industry involvement in the articulation and implementation of policy at regional levels. Outside of the EU, a number of well-developed models for stakeholder participation in fisheries management are found in the United States and Australia.[57]

Prior to the establishment of the RACs, the model followed by the Commission for fishing industry consultation within the European institutions was modelled on the trade advisory committees that operate under the

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[54] See, *inter alia*: A. Berghöfer *et al.*, 'Stakeholder Participation in Ecosystem-based Approaches to Fisheries Management: A Synthesis From European Research Projects' (2008) 32(2) *Marine Policy* 243–253; R. Varjopuro *et al.*, 'Introduction: Interaction Between Environment and Fisheries—The Role of Stakeholder Participation' (2008) 32(2) *Marine Policy* 147–157; J. L. Suárez de Vivero *et al.*, 'The Paradox of Public Participation in Fisheries Governance. The Rising Number of Actors and the Devolution Process' (2008) 32(3) *Marine Policy* 319–325.

[55] S. Fletcher, 'Stakeholder Representation and the Democratic Basis of Coastal Partnerships in the UK' (2003) 27(3) *Marine Policy* 229–240.

[56] J. Raakjær Nielsen, A. Christensen, 'Sharing Responsibilities in Danish Fisheries Management—Experiences and Future Directions' (2006) 30(2) *Marine Policy* 181–188.

[57] See, *inter alia:* S. Pascoe *et al.*, 'Stakeholder Objective Preferences in Australian Commonwealth Managed Fisheries' (2009) 33(5) *Marine Policy* 750–758; P. Pinto da Silva, A. Kitts, 'Collaborative Fisheries Management in the Northeast US: Emerging Initiatives and Future Directions' (2006) 30(6) *Marine Policy* 832–841.

Common Agricultural Policy. The principal committee established for this purpose, the Advisory Committee on Fisheries, worked at improving dialogue between the Commission and the fishing industry since the early 1970s.[58] By the late 1990s, the constituency of this committee was broadened to include a large range of interest groups, including the aquaculture industry.[59] At the same time, additional funding was provided to the Committee with a view to making the legislative preparatory phase in the European institutions more transparent and efficient.[60] As a result of these changes, the mandate of the Advisory Committee on Fisheries and Aquaculture (ACFA) was expanded to advising the Commission on the various legislative proposals for the sector and to issue opinions on its own initiative regarding the content and shape of fisheries management measures. Today, the ACFA comprises representatives from professional organisations representing: producer companies; the processing industry; and traders in fishery and aquaculture products; and from non-professional organisations representing the interests of consumers, the environment and development. The ACFA has served the CFP well. Indeed, an external evaluation of the effectiveness of the ACFA in 2008 was very positive, noting that it has undertaken sterling work and improved dialogue at a European level between the various sectors and interests concerned with the CFP.[61] Apart from the ACFA, a number of Europe-wide bodies are consulted by the Commission from time to time on draft legislation and these include: Europêche, the EU Fish Processors' Association, the EU Federation of National Organizations of Importers and Exporters of Fish, the European Association of Fish Producers' Organisations, and the Federation of European Aquaculture Producers.[62] These bodies have a less formal consultative role than the RACs in the preparation of draft legislative measures.

Despite the success of the various consultative bodies in shaping the content of European fisheries management measures, the structures for stakeholder consultation within the CFP were influenced by a number of developments on the wider landscape of European law which have their ori-

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[58] Commission Decision 71/128/EEC OJ L 68, 22. 3. 1971, p. 18.

[59] Commission Decision of 14 July 1999 renewing the Advisory Committee on Fisheries and Aquaculture. OJ L 187/70, 20. 7. 1999; subsequently amended by Commission Decision of 16 December 2004 . OJ L 370/91, 17.12.2004.

[60] Council Regulation (EC) No. 657/2000 of 27 March 2000 on closer dialogue with the fishing sector and groups affected by the common fisheries policy. OJ L 80/7. 31.3.2000.

[61] Report on the Intermediate Evaluation of the ACFA, p. II. Available at: http://ec.europa.eu/fisheries/publications/studies/acfa_evaluation_2008_en.pdf.

[62] Churchill and Owen, *op. cit., supra* note 29 at 28.

gin in the Commission's 2001 White Paper on European Governance.[63] The White Paper proposed opening up the policy formulation process with a view to getting more people and organisations involved in shaping and delivering EU policy. This was followed by a number of other policy initiatives aimed at enhancing the quality of European regulation, including the introduction of a general system of *ex ante* regulatory impact assessment for draft legislation in 2002.[64] This system has evolved steadily since 2001 as a mechanism to implement, *inter alia*: the Commission's Action Plan for Better Regulation, the European Strategy for Sustainable Development, and the Lisbon Strategy for Growth and Jobs.[65] Broadly speaking, regulatory impact assessment identifies the main options for policy delivery and evaluates how various policy changes will affect the economic, environmental and social fields.[66] At the heart of this assessment process is the *a priori* consultation with parties affected by the proposed legislation. In the context of the CFP, this entails the Commission consulting the Member States, the fishing sector, and all interested parties at an early stage in the law-making process. This has contributed to establishing a more inclusive and transparent policy for fisheries since its introduction in 2002.[67]

If we now look back, however, we can see that real change to consultative and participatory structures for the CFP came about through the work of the Directorate-General for Fisheries in the Commission in the late 1990s. In some respects, this Directorate-General was well ahead of the curve when it published its blueprint for reform of consultative structures under the CFP in an Action Plan in 1999 and subsequently elaborated much of the detail on how this was to be achieved in the 2001 Green Paper on the Future of the CFP.[68] The purpose of the 2001 Green Paper was to stimulate debate and

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[63] European Commission, *European Governance, A White Paper*, COM (2001) 428 final, Brussels, 25.7.2001, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf.

[64] Communication from the Commission on Impact Assessment, COM (2002) 276 final, Brussels, 5.6.2002, available at: http://trade.ec.europa.eu/doclib/docs/2005/february/tradoc_121479.pdf.

[65] Available at: www.europarl.europa.eu/summits/lis1_en.htm.

[66] European Commission, *Impact Assessment Guidelines*, 15.01.2009. Available at: http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf.

[67] For an example see the Commission Staff Working Document accompanying the Proposal for a Council Regulation establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy *Summary Of The Impact Assessment*, Brussels, SEC(2008) 2761; available at: http://ec.europa.eu/fisheries/publications/factsheets/legal_texts/sec_2008_2761_en.pdf.

[68] European Commission, Action plan for closer dialogue with the fishing industry and groups affected by the common fisheries policy, available at: http://ec.europa.eu/fisheries/

launch a process of consultation with interested parties. Among its proposals for reform, the 2001 Green Paper noted somewhat laconically that the arrangements for stakeholder consultation in the CFP were "not considered satisfactory" by the parties concerned and there was evidence that the legal framework underpinning the CFP was unsuited to responding quickly to local and emergency circumstances in the management of fisheries by the EU.[69] In response to these shortcomings, various proposals were evaluated by the Commission with a view to enhancing stakeholder participation in the policy process. Although the substantive detail of these proposals was never published, the 2001 Green Paper nonetheless refers to a number of different options, including: a system of decentralised regional or zonal management; a system of RACs providing advice to the Commission; and a system of individual fishing rights administered through centralised European management.[70] The Commission committed itself in the 2001 Green Paper to promoting better governance in the CFP by putting in place decision-making processes involving stakeholders at regional and local levels. In this context, it is important to recall that the Commission believed that the establishment of specific structures for stakeholder consultation in the regions would involve the stakeholders in early discussions about fisheries management while at the same time ensuring that fisheries governance remains compatible with the legal and institutional framework of the Treaty and that it does not affect the global and Community character of the CFP.[71] From the outset, it was foreseen that the role of the stakeholders would be limited to the provision of advice which the Commission would take into consideration when making proposals for legislation and taking management decisions. There were some obvious strengths in this approach, as it did not encroach on the Commission's prerogative to bring forward legislative proposals within the European institutions.[72] Moreover, it establishes a more flexible institutional mechanism for undertaking consultation with stakeholders at an early stage in the policy process and thus clearly accords with both the spirit and the letter of the White Paper on European Governance and the Commission's Action Plan for Better Regulation.[73] The general principles and mini-

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press_corner/press/planaction_en.pdf. See also, European Commission, *Green Paper on the Future of the Common Fisheries Policy*, *op. cit., supra* note 40.

[69] *Ibid.*, at 1.

[70] *Ibid.*, at 11.

[71] *Ibid.*, at 28.

[72] Art. 43 (ex Art 37 EC Treaty) of the TFEU.

[73] European Commission, *European Governance, A White Paper*, COM (2001) 428 final, *op. cit., supra* note 63; Communication from the Commission of 5 June 2002, Action Plan "Simplifying and improving the regulatory environment", COM (2002) 278 final, Brussels,

mum standards for the consultation of interested parties were set down by the Commission in a Communication published in 2002.[74] In parallel with these developments, the Commission undertook widespread public and industry consultation before bringing forward specific proposals on the legal framework for the establishment of the RACs.

Regulatory Framework Governing the RACs

The regulatory framework governing the RACs is set down in several secondary legal instruments. More specifically, the Basic Fishery Management Regulation provides a legal basis for their establishment and operation.[75] Much of the detail on how this is to be achieved is fleshed out in Council Decision 2004/585/EC which deals with matters such as: geographical coverage; structure and composition; and procedural rules for their operation. In addition, Council Decision 2007/409/EC provides RACs with sufficient and permanent funding for the development of their activities and the fulfilment of their objectives in providing advice on the CFP.[76] The RACs are brought into operation by means of Commission Decision. This has been a relatively slow process, with the first RAC established for the North Sea in 2004 and the most recent one established for the Mediterranean Sea in 2008.[77] All

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5.6.2002, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0278:FIN:en:PDF.

[74] Communication from the Commission. Towards a reinforced culture of consultation and dialogue—General principles and minimum standards for consultation of interested parties by the Commission. COM (2002) 704 final. Brussels, 11.12.2002, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:en:PDF.

[75] Council Regulation (EC) No. 2371/2002, *op. cit., supra* note 9.

[76] Arts. 31 and 32 of Council Regulation (EC) No. 2371/2002, *ibid*. Council Decision 2007/409/EC of 11 June 2007 amending Decision 2004/585/EC, *op. cit., supra* note 13.

[77] Commission Decision 2007/222/EC of 4 April 2007 declaring operational the Regional Advisory Council for the south-western waters under the common fisheries policy, OJ L 95, 5.4.2007; Commission Decision 2007/206/EC of 29 March 2007 declaring operational the Regional Advisory Council for the High-Seas/Long-Distance Fleet under the common fisheries policy, OJ L 91, 31.3.2007; Commission Decision 2006/191/EC of 1 March 2006 declaring operational the Regional Advisory Council for the Baltic Sea under the common fisheries policy, OJ L 66, 8.3.2006; Commission Decision 2005/668/EC of 22 September 2005 declaring operational the Regional Advisory Council for the north-western waters under the common fisheries policy, OJ L 249, 24.9.2005; Commission Decision 2005/606/EC of 5 August 2005 declaring operational the Regional Advisory Council for pelagic stocks under the common fisheries policy, OJ L 206, 9.8.2005; Commission Decision 2004/774/EC of 9 Nov 2004 declaring operational the Regional Advisory Council for the North Sea under the common fisheries policy, OJ L 342, 18.11.2004; Commission Decision of 29 August 2008 declaring operational the Regional Advisory Council for Mediterranean Sea under the Common Fisheries Policy, OJ L 232/12, 30.8.2008.

RACs have a degree of procedural autonomy regarding their internal *modus operandi* and this is reflected in their rules of procedure.[78]

Perhaps one of the most extraordinary features of the regulatory framework is that the Basic Fishery Management Regulation does not set down a precise list of objectives for the RACs apart from the general requirement that they advise the Commission on matters of fisheries management in respect of certain sea areas or fishing zones.[79] This advice must contribute to the achievement of the objectives of the CFP.[80] Indeed, Council Decision 2004/585/EC goes further than the Basic Fishery Management Regulation and places the onus on the founding parties to provide a statement of objectives with their request to establish a RAC for a particular region or fishery. Again this request must be compatible with the objectives, principles and guidelines of the CFP.[81] Another unusual feature in the legislative scheme is that when the principal legal instruments, the Basic Fishery Management Regulation, and Council Decision 2004/585/EC, are read together, they offer little guidance on the subject matter of this paper, that is to say, how the participation of RACs as one of the main stakeholder fora involved in decision-making within the CFP ought to evolve in the future. Nevertheless, a number of features in the legal framework call for comment as they may indicate the principal axis for the future developments of the role and mandate of the RACs.

