The European Union's Common Fishery Policy and the Icelandic Fishery Management System

Effective implementation of sustainable fisheries

Helga Hafliðadóttir

Lokaverkefni til MPA-gráðu í opinberri stjórnsýslu

Félagsvísindasvið

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Leiðbeinandi: Dr. M. Elvira Méndez-Pinedo

Stjórnmálafræðideild

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Abstract

This thesis explores the European Union's Common Fishery Policy and the Icelandic Fishery Management System. It offers a comparative analysis of the systems' management instruments intended to promote sustainable fisheries within Icelandic and European Union's waters. It predominantly focuses on effective implementation of the systems' management instruments in light of their conservation objective. The thesis' main objective is to explore whether the European Union's Common Fishery Policy can adopt management instruments from the Icelandic Fishery Management System in order to improve the state of the Union's marine resources. To do so it offers a comprehensive account of the legal framework of the systems' conservation policy, main management instruments, and their control and enforcement systems. Furthermore, a historical account is given in order to shed a light on the political and structural conditions that have shaped the systems' development. In July 2011, a legislative proposal for a new Basic Regulation for the Common Fishery Policy was published, the thesis therefore also covers the main changes the proposal introduces. The thesis' main findings, is that the fundamental difference between the systems; that the Icelandic Fishery Management System is governed by an Individual Transferable Quota System and the European Union's Common Fishery Policy is based on equal access to marine resources, has influenced the adopted management instruments, policy implementation, political decisions, as well as the challenges the systems face. Despite this, there are management measures that the Common Fishery Policy can adopt from the Icelandic Fishery Management System in order to improve the effective implementation of sustainable fisheries. Having said that, it is important to stretch, that a comparative analysis between two systems, also offers an opportunities to see what general lessons can be learned from each fishery management systems, if any.

Prologue

This thesis is a 30 ECTS master thesis in Public Administration. In the beginning of 2011, I was offered an opportunity by Matis to do a comparative research between the European Union's Common Fishery Policy and the Icelandic Fishery Management System, an area that has for a long time been an interest of mine. It was therefore with much enthusiasm that I accepted the offer. The thesis is a part of a larger research project that is under the guidance of Matis, the EcoFishMan. Fishery management systems are both a fascinating, and a somewhat difficult subject. During the writing of this thesis my understanding of fishery management systems increased substantially as well as my knowledge of what underpins a successful fishery management system. To Matis I would like to give deep gratitude for entrusting me with this task, and the guidelines I have received from them along the way. I would also like to give special thanks to Casey Sharpe, for her help with editing and the usage of the English language. Furthermore, I would like to give thanks to Helgu Sigurrós Valgeirsdóttur, from the Icelandic administration, for her review and comments on the Icelandic Fishery Management System. To my family I am very grateful since without their support the thesis would not have become a reality. Lastly, but certainly not least, I would like to give deep gratitude to my supervisor Dr. M. Elvira Méndez-Pinedo, for her support and encouragement, for teaching me so much, and for helping me to reach a goal which will enrich my life in the years to come.

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1. Introduction

Fish is an important food source for humanity, and marine resources have throughout centuries contributed to human welfare. In recent decades our understanding of marine resources and ecosystems has increased substantially, allowing us to gain a deeper understanding of what a successful fishery management consists of. The path to successful fishery management requires good governance. Without adequate regulation the potential of marine resources to contribute to human welfare, now and in the future, will not be met, and fish will become a luxury of the past.

It was not until the middle of the 20th century that the realisation emerged that marine resources were exhaustible. Following the discovery states began managing their fisheries more effectively, which has in some cases resulted in complex management regimes. Furthermore, over the last three decades, the concept of sustainable development has altered the general perception of the management of natural assets, influencing pursued goals in public policy, and accountability when it comes to the exploitation of the world's common resources. Because marine resources are exhaustible it is generally accepted that in order for them to continue to provide welfare in societies now and in the future, they must be conserved. A successful conservation of marine resources requires that their conservation remains the primary goal pursued, when marine policy is implemented. However it can be argued that when politics enter the implementation process of resource management, the general goal of fishery conservation has often developed into a pursuit of conflicting sub-goals that are of social and economic nature, leading to an overall decline in the dedication to the aim of conservation. Even so, the fact that politics influence fishery policy should not be regarded as an unimportant factor, as they play an important role in areas such as the distribution of fishing rights and fishing opportunities.