First, the spirit of reform and the enhancement of stakeholder participation in the CFP process is captured in the preamble of the Basic Fishery Management Regulation, which states that: "RACs should be established to enable the CFP to benefit from the knowledge and experience of the fishermen concerned and of other stakeholders and to take into account the diverse conditions throughout Community waters."[82] This requirement of stakeholder participation is also evident in substantive provisions of the Basic Fishery Management Regulation, as mentioned above, which provides that the CFP must be guided by principles of good governance, including broad involvement of stakeholders at all stages of the CFP from conception to implementation.[83]

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[78] See, for example, Rules of Procedure for the North Sea Regional Advisory Council, available at: http://ec.europa.eu/fisheries/press_corner/press/planaction_en.pdf.
[79] Art. 31(1) of Council Regulation (EC) No. 2371/2002, *op. cit., supra* note 9.
[80] Art. 2(1) of Council Regulation (EC) No. 2371/2002, *ibid.*
[81] Art. 3 (1)(a) of Council Regulation (EC) No. 2371/2002, *ibid.*
[82] Recital 27 of Council Regulation (EC) No. 2371/2002, *ibid.*
[83] Art. 2(1) of Council Regulation (EC) No. 2371/2002, *ibid.*

The second significant feature is that Articles 31 and 32 of the Basic Fishery Management Regulation, which set down the general legal principles governing the establishment of the RACs, are firmly rooted in Chapter VI of this Regulation. In this context, it is important to keep in mind that Articles 31 and 32 must therefore be read in light of Article 29 of the same Regulation, which clearly provides that the Council must act in accordance with the procedure laid down in Article 37 of the Treaty in decision-making except where otherwise provided for in the Basic Fishery Management Regulation.[84] The implications of this provision for the reform of the CFP are explored further in the third part of this article, below. At this point, it is sufficient to note that any future reform of decision-making structures within the CFP will have to comply with the requirements of the ordinary legislative procedure for law-making within the European institutions as set down by the Treaty.[85] This also means that the precise shape of any new decision-making structures involving greater participation by the RACs in the CFP will be decided ultimately by the Council acting jointly with the Parliament.

The third notable feature of the regulatory framework is that the mandate of the RACs is limited to a consultative role in the decision-making process regarding draft legislation and management measures. Indeed, the Basic Fishery Management Regulation does not appear to place an express legal obligation on the Commission to consult RACs on all the proposals which it intends to present for adoption.[86] Similarly, the Commission retains considerable discretion in its interactions with the RACs, including exercising its right to participate in RAC meetings. As mentioned above, the Commission has the right to accept or reject advisory opinions from the RACs, although the exercise of this power by the Commission must conform to the general principles of European law and the specific requirements of the CFP.[87] The prescriptive nature of the regulatory framework and the limited consultative role afforded to the RACs are balanced somewhat by their right to make

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[84] Art. 37 of the EC Treaty is now Art. 43 of the TFEU.

[85] Arts. 289(1) and 294 of the TFEU.

[86] Art. 31(4) of Council Regulation (EC) No. 2371/2002, *op. cit., supra* note 9.

[87] Thus, for example, the general principle of European law which prohibits discrimination on the grounds of nationality and which requires adherence to the principle of proportionality clearly curtails the Commission's power to act in a unilateral manner in relation to any specific recommendation from a RAC. Similarly, the requirement under the Basic Fishery Management Regulation for the Commission to comply with scientific advice when adopting measures under the CFP curtails the Commission from adhering to advice from a RAC if this is not scientifically sound. An example of such a conflict arose over the North Sea RAC recommendation for management measures aimed at facilitating the recovery of plaice and sole stocks which the Commission deemed as incompatible with the objectives of the CFP in promoting sustainable fisheries; Penas, *op. cit.*, *supra* note 20.

recommendations and suggestions of their own accord, or at the request of the Commission or a Member State.[88] The Basic Fishery Management Regulation also provides the RACs with a mandate which allows them to conduct any other activities necessary to fulfil their functions, such as entering into contractual arrangements on administrative matters with third parties.[89]

The final point that can be made about the regulatory framework is that it is not foreseen in the legislation that RACs are to act in splendid isolation in providing advice to the Commission. Indeed the Basic Fishery Management Regulation expressly provides that the consultative role of the RACs in the decision-making process is without prejudice to the consultative role of other bodies, such as the Scientific, Technical and Economic Committee for Fisheries (STECF) and the Committee for Fisheries and Aquaculture.[90] The former is an independent body made up of experts in the fields of marine biology, marine ecology, fisheries science, nature conservation, population dynamics, statistics, fishing gear technology, aquaculture, and the economics of fisheries and aquaculture.[91] They are consulted by the Commission at regular intervals on matters pertaining to the conservation and management of living aquatic resources, including biological, economic, environmental, social and technical considerations.[92] Members of STECF are appointed in their personal capacity and they must act independently of Member States and the interests of the various stakeholder groups, including the RACs.[93] The Committee for Fisheries and Aquaculture is comprised of national experts from the Member States with a non-voting Commission chairperson. There are numerous references to the regulatory functions of this important body in the legislative code underpinning the CFP; it needs to be distinguished very carefully from the other committees mentioned in this article such as ACFA, as it has an important formal role in the legislative process under the "comitology" procedure for law-making in the European institutions. This procedure is examined in greater detail in the third part of this article, below. Suffice it to note here that the RACs are expressly obliged under the Basic Fishery Management Regulation to keep the Committee for Fisheries and Aquaculture informed of their activities.[94]

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[88] Art. 31(5) of Council Regulation (EC) No. 2371/2002, *op. cit., supra* note 9.
[89] *Ibid*.
[90] Art. 31(4) of Council Regulation (EC) No. 2371/2002, *ibid*.
[91] Art. 33 of Council Regulation (EC) No. 2371/2002, *ibid.*; and Commission Decision 2005/629/EC, OJ L 225/18, 31.8.2005.
[92] Art. 33(1) of Council Regulation (EC) No. 2371/2002, *ibid*.
[93] Art. 2(2) of Commission Decision 2005/629/EC, *op. cit.*, *supra* note 91.
[94] Art 31(5) of Council Regulation (EC) No. 2371/2002 *op. cit., supra* note 9.

Geographical Footprint of the RACs

Council Decision 2004/585/EC is quite specific on the geographical footprint of the regional advisory bodies; it provides that a RAC shall be established for each of the following: the Baltic Sea; the Mediterranean Sea; the North Sea; north-western waters; south-western waters; pelagic stocks; and the high-seas/long-distance fleet. The precise geographical areas covered by each RAC are set out in Annex I of the Decision 2004/585/EC (these areas are illustrated in Figure 1). Provision is made for the creation of subdivisions to deal with issues that cover specific fisheries and biological regions. The procedure for the establishment of a RAC is stakeholder-led and this perhaps has contributed to the delay in their establishment, which extended to 5 years in the case of the RAC for the Mediterranean Sea.[95]

RACs are supra-national entities whose geographical footprint includes sea areas under the jurisdiction of at least two Member States. At a practical level, this means that stakeholders from a particular Member State may be active in several RACs, as is evident from the information shown in Table 1 below. In the UK, for example, stakeholders have interests in four different RACs, namely: the North Sea RAC, the North-Western Waters RAC, the Pelagic RAC and the Long-Distance RAC. That being said, the number of Member States participating in the activities of a particular RAC varies considerably, as is evident from the large number of Member States (12) participating in the work of the High-Seas/Long-Distance Fleet RAC. This may be contrasted with the RAC responsible for South-Western Waters, where 5 Member States participate in the consultation process. Some Member States, such as Spain, are active in nearly all of the RACs; this is perhaps a reflection of the size of the Spanish fleet and the diversity of Iberian stakeholder interests in European and global fisheries.

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[95] Council Decision 2004/585/EC (*op. cit., supra* note 11) allows for representatives of the "fisheries sector" and "other interest groups" to submit a request in this regard to the relevant Member States and to the Commission. This request must be compatible with the objectives, principles and guidelines of the CFP as set out in the Basic Fishery Management Regulation and shall include: (a) a statement of objectives; (b) operating principles; (c) initial rules of procedure; (d) the budget estimate; (e) a provisional list of organisations. Power is vested in the Member States concerned to determine whether the application is representative and accords with Council Decision 2004/585/EC (*ibid.*). They in turn must transmit a recommendation on the proposal to the Commission on the basis of common agreement. After evaluating the recommendation and possible amendments to the request, the Commission then decides whether or not to make the RAC operational. This decision must satisfy three procedural requirements, namely: it must be taken within three months of the request, it must specify the date at which the RACs become operational and it must be published in the *Official Journal of the European Union*.

Table 1. Number of participating members and EU Member States in the RACs.[96]

RAC	Number of Members and EU Member States
North Sea	32 Members covering 9 Member States (Belgium, Denmark, Germany, Spain, France, Netherlands, Poland, Sweden and UK)
Pelagic	60 Members covering 10 Member States (Denmark, Germany, Spain, France, Ireland, Netherlands, Poland, Portugal, Sweden and UK
North-Western Waters:	55 Members covering 6 Member States (Belgium, Spain, France, Ireland, Netherlands and UK)
Baltic Sea	42 Members covering 8 Member States (Denmark, Germany, Estonia, Latvia, Lithuania, Poland, Finland and Sweden)
High-Seas/Long-Distance Fleet	72 Members covering 12 Member States (Denmark, Germany, Estonia, Spain, France, Ireland, Italy, Lithuania, Netherlands, Poland, Portugal and UK)
South-Western Waters	115 Members covering 5 Member States (Belgium, Spain, France, Portugal and Netherlands)
Mediterranean Sea	includes Members from Bulgaria, Cyprus, France, Greece, Italy, Malta, Romania, Slovenia and Spain

In view of the worldwide scale of the European fishing industry, there are relatively few RACs. This particular issue was subject to considerable debate in the Council before it was decided to limit their number to seven for organisational and financial reasons. One advantage of this approach is that it helps avoid administrative overlap in the provision of advice by the RACs for the different fisheries. In adopting this approach, the Council also sought to ensure that the limits of the geographical areas under the remit of a particular RAC accord with natural ecosystem boundaries as far as possible. These limits are not, however, coterminous with the ecosystem(s) boundaries set down by the Marine Strategy Framework Directive and this may pose inherent difficulties in the provision of advice on ecosystem management for

[96] Source: UK House of Lords Paper 146-I, *op. cit., supra* note 26 at 39.

European fisheries.[97] On the other hand, this difficulty is partly ameliorated by the provision of a legal basis for the RACs to co-ordinate their positions and to issue joint recommendations on subjects of common concern including, it must be assumed, transboundary management issues.[98] An example of where this approach is pertinent is the provision of advice in relation to ICES Area IV (West of Scotland) where the North Sea RAC and the North-Western Waters RAC share common interests in relation to certain demersal stocks and socio-economic matters. In this connection, it is interesting to note that while the Commission has expressed its satisfaction with the geographical footprint of the RACs, it nevertheless left the door open for the future discussion of matters such as: whether ICES Area IV (West of Scotland) should be covered by the North Sea RAC; extending the remit of the Pelagic RAC which is currently limited to four stocks; the coordination of advice from the RACs on the management of deep-sea stocks; and the need to establish a specific RAC for the Black Sea region.[99]

A number of other attributes are notable about the geographical footprint of the RACs. They are heterogeneous organisations insofar as the geographical footprint of the Pelagic RAC overlaps areas which come within the remit of other RACs, such as the RAC for North-Western Waters and the RAC for the North Sea. Similarly, the geographical footprint of the RAC for the High-Seas/Long-Distance Fleet overlaps the sea areas that are under the management responsibility of RFMOs such as NEAFC. In this context, it should not be forgotten that a recent report by the FAO estimates that one-third of the world's high-seas bottom-fishing fleet was flagged to Member States of the EU and this fleet is taking more than half of the total high-seas bottom catch at a global level.[100] The RAC for the High-Seas/Long-Distance Fleet is therefore one of the most important stakeholder consultative bodies in world fisheries and any reform of its role in the decision-making process will be of interest to those concerned with the conservation and management of high-seas fisheries.

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[97] Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing the framework for Community action in field of marine environmental policy, OJ L 164, 25.6.2008.

[98] Art. 8 of Council Decision 2004/585/EC, *op. cit., supra* note 11.

[99] COM (2008) 364 final, *op. cit., supra* note 20 at 4.

[100] See FAO Fisheries and Aquaculture Technical Paper 522 (Rev.1) (2009). Available at: http://www.fao.org/fishery/publications/technical-papers/en.

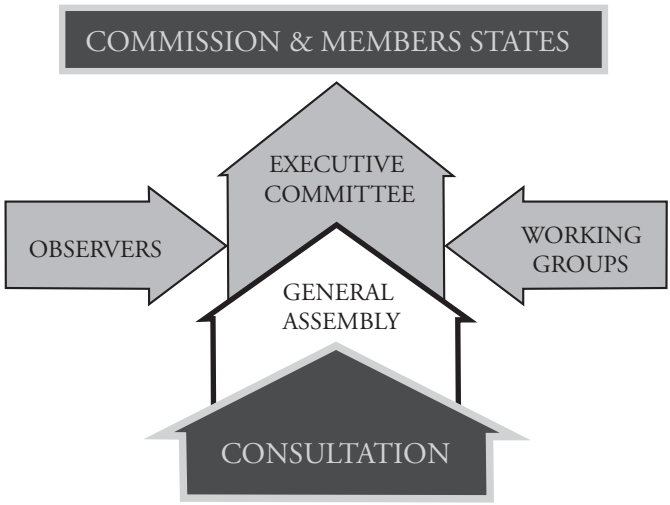

Fig. 2. Structure and composition of the RAC

(Source: Secretariat North Sea RAC).

RAC Structure and Composition

The structure and composition of the RACs are relatively straightforward, as can be seen from the scheme shown in Fig. 2. Each RAC has two statutory bodies: a General Assembly and an Executive Committee. These are supported by a secretariat and a number of working groups, as well as by "focus" groups which work on specific technical issues prior to their discussion by the Executive Committee. The General Assembly approves the annual report and the annual strategic plan drawn up by the Executive Committee. Much of the day-to-day work of the RAC, including the adoption of recommendations, is undertaken by an Executive Committee which may have up to 24 members appointed by the General Assembly.

The requirements set down by the Basic Fishery Management Regulation are relatively flexible and leave the composition of the RACs somewhat open-ended, apart from the stipulation that they must be composed *principally* (emphasis added) of fishermen and other representatives of interests affected by the CFP.[101] Far more detail is provided in Council Decision 2004/585/EC which strives to balance two broad categories of representation: the fisheries sector and other interest groups affected by the CFP. The "fisheries sector" in this context is defined broadly to mean: "the catching sub-sector, including

[101] Art. 31(2) of Council Regulation (EC) No 2371/2002, *op. cit., supra* note 9.

ship-owners, small-scale fishermen, employed fishermen, producer organisations as well as, amongst others, processors, traders and other market organisations and women's networks".[102] Similarly "other interest groups" is given an expansive definition and includes environmental organisations, aquaculture producers, consumers and recreational fishermen.[103]

The nomination process for members is stakeholder-led insofar as European and national organisations representing the fisheries sector and other interest groups are vested with the power under Council Decision 2004/585/EC to propose members to the Member States that are concerned with the establishment and operation of a RAC for a particular region or fishery. Member States must then agree on the members of the General Assembly. The primacy of representation from the industry is evident in the composition of both the General Assembly and the Executive Committee, where two-thirds of the seats must be allotted to representatives of the fisheries sector and one-third to representatives of the other interest groups affected by the CFP. The importance of strong representation by the industry is also reflected in the requirement that at least one representative of the catching subsector from each Member State concerned with the RAC must be represented in the Executive Committee.

Legal provision is also made for the participation by non-members in the work of the RACs.[104] Indeed, Decision 2004/585/EC provides an express legal basis for the invitation of scientists from scientific institutes in the Member States, or affiliated to international scientific bodies, to participate in the work of the RACs.[105] As a matter of practice, participation by scientists in stakeholder meetings has evolved considerably over the lifetime of the RACs and this participation is now undertaken within the framework set down by the Memorandum of Understanding (MOU) between the Commission and ICES which was first adopted in 2004.[106] This is a reciprocal arrangement insofar as stakeholders from the RACs are allowed to participate as observers in the meetings of a number of ICES Advisory Groups. The term "scientist" is not defined in Council Decision 2004/585/EC and the Commission has since suggested that this term could include other experts such as economists.[107] Apart from scientists, a number of other parties may also participate as active observers in the work of the RACs. These include:

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[102] Art. 1(2) of Council Decision 2004/585/EC, *op. cit., supra* note 11.
[103] Art. 1(3) of Council Decision 2004/585/EC, *ibid.*
[104] Art. 6 of Council Decision 2004/585/EC, *ibid.*
[105] Art. 6(1) of Council Decision 2004/585/EC, *ibid.*
[106] The current MOU dates from 2007 and is available at: http://www.ices.dk/indexfla.asp.
[107] Review of the Functioning of the RACs, COM (2008) 364 final, *op. cit., supra* note 20 at 7.

the Commission; national and regional administrations of the Member States concerned; a representative of the ACFA; representatives of the fisheries sector and other interest groups from third countries on invitation from the RAC.

In terms of financial cost, the RACs are modest organisations which receive meagre support from the EU budget. In 2008, for instance, they each had an annual budget of €250,000, the majority of which was spent on travel, meetings and the organisation of conferences.[108] At the time of writing, individual RACs have only two full-time staff members to service their administrative workload in response to the legislative programme brought forward by the Commission.

Have the RACs Enhanced Stakeholder Participation in the Common Fisheries Policy?

This is a key question and in view of the relatively short period of time that the RACs have been in operation, it may be premature to answer it definitively. Nevertheless, an initial assessment suggests that apart from being excellent value for money, the establishment of the RACs has improved stakeholder consultation and participation in the CFP. In 2008, the Commission published a Communication on the functioning of the RACs that is relatively upbeat about the success of the new structures.[109] The Communication notes that the RACs have become active players in the policy formulation process, which in turn has improved access to information and led to a better understanding by the industry and other stakeholders of the *raison d'être* for particular management decisions taken at a European level.[110] Moreover, the flow of information between the various parties involved in this dialogue is both top-down and bottom-up, which facilitates stakeholder consultation in relation to new legislative proposals and the Commission work programme, as well as providing the Commission with sector knowledge on local issues pertaining to fisheries management in the Member States. Other evidence of the initial success of the new structures is the increase in the number of advisory opinions issued by the RACs to the Commission on draft legislative proposals, as well as the number of meetings on a

[108] UK House of Lords Paper 146-I, *op cit., supra* note 26 at 39. On 20 June 2007, Member States approved this annual budget on the grounds that the RACs were bodies pursuing an aim of general European interest. See: http://ec.europa.eu/fisheries/documentation/publications/cfp_factsheets/racs_en.pdf.

[109] Review of the Functioning of the RACs, COM (2008) 364 final, *op. cit., supra* note 20 at l.

[110] *Ibid.*, at 8.

wide range of topics organised by RACs on their own initiative.[111] The advisory opinions submitted by the RACs on draft legislative proposals benefit a broad range of actors who are engaged in the fisheries policy formulation process, including: delegations from Member States in their discussions within the Council of Fisheries Ministers; Members of the European Parliament in their deliberations on matters concerning the CFP; and Member States in their dialogue with stakeholders on matters such as the designation of protected areas under the Habitats Directive.[112] The Communication from the Commission highlights progress as follows:

> RACs have helped soften hostility towards the CFP, thus facilitating further direct contacts between stakeholders, EU officials, Member States and scientists. However, the RACs are still going through a learning process. In order to agree on common recommendations, stakeholders first need to get to know each other better and develop new working methods. Some RACs have benefited from existing regional initiatives, while in other areas/sectors such structures are unprecedented and have thus faced serious capacity development challenges. This explains why the RACs were not all established at the same time and have not developed their activities at the same pace.[113]

When viewed from a distance, several factors appear to have contributed to the initial success of RACs in preparing recommendations and suggestions on the formulation and implementation of the CFP. Two of the principal factors are their broad constituency and the strong representation from the fisheries sector within their organisational structures.[114] That being said, the Commission has nevertheless suggested that there is scope for greater involvement by fish processors, traders and other market organisations in the work of the RACs.[115] In particular, participation by individuals from the fishing industry, or what is sometimes referred to as "grassroots interests" in European institutional publications, is described as disappointing by the Commission.[116] One authoritative commentator has since suggested that the sophisticated debate within RACs tends to be dominated by articulate representatives from

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[111] Review of the Functioning of the RACs, COM (2008) 364 final, mentions specifically the Baltic Sea RAC Conference on Control and Compliance in March 2007, the Joint RACs meeting on offshore marine protected areas in March 2008 or the North Sea RAC, and the North-Western Waters symposium on cod recovery in March 2007; *op. cit., supra* note 20.

[112] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.07.1992, pp. 7–50.

[113] Review of the Functioning of the RACs, COM (2008) 364 final, *op. cit., supra* note 20 at 8.

[114] *Ibid.*, at 7.

[115] *Ibid.*, at 5.

[116] *Ibid.*

the fishing industry who can sometimes appear to be removed from grass-roots interests.[117] Conversely, it appears that other interest groups, such as environmental NGOs, are playing an active part in the policy process despite their limited resources.[118] Participation in the work of the RACs by non-members, or parties who are classified as "active observers" under the legal framework, such as the Commission and national bodies responsible for fisheries management in the Member States, appears to have varied considerably. From the outset and perhaps for obvious reasons, the Commission has taken a lead as an "active observer" by providing financial support for the RACs and by attending and contributing to the dialogue at the meetings of the various working groups. Indeed, the Commission has suggested that its attendance at all RAC meetings may be counter-productive to independent discussion by stakeholders.[119] Moreover, the Commission concluded in its 2008 review of the functioning of the RACs that the involvement of active observers in the current structures is less than expected, which may have the potential to undermine the collaborative nature of the consultation process in the future.[120] Although the active involvement of the Member States is a fundamental requirement for the success of the RACs, the greatest weakness in the current arrangements appears to be the level of participation by observers from national bodies responsible for fisheries management in the Member States.[121] Again state practice in the EU appears to vary considerably, with some Member States, such as the UK, providing a lead in the provision of financial and administrative support. This may be contrasted with the level of participation by administrations in other Member States which have been slow to get involved due to budgetary and resource constraints. The level of participation at RAC meetings by observers from stakeholder organizations in third countries has not achieved its potential for similar reasons. Indeed, the Commission has expressed the view that reciprocal access arrangements ought to be negotiated so that representatives of the European RACs are able to attend stakeholder meetings in third countries.[122] From a practical perspective, this would appear to be essential to the work of the RAC for the High-Seas/Long-Distance Fleet, which will have to foster a strong working relationship with similar organisations outside the EU if they

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[117] Penas, *op. cit., supra* note 20 at 592.
[118] Review of the Functioning of the RACs, COM (2008) 364 final, *op. cit., supra* note 20 at 5.
[119] *Ibid.*, at 7–8.
[120] *Ibid.*
[121] *Ibid.* at 7.
[122] *Ibid.* at 8.

are to be successful in influencing fisheries policy in sea areas beyond the national jurisdiction of the Member States.

Another factor which has contributed to the success of the RACs is the degree of transparency that they bring to the decision-making process regarding the substantive detail of draft regulatory measures for the management of fisheries. Transparency in decision-making is an important attribute of European law and entails a number of features, including the holding of meetings in public, the provision of information, and the right of public access to documents. The latter right is now enshrined in the TFEU as part of the Charter of Fundamental Rights of the EU.[123] The procedures followed by the RACs are designed to ensure transparency at all stages of the decision-making process within their constituent bodies. Indeed, a brief perusal of the relevant provisions in Council Decision 2004/585/EC reveals that the RACs derive much of their legitimacy from using transparent procedures for providing advice to the Commission. Thus, for example, all the meetings of the General Assembly are open to the public.[124] Similarly, the meetings of the Executive Committee are open to the public unless, in exceptional cases, decided otherwise by a majority of Committee members.[125] Moreover, the Executive Committee is obliged to make its recommendations immediately available to a number of other parties, including the General Assembly, the Commission, the relevant Member States and, upon request, to any member of the public.[126] The democratic nature of the decision-making process is also evident from the requirement placed on the members of the Executive Committee to adopt recommendations by consensus where possible.[127] If no consensus can be reached, dissenting opinions expressed by Committee members must be recorded in the recommendations adopted by the majority of the Committee members present and voting.[128] Upon receipt in writing of the recommendations, the Commission and, where relevant, the Member States concerned, must reply precisely to them within a reasonable time period and, at the latest, within three months.[129] The democratic and transparent functioning of the RAC is facilitated by the requirement set down by Council Decision 2004/585/EC that a chairperson must be nominated by consensus and that (s)he must act impartially in discharging her/his functions.[130] An express

[123] Art. 15 of the TFEU.
[124] Art. 6(5) of Council Decision 2004/585/EC, *op. cit., supra* note 11.
[125] Art. 7(2) of Council Decision 2004/585/EC, *ibid.*
[126] *Ibid.*
[127] Art. 7(3) of Council Decision 2004/585/EC, *ibid.*
[128] *Ibid.*
[129] *Ibid.*
[130] Art. 7(4) of Council Decision 2004/585/EC, *ibid.*

legal obligation is placed on Member States to provide the appropriate support, including logistical help, to facilitate the functioning of a RAC.[131] All of these requirements ensure that the initial deliberation on draft legislation is open to public scrutiny, which addresses a longstanding weakness of the CFP in terms of democratic accountability.[132] Furthermore, this continues to be an important issue for the fishing industry, as is evident from the current round of public consultations regarding the reform of the CFP in 2012.[133]

The fourth factor which has contributed to the success of the RACs is that they have forged an excellent working relationship with the various regulatory and consultative bodies concerned with the CFP. In particular, the RACs appear to have fostered a dynamic relationship with members of the European Parliament and this relationship has the potential to evolve considerably as the Parliament fulfils its role as co-legislator on fisheries matters under the TFEU.[134] The working relationships with the other advisory bodies, ACFA and STECF, similarly appear to be evolving steadily as the RACs become more familiar with the European law-making process. In this connection, the relationship between ACFA and the RACs has been subject to external evaluation at the behest of the Commission.[135] The evaluation suggests that it is generally recognised among all stakeholders that the RACs should address the regional/local issues while the ACFA should concentrate on EU-wide (horizontal) matters.[136] The evaluation goes on to suggest that greater synergies could be achieved between the two stakeholder bodies if more effort is devoted to the coordination of their respective work programmes.[137]

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[131] Art. 7(4) and 7 (5) of Council Decision 2004/585/EC, *ibid.*

[132] *Green Paper on the Future of the Common Fisheries Policy*, COM (2001) 135 final, 20.3.2001. *op. cit., supra* note 68.

[133] L. O'Cinnéide, 'Reform of the Common Fisheries Policy', at the workshop hosted by the Irish Institute of International and European Affairs Conference, 8 October 2009. Available at: http://www.iiea.com/.

[134] S. Stevenson, MEP, Senior Vice-President of the Fisheries Committee in the European Parliament, paper on 'Democracy and the role of the European Parliament within a reformed Common Fisheries Policy' presented at the Inter-RAC Conference on "Decision-making within a reformed Common Fisheries Policy (CFP)", The Merchants' Hall, Edinburgh, Scotland, 4 November 2009. Available at: http://www.nsrac.org/wp-content/uploads/2009/11/Struan-Stevenson-presentation-FINAL.doc.

[135] *Report on the Intermediate Evaluation of the ACFA* at 73; available at: http://ec.europa.eu/fisheries/publications/studies/acfa_evaluation_2008_en.pdf.

[136] *Ibid.*, at 64.

[137] *Ibid.*, at 67. One of the scenarios examined in the evaluation is to replace ACFA with a RCC Coordination Committee (RCC). The advantages and disadvantages of this proposal are enumerated as follows: RACs have a better institutional position and consequently the RCC can be expected to be more effective than ACFA; ACFA funding may become additionally available for RACs and the RCC; the number of meetings would be possibly reduced,

Little has been published on how far the advice and opinions of the RACs have been heeded by or influenced the Commission, the Council or the Parliament, in relation to the content and shape of specific management measures.[138] Without some kind of answer to this question, it is impossible to evaluate properly the success or otherwise of the RACs. Nevertheless, the input of the RACs in the formulation of draft legislation has given the decision-making process within the CFP the external appearance of being more inclusive, transparent and accountable. This in itself is an important development because, as seen above, the purpose of the RACs is to integrate the views of stakeholders into the decision-making process and to enable the CFP to benefit from their knowledge and experience. Despite the progress that has been made in attaining this objective, it should not be forgotten that the role of RACs in the formulation and implementation of the CFP has always been considered by the Commission as evolutionary in nature and subject to development over time on the basis of experience.[139] Accordingly, let us now, in part three below, examine some of the legal constraints on and the future prospects for enhancing RAC participation in decision-making within the European institutions.

Legal Constraints and Future Options for Enhancing RAC Participation in the CFP

Legal Constraints

Several parameters will shape the future role played by the RACs in fisheries management in the EU. Many stem from the unique nature of the European legal order, such as the supremacy of European law over the law of the

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but this is uncertain; a clearer distinction between political discussion in RCC and more technical discussion in RACs; consistency with the structure of DG Mare; focussed discussion in the *ad hoc* working groups. The disadvantages include: a new bureaucracy would be created which lacks the experience of the ACFA Bureau/Plenary; the dialogue among some stakeholders may disappear; the EU professional organisations will be seriously weakened; the discussion would again be based on national interests, as before 1999; representation of groups without regional affiliation (aquaculture, trade, processing) may be weakened.

[138] There are a number of references to the advice of RACs not being heeded in the literature: see, for example, Penas, *op. cit.*, *supra* note 20. There are also a number of examples of their success, such as the role of the North Sea RAC in providing advice on the cod recovery programme, see UK House of Lords Paper 146-I, *op cit., supra* note 26 at 39.

[139] Proposal for a Council Decision establishing Regional Advisory Councils under the Common Fisheries Policy. COM (2003) 607 final, *op. cit., supra* note 22 at 3.

Member States.[140] In reviewing these parameters it may be appropriate to start with some of the changes that have occurred as a result of the ratification of the Lisbon Treaty by the Member States, as this has brought fundamental reform to the institutional architecture and functioning of the EU.[141] Although it is clearly beyond the scope of this article to review all the changes brought about by the Lisbon Treaty to the European legal order, or indeed to the entire body of European law as it applies to the CFP, a number of points can still be made.

The Treaty of Lisbon brings into operation the TFEU as the primary law of the EU since 1 December 2009.[142] The aim of the Lisbon Treaty is "to complete the process started by the Treaty of Amsterdam and by the Treaty of Nice with a view to enhancing the efficiency and democratic legitimacy of the EU and to improving the coherence of its action".[143] In this context, it is important to note that the Lisbon Treaty clearly states that the EU shall have exclusive competence in the area of the conservation of marine biological resources under the CFP.[144] In other areas of fisheries, there is shared competence between the EU and Member States.[145] On the issue of competence, the changes brought about by the ratification of the Lisbon Treaty do not represent any quantum leap in jurisdictional creep by the European institutions insofar as their power to regulate sea-fisheries may be traced back to several landmark decisions by the European Court of Justice in the late 1970s, as well as to the Act of Accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community of 1972 which provided that "from the sixth year after Accession at the latest [1979] the Council acting on a proposal from the Commission shall determine conditions for fishing with a view to protecting fishing

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[140] The primacy of European law over the law in the Member States has received the *imprimatur* of the European Court of Justice in a number of seminal cases, including: Case 26/62, *Van Gend en Loos* [1963] E.C.R. 1; Case 6/64, *Costa v. Enel* [1964] E.C.R. 585; Case 11/70, *Internationale Handelsgesellschaft* [1970] E.C.R. 01125; Case 106/77, *Simmenthal v. Ministero delle Finanze* [1978] E.C.R. 629; Case C-221/89, *Factortame* II [1991] E.C.R. I-3905; Case C-234/04, *Kapferer* [2006] E.C.R. I-2585; Case C-119/05, *Lucchini* [2007] E.C.R. I-6199. See, *inter alia*: M. Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty' (2005) 11 *European Law Journal* 262–307; K. Lenaerts, T. Corthaut, 'Of Birds and Hedges: The Role of Primacy in Invoking Norms of EU Law' (2006) 31 *European Law Review* 289–315.

[141] Lisbon Treaty, *op. cit.*, *supra* note 2.

[142] *Ibid*.

[143] Preamble of the TFEU.

[144] Art. 3(1)(d) of the TFEU.

[145] Art. 4(2)(d) of the TFEU.

grounds and conservation of the biological resources of the sea".[146] The European Court of Justice held in *Commission* v. *United Kingdom* that since 1979 the competence to regulate sea-fisheries in the waters under the sovereignty and jurisdiction of the Member States belongs "fully and definitively to the Community".[147] Since then, the European Court of Justice has affirmed that this power is an exclusive one.[148] The TFEU therefore merely codifies existing law on the competence of the European institutions to adopt fisheries law that is binding on the Member States under the CFP. Any development of the role of the RAC which entails an abolition or indeed a diminution of the Union's institutional competence to adopt fisheries conservation measures will require, *prima facia*, amendment of the TFEU, something which is unlikely to happen for a considerable period of time in light of the protracted debate and difficulties encountered in the Member States leading up to their ratification of the Lisbon Treaty.[149]

Apart from providing the CFP with a secure legal basis in the primary law of the EU, the structure of the TFEU is complex and fisheries are dealt with in Title III of the TFEU under the *chapeau* "Agriculture and Fisheries".[150] At first sight, it appears that the provisions on fisheries are needlessly complicated by cross-references to the provisions in the TFEU dealing with agriculture.[151] Indeed, a golden opportunity was missed in the drafting of the TFEU to incorporate specific provisions unique to fisheries. In particular, it is regrettable that a clear list of objectives for the CFP in its own right was not included in the Treaty, as the current list of objectives is framed with

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[146] Art. 102 of the Act of Accession of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland, OJ L 73, March 27, 1972 (in French). Case 61/77, *Commission* v. *Ireland* [1978] E.C.R. 417 at 31.

[147] Case 804/79, [1981] E.C.R. 1045. Since the expiry of the time limit in Art.102, 31 December 1978, the Court has held in a number of cases that Member States can no longer take national fishery conservation measures. See, *inter alia*: Case 61/77, *Commission* v. *Ireland* [1978] E.C.R. 417; Case 87/77, *Minister for Fisheries* v. *Sconenberg* [1978] E.C.R. 473; Joined Cases 185–204/78, *Officier van Justitie* v. *J. Van Dam en Zonen et al.* [1979] E.C.R. 2923.

[148] Case 22/70, *Commission* v. *Council* [1971] E.C.R. 263 at 31. Cited by the European Court of Justice in Case 61/77, *Commission* v. *Ireland* [1978] E.C.R. 417 at 61. The Irish Supreme Court noted the exclusive nature of this competence in *Kennedy v. Attorney-General & Minister for Marine and Natural Resources* [2005] I.E.S.C. 36.

[149] All EU Member States had to ratify the Lisbon Treaty before it entered into force. Hungary was the first Member State to do so in 2007 and the Czech Republic was the last to ratify on 13 November 2009. Ireland was the only Member State to hold referenda. The Lisbon Treaty failed to muster sufficient public support in the first referendum in 2008 in Ireland but was successfully passed in a second in 2009 after a long and divisive campaign.

[150] Arts. 38 through to 44 of the TFEU.

[151] *Ibid.*

agriculture in mind as opposed to fisheries. As mentioned previously, a similar lacuna existed in the EC Treaty, but this did not curtail the elaboration of the CFP to any great extent.[152] The central issue highlighted for the purpose of this article, however, is that Title III of the TFEU will shape the future options for the reform of the CFP. This means that the European institutions, in devising new decision-making structures for the CFP, are obliged to comply with the broader objectives for the policy set down in the TFEU having regard to the specific characteristics of the fisheries sector.[153]

Perhaps the principal change that the TFEU brings about to the legal order as it applies to the CFP is the changes that it makes to the legislative procedures that must be followed in the European institutions in preparing and adopting draft legislative proposals for fisheries management. More specifically, the TFEU applies the ordinary legislative procedure to fisheries, with the important exception of the procedures that must be followed for the adoption of the annual TAC/Quota measures which remains the sole prerogative of the Council.[154] The latter exception aside, this brings about a fundamental change to the law-making procedures within the European institutions, as the EC Treaty only required consultation with the Parliament on draft fisheries legislation.[155] The new procedure under the TFEU makes the Parliament a co-legislator with the Council, which brings about greater democratic legitimacy in the law-making process insofar as the members of the European Parliament are directly elected by and derive their mandate from the citizens of the EU. Moreover, it is anticipated that the extension of the ordinary legislative procedure to policy areas such as fisheries ought to bring about greater consistency in decision-making procedures and thereby reduce the need for the wasteful legal disputes between European institutions regarding the correct legal basis for regulatory measures.[156] On the negative side, however, the application of ordinary legislative procedure to fisheries will make law-making in the European institutions more protracted: it may take up to two years before a legislative proposal is finally adopted by the Council and the Parliament after it is first tabled by the Commission. Clearly, this will have implications for the future formulation and implementation of the CFP

[152] Art. 33 of the EC Treaty.
[153] Arts. 38 through to 44 of the TFEU.
[154] Art. 43 of the TFEU. Art. 43(3) specifically states that the Council on a proposal from the Commission shall adopt measures on the fixing and allocation of fishing opportunities.
[155] Art. 37 of the EC Treaty.
[156] See M. Dougan, 'The Treaty of Lisbon: Winning Hearts Not Minds' *Common Market Law Review* (2008) 45: 617–703 at 640.

which often depends on short-term legislative measures to address conservation issues.

From the perspective of stakeholders, the extension of the ordinary legislative procedure to fisheries ought to foster a new era of cooperation between the RACs and the European Parliament, as the latter will have many opportunities to influence the content of draft legislative proposals submitted by the Commission for the implementation of the CFP prior to their final adoption by the Council and the Parliament as co-legislators.[157] In this context, it is important to keep in mind that any proposals for reform of the CFP which impinges on the current role of the RACs, such as those discussed at the end of this article, will have to respect the law-making powers of the various European institutions under the Treaties. Moreover, the precise *modus operandi* of the RACs, as currently envisaged under the Basic Fishery Management Regulation, is not changed by the ratification of the Lisbon Treaty or the coming into force of the TFEU insofar as their remit remains strictly advisory and their contribution is limited to the submission of recommendations to the Commission on draft legislative proposals.[158] In particular, the TFEU does not place any legal obligation on the Commission or the Member States to implement any recommendations or advice emanating from a RAC or vest them with additional powers to prevent or amend the adoption of draft legislation on fisheries management by the European institutions under the ordinary legislative procedure.

A significant change made by the Lisbon Treaty, which will have long-term implications for the High-Seas/Long-Distance Fleet RAC, is that the European Parliament's consent will be required before the EU can conclude bilateral fisheries agreements with third States.[159] Many of these agreements are with developing States.[160] In the past, the Parliament has voiced concern about their compatibility with the EU's international obligation to promote sustainable fisheries at a global level.[161] In the future, we can expect that the recommendations emanating from the High-Seas/Long-Distance Fleet RAC will be subject to considerable parliamentary scrutiny to ensure that they are consistent with the EU's obligations under a whole range of international

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[157] Art. 43(2)(3) of the TFEU.

[158] Arts. 31 and 32 of Council Regulation No. 2371/2002, *op. cit., supra* note 9; Council Decision 2004/585/EC, *op. cit., supra* note 11.

[159] Art. 218 of the TFEU.

[160] http://ec.europa.eu/fisheries/cfp/international/agreements/index_en.htm.

[161] Churchill and Owen, *op. cit., supra* note 29.

agreements including the 1995 Straddling Fish Stocks Agreement and the 1996 High Seas Compliance Agreement.[162]

Apart from the enhanced role of the Parliament in EU law-making, several other aspects of the European Treaties will constrain the future role of the RACs in decision-making within a reformed CFP. As mentioned previously, one of the principal reasons for establishing the RACs was to move decision-making closer to stakeholders in general and the industry in particular. This suggests that there may be scope for the application of the principle of subsidiarity which is aimed at ensuring that European decisions are taken as closely as possible to the citizens of the EU.[163] Although the principle of subsidiarity has a solid legal basis in the TEU, it can only be applied in policy areas which do not fall within the exclusive competence of the EU. The conservation of marine biological resources under the CFP is an exclusive European competence, which therefore precludes the application of the subsidiarity principle as a legal basis for ensuring that policy decisions on conservation measures are taken at devolved levels in the Member States. What is more, there is little scope within the European legal order for entities other than the Member States to play a meaningful role in protecting regional interests. This is evident from a decision by the European Court of First Instance which upheld the rights of Member States to defend the general interest in their territories.[164] Although this decision concerned the autonomous governance structure within a Member State (Portugal) and its capacity to annul a European fisheries management measure pertaining to the Exclusive Economic Zone of the Azores, it has serious implications for other regional bodies seeking to protect their interests where a Member State or Member States omits to act on behalf of the regional body. In such instances, the regional body does not have the same *locus standi* as a Member State

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[162] Council Decision of 8 June 1998 on the ratification by the European Community of the Agreement for the implementing 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 stocks and highly migratory fish stocks. OJ L 189, 3.07.1998, p.14. Entry into force 18.01.2004. Council Decision of 25 June 1996 on acceptance by the Community of the Agreement to promote compliance with international conservation and management measures by fishing vessels on the high seas. OJ L 177, 16.07.1996, p.24. Entry into force 24.04.2003.

[163] Art 5 of the TEU. An official hard copy is published in the Official Journal of the European Union at OJ C115/51, 9.05.2008. Electronic copy available at: http://eur-lex.europa.eu/JOHtml.do?uri=OJ:C:2008:115:SOM:EN:HTML.

[164] Case T-37/04, *The Autonomous Regions of the Azores* v. *Council*, Judgment of 1 July 2008, para. 53; Case T-417/04, *Regione Autonoma Friuli-Venezia Giulia* v. *Commission* [2007] ECR II-641, para. 62.

before the European Court of Justice and it can only challenge European legal measures on demonstration of direct and individual concern in accordance with the requirements of the TFEU.[165] In other words, regional structures (whether public or private) such as the RACs are no substitute for the legal capacity of Member States in the European legal order. The primacy of Member States as legal actors is borne out by the fact that it is only a Member State or the Commission that can initiate enforcement proceedings against a recalcitrant Member State in the European Court of Justice for failure to uphold an obligation under the Treaties.[166]

One final point is that the Lisbon Treaty firmly closes the door on the renationalization of European fisheries as a future option for the reform of the CFP as this will require the future amendment of the TFEU. As it stands, this will be politically difficult, to say the least, and the scale of this task may be appreciated when one considers the two different methods for amending the Treaties.[167] The first is referred to as an ordinary revision procedure, which involves convening an intergovernmental conference similar to the preparations that led to the adoption of previous European Treaties, such as the Lisbon Treaty itself.[168] In the alternative is a simplified revision procedure, whereby Part 3 of the TFEU, which deals with internal policy and action of the Union, including the CFP, could be amended by a unanimous decision of the European Council subject to ratification by all Member States "in accordance with their respective constitutional requirements".[169] In practice, this will mean a further referendum in Ireland and parliamentary approval in the other Member States. For this reason, the amendment of the TFEU is not a viable option as a means to reform the CFP. The debate on the reform of decision-making structures and procedures for the adoption of European fisheries management measures must therefore take place within the broader institutional and treaty setting of the EU. Accordingly, it is appropriate to conclude this article by reviewing the options for the reform of decision-making within the European institutions and their implications for the RACs.[170]

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[165] Art. 263(4) of the TFEU.
[166] Arts. 258 and 259 of the TFEU.
[167] Art. 48 of the TEU.
[168] Art. 48(2) to (5) of the TEU.
[169] Art. 48(6) of the TEU.
[170] For a general discussion, see H. Hofmann, 'Legislation, Delegation and Implementation under the Lisbon Treaty: Typology Meets Reality' (2009) 15(4) *European Law Journal* 482–505.

Future Options: Three Choices

Much of the current discussion on the reform of the CFP centres on how to improve participation in EU fisheries management by stakeholders in general and the RACs in particular. The European institutions are playing a central part in this debate, despite the fact that the Commission did not present any specific proposals on how to enhance the role of RACs in decision-making under the CFP when it reviewed the functioning of the new regional consultative structures in 2008.[171] A number of valid reasons for this omission appear to exist, including the relative newness of the structures and the impending consultation with interested parties in the Member States on the reform of the CFP. However, in assessing the future role of RACs in decision-making, it is interesting to note that the 2009 Green Paper emphasises that a major weakness in the current management structure for the CFP is the absence of clear delimitation of responsibility between the Council, the Parliament, the Member States, and the Commission in relation to the CFP.[172] In practice, decisions are taken by the Council at the highest political level and little distinction is made between decisions concerning the long-term fundamental objectives of the CFP and the more short-term measures that are required for the implementation of the CFP.[173]

The difficult task of how to address this shortcoming is compounded by some of the changes to the law-making procedures in the European institutions brought about by the Lisbon Treaty. More specifically, as seen above, the TFEU provides a legal basis for applying the ordinary legislative procedure to all fisheries decisions apart from those establishing annual fishing opportunities.[174] Unfortunately, reliance on this system will slow down the law-making process in the European institutions and is unlikely to lead to simpler laws in policy areas such as fisheries.[175] This is one of the reasons why the 2009 Green Paper advocates the necessity to bring decision-making under the CFP into line with other European policies by drawing a clear hierarchy between fundamental principles on the one hand and technical implementation on the other hand.[176] The options for doing this are clearly curtailed by the unique nature of the European legal order and essentially

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[171] Review of the Functioning of the RACs, COM (2008) 364 final, *op. cit., supra* note 20.
[172] Green Paper, Reform of the CFP, COM (2009) 163 final, *op. cit., supra* note 23 at 10.
[173] *Ibid.*
[174] Art. 43(2)(3) of the TFEU.
[175] E. Best, P. Settembri, 'Legislative Output after Enlargement: Similar Number, Shifting Nature' in: Best *et al.* (eds.) *The Institutions of the Enlarged European Union* (Cheltenham: Edward Elgar Publishing Ltd., 2008) pp. 284–314.
[176] Green Paper, Reform of the CFP, COM (2009) 163, *op. cit., supra* note 23 at 10.

come down to three choices, two of which are canvassed by the Commission in the 2009 Green Paper, and a third "theoretical option" which is mentioned below for the sake of completeness.

Option 1: Greater Delegation of Implementing Powers to the Commission

As seen above, one of the big changes that the Lisbon Treaty brings to the European legal order is that it makes the Council and the Parliament co-legislators for policies such as fisheries. In practice, however, resorting to primary legislation for the adoption of the vast amount of regulatory measures required to implement the CFP may be unworkable within the European institutions, as the Council and Parliament will rarely have the time or indeed the requisite technical expertise to address the considerable detail of fisheries management measures during the course of their deliberations on the draft legislative proposals submitted by the Commission. Therefore it comes as no surprise that the first option suggested in the 2009 Green Paper is to delegate more responsibility to the Commission by making greater use of the "comitology" procedure for the adoption of detailed fisheries management measures.[177] This procedure allows the Commission to exercise delegated powers conferred on it by the Council for the implementation of the rules laid down by the latter.[178] Broadly speaking, the function of the "comitology" committees is to ensure that the Commission exercises its delegated powers in accordance with the instructions issued by the Council and taking into account the views of the Member States.[179]

Although this option has many advantages for policy areas such as fisheries, several constraints on the use of "comitology" ought to be taken into careful consideration when devising new decision-making structures for enhancing the role of the RACs within the CFP. For instance, delegation must only relate to matters of detail and not to basic principles. In a similar vein, the Commission can only act within the limits of the powers delegated by the Council. Indeed, the European Court of Justice has upheld the wide discretion afforded to the Commission in discharging its implementation

[177] *Ibid.*

[178] Arts. 202 and 211 of the EC Treaty. The procedures for the adoption of delegated and implementing legislation is set down in Arts. 290 and 291 of the TFEU.

[179] See, *inter alia*: T. Christiansen, T. Larsson, *The Role of Committees in the Policy Process of the European Union: Legislation, Implementation and Deliberation* (Cheltenham: Edward Elgar Publishing, 2007); P. Craig, G. de Burca, *EU Law: Text, Cases & Materials* (Oxford; Clarendon Press, 2008), pp. 118–123; A. Kaczorowska, *European Union Law* (London; Routledge-Cavendish, 2009), pp. 199–201; P. Craig, *EU Administrative Law* (Oxford; Oxford University Press, 2006), pp. 99–142.

powers through the use of "comitology", but has otherwise sought to maintain the balance of powers within the European institutions.[180] This balance is reflected in the procedural mechanism which allows the Council to give the Commission an appreciable wide power of implementation, while reserving its own right to intervene.[181] Despite these positive features, one of the longstanding criticisms of "comitology" is that it is undemocratic, lacks accountability and transparency, and vests too much power in committees with a corresponding diminution of the *vires* of the European institutions.[182] In response to these concerns, "comitology" was simplified in 1999 and a new amending decision on delegation was adopted in 2006 which gave the European Parliament a right to review and to oppose how legislative acts adopted by the co-decision procedure are implemented by the Commission.[183]

What "comitology" means in practice is that the Council adopts a framework instrument, such as the Basic Fishery Management Regulation, and then it delegates responsibility to the Commission to implement detailed management measures through the adoption of a Commission Regulation or Decision.[184] The Commission has made wide use of its implementing powers for many technical aspects of the CFP and is assisted by three management committees, namely: the Committee for Fisheries and Aquaculture; the Committee on Structures for Fisheries and Aquaculture; and the Committee for Fisheries Products. The most important committee is undoubtedly the Committee for Fisheries and Aquaculture, which is comprised of national experts from the Member States with a non-voting Commission chairperson.[185] The role of this committee in formulating the CFP is not free from controversy. For example, a report published by the Institute for European Environmental Policy notes that while three committees exist on paper, in practice they are generally comprised of the same national civil servants, each

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[180] Case 9/56, *Meroni v. High Authority*; Case 41/69 *Chemiefarma* [1970] E.C.R. 661; Case 57/72, *Westzucker* [1973] E.C.R. 321; Case 230/78, *Eridania* [1979] E.C.R. 2749; Joined Cases C-296/93 and C-307/93, *France and Ireland v. Commission* [1996] E.C.R. I-795.

[181] Case 23/75, *Rey Soda* v. *Cassa Conguaglio Zucchero* [1975] E.C.R. 1279 at para. 13.

[182] See Craig, *EU Administrative Law, op. cit., supra* note 179 at 99–142.

[183] Council Decision 2006/512/EC of 17 July 2006 amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission. OJ L 2000/11, 22.7.2006. Essentially this introduced a new type of procedure for the exercise of implementing powers, the regulatory procedure with scrutiny, which allows the legislator to oppose the adoption of draft measures where it indicates that the draft exceeds the implementing powers provided for in the basic instrument, or that the draft is incompatible with the aim or the content of that instrument or fails to respect the principles of subsidiarity or proportionality

[184] Art. 30 of Council Regulation (EC) No. 2371/2002, *op. cit., supra* note 9.

[185] *Ibid*.

committee meeting sequentially over two days every month.[186] Moreover, the report goes on to find that:

> …fisheries policy is generally developed through management committees much less than in other policy areas. This is perhaps because of the political nature of fisheries policy, which means that Council working groups largely take a lead. Even where management committees are delegated power under legislation, the Council working groups often lead with negotiations and effectively hand over outcomes to the committees for official adoption as a Commission Decision or Regulation.[187]

A similar point regarding the prescriptive detail of the work undertaken by the Council and the failure to delegate to the appropriate level for decision-making has been made by the United Kingdom Minister for the Marine and Natural Resources on a number of occasions.[188]

In considering the value of this option as a means to enhance the role of the RACs within a reformed CFP, it is important to keep in mind that "comitology" is significantly altered by changes introduced by the Lisbon Treaty which establishes a hierarchy of norms with a distinction between legislative acts, delegated acts and implementing acts.[189] Although the legal basis for "comitology" in the EC Treaty is repealed, the *acquis communautaire* will continue to be applied, including all provisions on "comitology", until the basic act is repealed or modified in accordance with the provisions of the TFEU.[190] The TFEU extends the European Parliament's equality with the Council in all matters delegated to the Commission and empowers both institutions to revoke the delegation of authority to the Commission.[191] However, it is not expected that the new arrangements introduced by the Lisbon Treaty will expedite or improve decision-making in the European institutions under the "comitology" procedure.[192]

With a view to reform, it is difficult to see what difference this option will make to the future role of the RACs within the CFP. Under this option, the

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[186] Institute for European Environmental Policy, "EU Fisheries Decision Making Guide", September 2008 (Institute for European Environmental Policy). Available at: http://www.fishsec.org/downloads/1245774155_75275.pdf.

[187] *Ibid.* at 17.

[188] Irranca-Davies, *op. cit.*, *supra* note 3.

[189] Arts. 290 and 291 of the TFEU.

[190] Comitology Handbook, March 2009.

[191] Art. 290(2)(a) of the TFEU.

[192] E. Best, 'The Lisbon Treaty: A Qualified Advance for EU Decision-Making and Governance', available at: http://www.eipa.eu/files/repository/eipascope/20080509183728_SCOPE2008-1-2_EdwardBest.pdf.

RACs could, and presumably would, still be consulted by the Commission. Aside from that, there are a number of strengths and weaknesses associated with this option which have major implications for how fisheries management decisions are taken within the European institutions in general. First, on the positive side, this option will reduce the workload of the Council and allow the expert representatives from the Member States to deal with the technical detail of the numerous legislative acts that comprise the CFP. Second, it will allow the Council and the Parliament to supervise the adoption of implementation measures. Third, it will not disturb the carefully balanced equilibrium that exists between the European institutions in the exercise of their law-making functions.

On the negative side, however, greater reliance on "comitology" is unlikely to deliver the type of fundamental change outlined in the 2009 Green Paper. In particular, it will entail placing increased reliance on the committee system within the European institutions which has not delivered success for the CFP in the past. Moreover, it is frequently difficult to separate out technical detail from fundamental policy decisions in fisheries management measures. Indeed, the technical detail of fisheries management measures may be of greater concern to the RACs than the articulation of general principles, such as the principle of good governance.[193] Therefore, it may be an oversimplification to suggest that it is possible to create a clear division between the work of the Council and the Parliament as co-legislators on principles and the downstream work of the management committees on the finer details of implementation regulations. In considering this option it should also be borne in mind that there is limited technical expertise available to the Commission to deliver the range of services that are required in modern fisheries management and this is unlikely to be resolved unless further resources are committed to the Directorate-General for Maritime Affairs and Fisheries. Furthermore, one of the weaknesses associated with the use of "comitology" in the European institutions is that it does not lend itself easily to vesting stakeholders, such as those represented by the RACs, with participatory rights in the decision-making process.[194] For this reason, careful consideration ought to be given to the other two options reviewed below.

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[193] These principles are set out in Art. 2 of Council Regulation No. 2371/2002, *op. cit., supra* note 9.

[194] See M. Leeuw, 'Openness in the Legislative Process in the European Union' (2007) 32 (3) *European Law Review* 295–318.

Option 2: Delegation of Implementing Decisions to the Member States

The second suggestion made in the 2009 Green Paper is the following:

> . . . to rely wherever possible on specific regional management solutions implemented by Member States, subject to Community standards and control. The Treaty stipulates that the policy must be based on exclusive Community competence but this would not prevent implementation decisions from being delegated to Member States, provided they are bound by decisions on principles at Community level. For instance, decisions on certain principles and standards such as fishing within MSY, adapting fleet capacity to available resources or eliminating discards could remain at Community level, but it would then be left to Member States to regulate their fisheries within these Community standards. In most cases this delegation would need to be organised at the level of marine regions because shared fish stocks and shared ecosystems cover wide geographical areas and cannot be managed by individual Member States acting in isolation. Member States would therefore have to work together to develop the setups required. This setup requires effective checks and balances by the Community to ensure that common standards are safeguarded when policy is implemented.[195]

The 2009 Green Paper goes on to recommend the establishment of a clear division of responsibility between the Council and Parliament focusing on principles on the one hand, and with the Member States, the Commission and the industry focusing on implementation measures on the other hand.[196] In the opinion of the Commission, this approach would lead to a simpler and cheaper CFP and make the implementation of regulatory measures more sensitive to local conditions in the Member States.[197] Without elaborating on any of the detail, the Commission suggests that moving to a new regional management setup for the CFP would most likely enhance the advisory role of the RACs. The 2009 Green Paper does not, however, say how this is to be achieved in practice. Like the first option, it is primarily concerned with the reform of decision-making relating to the CFP generally. On the other hand, it is premised on the rather convincing argument that the regulations adopted in Council and Parliament ought to be set at a higher level of normative generality, thereby leaving more scope for Member States to implement the policy at national levels, taking local considerations into account as articulated by the RACs. At first sight, this option clearly accords with the regionalisation

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[195] Green Paper, Reform of the CFP, COM (2009) 163 final, *op. cit., supra* note 23 at 10.
[196] *Ibid*.
[197] *Ibid.*, at 11.

of the CFP and the implementation of the ecosystem approach.[198] Moreover, it is consistent with the approach adopted in a number of policy areas, such as environmental policy, research, financial management, vocational training and education, where EU management tasks are undertaken by public sector bodies in the Member States.[199] The principal advantage of this approach is that it facilitates greater proximity between stakeholders and the bodies tasked with implementing management decisions in the Member States.

This option suffers from a number of weaknesses, including the constraints imposed by the exclusive competence vested in the European institutions under the TFEU in the domain of fisheries.[200] As mentioned previously, the Commission can only devolve detailed implementation tasks to the Member States within the strict confines of what is permissible under the Treaties. For this reason, this option will require the adoption of a specific framework regulation by the Council and the Parliament, setting down the precise parameters governing the exercise of the devolved management function by the Member States. The Parliament may oppose the adoption of such a measure as it will impinge on its role as co-legislator under the TFEU. Again, similar to the first option reviewed above, there may be difficulties with this option in separating out matters of principle from detail in the implementation of the CFP. Moreover, unless the role of the RACs is strengthened under this option, the method by which fisheries law is made may be of little relevance to those to whom the law is applied in the fishing industry.[201]

One major weakness with this option is that it has the potential to reduce further the visibility of the European institutions in the eyes of the stakeholders represented by the RACs, because it will entail the establishment of new structures and procedures for the implementation of the CFP in the Member States. In this context, it may be pertinent to note that devolving more responsibility to the Member States does not guarantee a result that cures all the ills of the CFP. Indeed, experience with the implementation and enforce-

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[198] *Op. cit.*, *supra* note 43.

[199] See, *inter alia*: B. Eberlein, E. Grande, 'Beyond Delegation: Transnational Regulatory Regimes and the EU Regulatory State', (2005) 12 (1) *Journal of European Public Policy*, 89–112; C. Knill, *The Europeanisation of National Administrations: Patterns of Institutional Adjustment and Persistence* (Cambridge: Cambridge University Press, 2001); A. Heritier *et al., Differential Europe: The European Union Impact on National Policymaking* (Lanham: Rowman and Littlefield, 2001); B. Laffan, 'From Policy Entrepreneur to Policy Manager: the Challenge Facing the European Commission' (1997) 4(3) *Journal of European Public Policy* 422–438.

[200] Art. 3(1)(d) of the TFEU.

[201] A similar point is made about law-making generally: see Hansard Society, *Making the Law: Report of the Hansard Society Commission on the Legislative Process* (London: Hansard Society, 1992).

ment of European fisheries law in the Member States over the past two decades suggests otherwise.[202] In particular, the delegation of implementing decisions to the Member States will not alleviate the need for supervision and coordination of Member State actions by the European institutions.[203] For this reason, perhaps consideration ought to be given to a more radical solution which is specifically geared to providing the RACs with greater responsibility in the policy formulation process.

Option 3: Delegation of Powers to a Newly Established European Fisheries Management Agency

Options 1 and 2 above are based on the proposals for reform of decision-making set out in the 2009 Green Paper and focus on the concept of delegation and implementation of the CFP at regional levels. There is little detail in the 2009 Green Paper on how either of these options will enhance the advisory role of the RACs. Indeed, both options clearly foresee that policy decisions will remain within the remit of European institutions and the Member States.[204] The reason for this stems from the exclusive jurisdiction of the EU in fisheries matters and the supremacy of European law over the law in the Member States.[205] As it stands, responsibility for the executive implementation of EU Law rests with the Council, the Commission, and the Member States, or in a very limited number of instances with specialist European agencies that have been established for this purpose.

This leads to one theoretical option which the 2009 Green Paper omits to mention. This option is based on the understanding that the Lisbon Treaty opens the door for greater use of European regulatory agencies to undertake clearly defined tasks which involve greater stakeholder participation in the formulation and implementation of European policies. When considering the viability of this option, it may be pertinent to note that the law on European agencies has evolved steadily over the past five decades. Heretofore, the position was governed by a very old judgement of the European Court of Justice in the 1958 *Meroni* case, which places very strict limits on the degree to which European institutions may sub-delegate their powers to other

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[202] See, *inter alia*, Court of Auditors, Special Report No. 7/2007 on the control, inspection and sanction systems relating to the rules on conservation of Community fisheries resources together with the Commission's replies (pursuant to Art. 248(4) second paragraph, EC) (2007/C 317/01).OJ C 317/1, 28.12.2007; Long and Curran, *op. cit.*, *supra* note 29, *passim.*

[203] *Ibid*.

[204] Green Paper, Reform of the CFP, COM (2009) 163 final, *op. cit., supra* note 23.

[205] See cases cited *supra* note 140.

bodies not directly established by the Treaties.[206] As a result of this decision, which is sometimes referred to as the Meroni principle, European agencies as a general rule do not have meaningful discretionary powers and many of the 22 agencies which are now in operation are limited to the performance of technical tasks or the provision of advice on the formulation and implementation of European policies.[207] As a result, European institutions have traditionally been unable to make "full use of the advantages potentially offered by autonomous regulatory bodies in terms of expertise, political independence and output legitimacy".[208]

In considering this option it should be noted that academic opinion is divided on whether the Lisbon Treaty provides a legal basis and greater scope for the use of quasi-autonomous bodies as a means to improve the formulation and implementation of European legislation. One view is that the Lisbon Treaty now lays down a legal basis for reconsidering the restrictive *Meroni* principle insofar as "the revised Treaties provide a much more explicit primary law basis for the Union's various offices and agencies, including their amenability to investigation by the Ombudsman, the possibility of bringing actions for annulment and for failure to act, and of seeking preliminary references in respect of their activities".[209] This may be contrasted with the alternative view, which suggests that the Lisbon Treaty reiterates the *Meroni* principle insofar as it does not vest agencies expressly with delegation powers to issue implementing acts, as this is explicitly reserved under the Treaty to the Commission or, exceptionally, to the Council.[210] Although academic opinion may be divided on the topic, it is unlikely that the European treaties will curtail the establishment of European agencies to undertake administrative functions or to carry out complex tasks, including issuing decisions that are binding on third parties. Indeed, this development was clearly foreseen as far back as 2002 in the Commission's White Paper on Governance, which provides as follows:

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[206] Case 9/56, *Meroni v. High Authority* [1958] E.C.R. 11; Case 10/56, *Meroni*, [1958] ECR 53.

[207] For an academic commentary on the development of the role of European Agencies in the regulatory process, see *inter alia*: Craig, *EU Administrative Law, op. cit., supra* note 179 at Chapter 5; D. Geradin *et al*., *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Cheltenham: Edward Elgar, 2005; R. Dehousse, 'Regulation by Networks in the European Community: the role of European Agencies' (1997) 4(2) *Journal of European Public Policy* 246–261; Eberlein and Grande, *op. cit., supra* note 199. The Agencies themselves are described at: http://europa.eu/agencies/community_agencies/.

[208] Dougan, *op. cit., supra* note 156 at 652, who cites G. Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (Oxford: Oxford University Press, 2005).

[209] *Ibid.*

[210] Hofmann, *op. cit., supra* note 170 at 501.

> The creation of further autonomous EU regulatory agencies in clearly defined areas will improve the way rules are applied and enforced across the Union. Such agencies should be granted the power to take individual decisions in application of regulatory measures. They should operate with a degree of independence and within a clear framework established by the legislature. The regulation creating each agency should set out the limits of their activities and powers, their responsibilities and requirements for openness.[211]

The White Paper subsequently qualifies this endorsement by pointing out that the creation of regulatory agencies ought to be done in such a way that respects the balance of powers between the European institutions and does not impinge on their respective roles and powers.[212] The Commission's Communication on European Regulatory Agencies has since suggested that the European legislator may consider it better to delegate certain clearly defined tasks to European regulatory agencies in highly specialised technical areas requiring advanced expertise and continuity, credibility and visibility of public action.[213] Indeed, a quick trawl through the history of the European institutions reveals that the emergence of European agencies as legal entities in their own right may be traced back to 1975 with the establishment of the European Foundation for the Improvement of Living and Working Conditions. They have since multiplied and flourished and are now in operation for a number of high-profile areas, such as fisheries control, food safety, aviation safety, maritime safety, railways and fundamental rights.[214]

Assuming that this trend is set to continue, it may be appropriate to consider the "agency option" as a theoretical alternative to the options advanced in the 2009 Green Paper for enhancing the role of the RACs in decision-making within a reformed CFP. Again this option has a number of strengths and weaknesses from the perspective of the RACs. For a start, although some publications on the subject have classified European agencies into two broad categories, executive and regulatory, this classification is fraught with difficulty and slightly misleading.[215] This can be seen if one follows the logic of these publications, which point out that executive agencies are responsible within the European institutional administrative structure for purely managerial

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[211] European Commission, *European Governance, A White Paper*, COM (2001) 428 final, *op. cit., supra* note 63 at 24.

[212] *Ibid.*

[213] Communication from the Commission, *The operating framework for the European Regulatory Agencies*, COM (2002) 718 final, Brussels, 11.12.2002, at 5. Available at: http://ec.europa.eu/governance/docs/comm_agence_en.pdf.

[214] Available at: http://www.europa.eu/agencies/community_agencies/.

[215] Communication from the Commission, *The operating framework for the European Regulatory Agencies* COM (2002) 718 final, *op. cit., supra* note 213 at 3.

tasks, such as financial support programmes. This may be contrasted with the so-called regulatory agencies, which are actively involved in the executive function by enacting instruments that help to regulate a specific sector. The term "regulatory agency" leads to the inference that the body has decision-making powers which can be exercised by the adoption of legislative rules that are applicable to those that come within their ambit.[216] As it stands, however, none of the 22 European agencies that are in operation today are truly regulatory agencies strictu sensu insofar as they do not exercise a full range of discretionary powers through adjudication and law-making.[217] Many agencies have been established with the simple objective of meeting the demands for geographical devolution of the institutions in the Member States or to help the Commission cope with new tasks of a technical or scientific nature. Indeed, a brief review of the historical development of agencies reveals that there is no single *sine qua non* for their establishment, apart from the need to decentralise EU activities and to facilitate greater stakeholder dialogue at European or national levels. Thus it is unsurprising that no common thread links the broad range of policy areas where agencies are now in operation. Moreover, the functions and powers of the 22 agencies that are in operation vary significantly.[218] Some agencies are simply con-

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[216] Craig, *EU Administrative Law, op. cit., supra* note 179 at 154.

[217] D. Geradin, N. Petit, 'The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform' (2004) Jean Monnet Working Paper 01/04, NYU School of Law. Available at: http://centers.law.nyu.edu/jeanmonnet/papers/04/040101.pdf.

[218] Regulation (EEC) No. 337/75 of 10 February 1975 establishing a European Centre for the Development of Vocational Training. OJ L 39/1, 13.2.1975; Regulation (EEC) No. 1365/75 of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions. OJ L 139/1, 30.5.1975; Regulation (EC) No. 401/2009 of 23 April 2009 on the European Environment Agency and the European Environment Information and Observation Network. OJ L 126/13, 21.5.2009; Regulation (EEC) No. 1360/90 of 7 May 1990 establishing a European Training Foundation. OJ L 131/1, 23.5.1990; Regulation No. 1920/2006 of 12 December 2006 on the European Monitoring Centre for Drugs and Drug Addiction (recast). OJ L 376/1, 27.12.2006; Regulation (EC) No. 726/2004 of 31 March 2004 laying down Community procedures for the authorisation and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency. OJ L 136/1, 30.4.2004. Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark. OJ L011/1, 14.01.1994; Regulation (EC) No. 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work. OJ L 216/1, 20.08.1994; Regulation (EC) No. 2100/94 of 27 July 1994 on Community plant variety rights. OJ L 227/1, 1.9.1994; Regulation (EC) No. 2965/94 of 28 November 1994 setting up a Translation Centre for bodies of the European Union. OJ L 314/1, 07.12.1994; Regulation (EC) No. 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia. OJ L 151/1, 10.6.1997. Regulation (EC) No. 2667/2000 of 5 December 2000 on the European Agency for Reconstruction. OJ L 306/7, 7.12.2000; Regulation (EC) No 178/2002 of 28 January 2002 laying down the general principles and

cerned with gathering information and coordinating Member State action, such as the European Training Foundation and the European Network and Information Security Agency. This may be contrasted with a number of other agencies which have the power to make decisions that are binding on third parties.[219]

In considering the "agency option" as a possible choice for enhancing the role of the RACs in decision-making within the CFP, it is important to keep in mind that European agencies have their own legal personality and a degree of independence from the European institutions. As a rule, they are established on the basis of secondary legislation adopted by the Council (and by the Parliament since the ratification of the Lisbon Treaty) on a proposal from the Commission in order to accomplish very specific technical, scientific or managerial tasks.[220]

One distinct advantage of the agency option is that it would allow for the establishment of a fairly sophisticated and flexible structure for decision-making on fisheries management at a regional level which could have a direct input from the various stakeholders represented by the RACs. Although the Commission has made a concerted effort in recent years to harmonise the structure and composition of agencies at a European level, the precise structure and composition tends to vary from agency to agency, depending upon their mandate and the nature and range of the tasks that they perform.[221] In practice, however, the majority of European agencies have common features, such as: an administrative or management board; an executive director; and a

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requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety. OJ L 31/1. 1.2.2002; Regulation (EC) No. 1406/2002 of 27 June 2002 establishing a European Maritime Safety Agency European Maritime Safety Agency. OJ L 208/1, 5.8.2002; Regulation (EC) No. 216/2008 of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No 1592/2002 and Directive 2004/36/EC. OJ L 79/1, 19.3.2008; Regulation (EC) No. 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EC) No. 2847/93 establishing a control system applicable to the common fisheries policy. OJ L 128/1, 21.5.2005.

[219] These include the Office for the Harmonization in the Internal Market, the European Aviation Safety Agency (EASA) and the Community Plant Variety Office (CPVO). The CPVO, for example, has been delegated the power to adopt legally binding decisions in relation on the registration of plant variety rights under Art 62 of Council Regulation 2100/94 of 22 July 1994 on Community plant varieties, [1994] OJ L 227/1 as subsequently amended in 1995, OJ L 258/1.

[220] For example, the CFCA undertakes a limited range of tasks relating to the enforcement of fishery law in the Member States, *op. cit.*, *supra* note 46.

[221] Communication from the Commission, *The operating framework for the European Regulatory Agencies* COM (2002) 718 final, *op. cit., supra* note 213.

number of standing technical and/or scientific committees to support the work of the agency.[222]

Apart from providing a fresh start for decision-making within the CFP, this option would allow for a separation of tasks, with the Council, Parliament and the Commission focusing on policy, while the agency takes responsibility for coordinating Member State action, scientific advice and participation by stakeholders, including those represented by the RACs.[223] A number of other advantages stem from the fact that European agencies have political independence and permanent structures which may be more amenable to regionalisation and the application of the ecosystems approach. In addition, it may be possible to combine the rule-making function with an appropriate compliance model for specific European fisheries; this may ultimately require reviewing the role of the CFCA to see where it best fits with a new parent agency responsible for the management of fisheries on a regional basis, should one be established.

The principal disadvantage of this option is that it may represent a somewhat Pyrrhic victory of form over substance, insofar as the role of the agency in decision-making would be focused on the technical and scientific aspects of policy implementation. This will not negate the role of the European institutions in law-making, as regulatory agencies have very limited discretionary powers, even if the Lisbon Treaty vests them with more scope to take on a broader range of functions.[224] At a political level, there may be considerable reluctance for the Council, Parliament and Commission to disturb the present institutional balance, which prevents any single interest from becoming dominant in decision-making. Moreover, it should also be borne in mind that agencies are sometimes perceived as being fundamentally undemocratic, because the prime actors in the policy process are regulators and experts.[225] The Parliament in particular may oppose any proposal to establish a European Fisheries Management Agency on the ground that a proliferation of

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[222] Craig, *op. cit., supra* note 179 at 170–173.

[223] Green Paper, Reform of the CFP, COM (2009) 163 final, *op. cit., supra* note 23 at 10.

[224] Dougan, *op. cit.*, *supra* note 156.

[225] See *inter alia*: Majone, *op. cit.*, *supra* note 208, *passim*; by the same author ,'The Credibility Crisis of Community Regulation' (2000) 38(2) *Journal of Common Market Studies* 273–30; E. Chiti, 'The Emergence of a Community Administration: The Case of European Agencies' (2000) 37(2) *Common Market Law Review* 309–343; by the same author, 'Decentralisation and Integration into the Community Administrations: A New Perspective on European Agencies' (2004) 10 (4) *European Law Journal* 402–438; S. Krapohl, 'Credible Commitment in Non-independent Regulatory Agencies: A Comparative Analysis of the European Agencies for Pharmaceuticals and Foodstuffs' (2005) 10(5) *European Law Journal* 518–538.

agencies already exists on the European institutional landscape, which raises concerns about their political accountability and transparency. In any case, the establishment of such an agency will require considerable resources, an accountability mechanism, adjudicatory processes and an appeals mechanism.[226] One further consideration to be taken into account when reviewing this option is that it must be emphasised that European law firmly curtails the power of agencies to adopt general regulatory measures and the tendency is not to vest agencies with powers to take decisions which would arbitrate between conflicting public interests, exercise political discretion or carry out complex economic assessments.[227] Neither can they be vested with responsibilities for which the TFEU has conferred the direct power of decision on the Commission, such as the power to take enforcement proceedings against Member States for their failure to comply with European law.[228]

Ultimately it must be asked whether this option will enhance the role of the RACs in decision-making within the European institutions. This question has no clear answers because of the great diversity in agency practice regarding the consultation and participation rights granted to stakeholders. Some agencies place considerable importance on interacting with key players in their policy areas and have established strong links with Member States, as well as with regional, international and non-governmental organisations. The European Food Safety Authority, for example, has an Advisory Forum made up of representatives of each Member State's national food agency and of national officials dealing with food safety issues.[229] Several other agencies are required by European law to actively engage with those that are concerned with their work. Indeed, one authoritative commentator has suggested that European agencies have become "the breeding ground and learning sites for state of the art participatory practices which are streets ahead of the rhetoric surrounding the implementation of Commission's White Paper on Governance".[230]

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[226] Several agencies, including the Office for Harmonisation in the Internal Market, the CPVO and the European Aviation Safety Agency, have appeals mechanisms to deal with any complaints by third parties arising from decisions they adopt, prior to any referral to the Court of First Instance.

[227] European Commission, *European Governance, A White Paper*, COM (2001) 428 final, *op. cit., supra* note 63.

[228] Art. 258 of the TFEU.

[229] Art. 27 of Regulation (EC) No. 178/2002 of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31/1, 1.2.2002.

[230] D. Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in: D. Geradin *et al.*, *op. cit., supra* note 207 at 88–120 (especially at 113).

One noteworthy example is the rule-making procedure followed by the European Aviation Safety Agency (EASA) which allows interested parties to play a key role in the drafting of legislation and implementation measures related to the regulation of civil aviation safety and environmental compatibility.[231] The success of EASA as a quasi-regulatory body is built upon the links it has established with stakeholders and the use it makes of industry knowledge in preparing draft legislation. The powers of EASA are set out in a Council Regulation which requires it to submit opinions to the Commission and requires the Commission to consult with it on any technical matters within its field of competence.[232] At an external level, EASA plays a key role in international co-operation within the field of civil aviation. At first sight, it appears that the rule-making process followed by EASA offers a useful model for the development of a more inclusive approach to stakeholder participation in decision-making in other European policy areas, such as the CFP. In particular, this model may offer greater scope for involving the RACs at an early stage in the policy process, leading to the preparation of draft legislation and implementation measures. However, considerable caution ought to be exercised in considering the EASA model, as regulatory measures aimed at improving the safety of aircraft, which is essentially the task of EASA, are unlikely to be as controversial or as politically sensitive as formulating fisheries management rules which arbitrate between conflicting public and private interests in the Member States.

One particular feature regarding the "agency option" which is important to keep in mind is that the creation of such a body would be fundamentally different from RFMOs, such as NEAFC, or indeed the Regional Management Organisations that are in operation in the USA and Australia, insofar as these are independent regulatory bodies capable of adopting legally binding measures in their own right. This may be contrasted with the rather lim-

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[231] EASA may be considered to be a quasi-regulatory agency which has elaborate rule-making procedures and a major input into the drafting of complex implementing regulations concerning air safety before their formal approval by the Commission pursuant to Regulation (EC) No. 1592/2002 of the European Parliament and of the Council of 15 July 2002 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency [2002] OJ L 240/1. Although the Commission has the final say on the adoption of these regulations, the recommendation of EASA carries considerable weight on the outcome of the decision-making process. Indeed, in most instances, it appears that the Commission will simply adopt the recommendation from EASA without much deliberation or scrutiny. See P. Craig, *EU Administrative Law* , *op. cit., supra* note 179 at 156.

[232] Regulation (EC) No. 216/2008 of 20 February 2008 on common rules in the field of civil aviation and establishing a European Aviation Safety Agency, and repealing Council Directive 91/670/EEC, Regulation (EC) No. 1592/2002 and Directive 2004/36/EC, OJ L 79/1, 19.3.2008.

ited remit of European agencies which do not have direct discretionary regulatory powers of their own and whose core task would be to undertake some key management functions sub-delegated by the Commission in order to let the European institutions concentrate on the core task of policy formulation at a higher level.

Conclusions

The year 2011 will be an important year for the CFP as it will see the conclusion of the third major reform of the CFP since 1983. Although it may be premature to forecast the precise outcomes of the reform process, there is little doubt but that many aspects of the sophisticated body of fisheries law that now forms the *acquis communautaire* will be carried over into the revised CFP when the process is completed next year. In particular, we can expect that the CFP will be guided by: the principles of good governance which require a clear definition of responsibilities at European, national and local levels; a decision-making process based on sound scientific advice which delivers timely results; broad involvement of stakeholders at all stages of the CFP process from conception to implementation; and a requirement that the CFP is consistent with other European policies, in particular with environmental, social, regional, development, health and consumer protection policies.[233] These objectives are laudable and the CFP will have to overcome a number of political and legal hurdles if they are to be attained within the lifetime of the revised CFP. The scale of this task is compounded by the fact that many stakeholders are losing confidence in the CFP and in its capacity to deliver a sustainable future for the European fishing industry.[234] For this reason, the 2009 Green Paper records the commitment of the Commission to reform the decision-making structures within the European institutions with a view to enhancing stakeholder involvement in the formulation and implementation of the CFP.[235] The pressing nature of this task may be appreciated when one considers that the timetable for reform has a series of fast-approaching deadlines, with the Commission publishing a summary of the reform debate and a regulatory impact assessment in the first half of 2010. Thereafter, proposals for the reform of the CFP will be tabled in early 2011 with the law-making process in the Parliament and Council scheduled for

[233] These are the objectives of the CFP as set out in Art. 2(2) of Council Regulation No. 2371/2002, *op. cit., supra* note 9.
[234] Green Paper, Reform of the CFP, COM (2009) 163 final, *op. cit., supra* note 23 at 5.
[235] *Ibid.*

conclusion with the adoption of a new basic fisheries management regulation for the CFP at the end of 2011.

One of the key priorities for the reform of the CFP is to devise new European institutional procedures for making the best decisions in fisheries management. At present, some may argue that stakeholders should avoid becoming involved in a debate about new structures and concentrate their efforts on reforming the central elements of the CFP, such as the prohibition on discards.[236] Conversely, it may be contended that the deplorable state of many European fisheries demands a more pragmatic approach, as the current structures and procedures in the EU for taking decisions on fisheries management are unlikely to achieve many of the principal objectives of the CFP as it stands.[237] However, the veracity of these arguments should not overshadow the vital role that stakeholders and the RACs in particular are playing and ought to play in the CFP process. Stakeholder input has undoubtedly made the CFP more transparent and legitimate in the eyes of the public since the establishment of the first RAC, the North Sea RAC, in 2004. In spite of this success, it must also be accepted that many stakeholders remain dissatisfied and are actively seeking a more participatory role in policy-making under the CFP. In this context, the reform of the CFP presents a rare opportunity to make real changes in structures and procedures with a view to enhancing RAC participation in the attainment of the environmental, economic and social objectives of the CFP. As co-legislator, the European Parliament will play an important role in shaping the new measures and many Parliamentary members are aware that good governance in the CFP means governance for the general interest of those governed, on the basis of commonly shared values and with the involvement of all stakeholders, including those that come within the broad scope of the European Integrated Maritime Policy.[238] As mentioned in the introduction to this article, this trend of greater stakeholder involvement in policy-making is fully consistent with recent developments in international law and best practice in ocean governance.[239]

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[236] See Inter-RAC Conference on Decision-Making in the Reform of the Common Fisheries Policy, Merchants Hall, Edinburgh, 3–4 November 2009. Available at: www.nsrac.org/wp-content/…/11/Inter-RAC-CFP-Edinburgh-Report.pdf.

[237] Green Paper, Reform of the CFP, COM (2009) 163 final, *op. cit., supra* note 23 at 7.

[238] H. Siemers, DG MARE, 'Integration of the Common Fisheries Policy into Wider Maritime Policy', in: Inter-RAC Conference on Decision-Making in the Reform of the Common Fisheries Policy, Merchants Hall, Edinburgh, 3–4 November 2009; *op. cit., supra* note 236.

[239] On the issue of governance, see T. Treves, 'Principles and Objectives of the Legal Regime Governing Areas Beyond National Jurisdiction', in: E. Molenaar, A. Oude Elferink (eds.), *The*

In considering the various options for the reform of the CFP, many commentators are now aware that rules governing the use of natural resources are more likely to be successful if they are executed with the active participation of stakeholders in their design and implementation.[240] In the search for legitimacy, however, it would be inherently unfair to place additional responsibility on the RACs within a reformed CFP without ensuring that they are properly resourced and their participation in the decision-making process goes well beyond the "icing on the cake" approach to stakeholder consultation that is sometimes evident in the various schemes for fisheries management that are implemented both within and beyond the EU. For this reason, existing arrangements within the CFP could be improved if a legally binding obligation is placed on the Commission to consult with RACs on all legislative proposals which apply to their geographical region. In other words, replace the current discretion afforded to the Commission under the Basic Fishery Management Regulation with a mandatory consultation requirement.[241] In devising the new structures for fisheries management, the European institutions must also take into account that any increase in the use of the "comitology" procedure (see Option 1, above), will do little if anything to alleviate continuing concerns about the legitimacy of decision-making within the CFP. Accordingly, serious consideration ought to be given to the second option canvassed in the 2009 Green Paper, which entails greater delegation of responsibility to the Member States for the implementation of specific regional management solutions. As an alternative, perhaps the Commission should evaluate the feasibility of the third option reviewed in this article, which will involve establishing an autonomous regulatory agency for fisheries management at a European level, drawing upon best practice from existing agencies and working within the confines of what is permissible under the TFEU. In doing so, it should be borne in mind that RACs are heterogeneous organisations and that any new decision-making structures within the CFP ought to be flexible and capable of meeting the needs of all major stakeholders in the various geographical regions.

As a final point, it may be appropriate to conclude by suggesting that the various options reviewed above do not cross the Rubicon and lead to an uncertain future for the management of European fisheries. In particular, they pose little risk to the balance of powers within the European institutions,

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International Legal Regime of Areas beyond National Jurisdiction: Current and Future Developments (The Hague: Brill Academic Publishers, 2010) 7–25 at 7.

[240] E. Ostrom, R. Gardner, J. Walker, *Rules, Games, and Common-Pool Resources, op. cit.*, *supra* note 28.

[241] Art. 31(1) of Council Regulation (EC) No. 2371/2002, *op. cit., supra* note 9.

because delegated legislation must still conform to the guiding principles and parameters of the CFP as set down by the parent legal instrument authorising the delegation. Moreover, delegated power can only be exercised in the shadow of the Council and the Parliament, who may reject a particular legislative proposal or indeed the delegation in its entirety. This means that the new Basic Fishery Management Regulation will set down the precise limits of the delegation of powers to the Commission, the Member States, or indeed to any future European agency established for the purpose of fisheries management. In this context, it should be borne in mind that despite the cogent case supporting reform of the current decision-making structures and procedures, as well as the precarious nature of European fisheries, the time may not be politically right for pursuing a radical solution to the difficulties encountered within the CFP. As seen above, the Lisbon Treaty has altered the European institutional equilibrium in law-making and there may be little enthusiasm within the institutions in general and the Parliament in particular for exploring the boundaries of their competence, sub-delegating their newly found powers and testing the efficacy of this method of policy delivery for the CFP. Moreover, several Member States, including France, Germany and Spain, a number of industry representative organisations and one environmental non-governmental organisation have expressed strong reservations about transferring any future management responsibilities to the RACs.[242] However, in light of the high stakes for the future of the European fishing industry, it must surely be time to accept that the success of the new arrangements for fisheries management in the EU will ultimately depend on how well they enhance the rights of stakeholders to participate in the formulation and implementation of policy. For this reason, all stakeholders should be actively encouraged to pursue the reform options that best serve their interests and to actively engage in the debate regarding the future reorientation of the CFP in 2012.

[242] UK House of Lords Paper 146-I, para. 135, *op. cit., supra* note 26.