Fishery management can be described as a causal chain of three main pillars: *conservation, control,* and *enforcement.* An efficient fishery management system presupposes that these three pillars work effectively together. For that to be true, politicians have to be provided with accurate scientific estimates of fish stocks,

they then have to use that knowledge to take decisions to ensure sustainable utilisation of marine resources. Those decisions then have to be efficiently implemented by national administrations, and finally the fishing industry has to comply with national fishery law. Throughout the years this presumption of fishery management systems has been subject to wide discourse among academics. Scholars have pointed to the problems that exist in generating scientific advice on fish stocks, which can be disputed because of limited knowledge on marine ecosystems, and to some extent on fish biological systems. Furthermore they have criticised the existence of politics in fishery management, which has resulted in some politicians taking decisions based on short term interests, rather than on the scientific advice given. And finally, a large literature exists on the general management of common property resources, and the fact that fishermen do not always follow fishery law.[1] The discourse on common property mainly focuses on political decisions regarding the distribution of fishing rights and fishing opportunities, and the management and structure of authority within the fishery systems. The discourse can broadly be divided into two schools of thought. The neoclassical approach, which is inspired by the theory of *tragedy of the commons*, has advises privatisation of user rights. And the cooperative management school, which has defended the common property institutions.[2]

This thesis aims to investigate the European Union's and the Icelandic fishery management systems. Both systems have the main objective of conserving marine resources, but despite their common ground, their ability to meet their conservation objective has been quite different. In Europe 60% of fish stocks in the Union's waters are fished beyond maximum sustainable yield,[3] and furthermore, in a research carried out by the International Council for the Exploration of the Sea in 2007, 30% of European fish stocks were out of safe biological limits.[4] Iceland on the other hand has been more successful in conserving its marine resources, and succeeded in turning around a decades-long

[1] Gezelius, S.S.,"The problem of Implementing Policies for Sustainable Fishing", p. 3-4.
[2] Gezelius, S.S.,"The problem of Implementing Policies for Sustainable Fishing", p. 5.
[3] Report from the Commission to the European parilament, the council, the European Economic and Social Committee and the Commitee of the Regions, *On Reporting Obligations under Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy* COM(2011) 418 final, p. 2.
[4] Commission COM(2009)163 final, Green paper: Reform of the Common Fisheries Policy, 22 April 2009.

problem of depleting fish stocks. Therefore, it is interesting to compare the two systems and see where they differ in terms of implementation measures to ensure effectiveness of their marine policy, in particular regarding the conservation of marine resources. The thesis predominantly explores the relationship between the three pillars in the fishery management chain; conservation, control and enforcement, and the way they affect effective implementation of the system's conservation policy. The research questions are the following ones: Can the European Union adopt management measures used within the Icelandic Fishery Management System to better ensure the conservation of European marine resources? What challenges is the European Union's Common Fishery Policy facing? What management measures does the European Union's Common Fishery Policy use to try and counter these challenges? What management measures does the Icelandic Fishery Management System use to counter the challenges that the European Union's Common Fishery Policy is facing? Where do the main differences in the systems management tools lie? Do the systems' implementation measures affect their effectiveness? And lastly, are the underlying objectives of the fishery management systems the same?

As stated the thesis' main objective is to provide an insight into factors that shape the effective implementation of each system's conservation policy by comparing management measures that they use to promote the conservation of marine resources within their territory. In order to do so a descriptive account of each system's management measures is essential, in particular of their conservation policy, and control and enforcement systems. Special emphasis will be placed on the legal framework of the systems' conservation policies, as it defines their objectives and determines the management measures adopted. The descriptive account of the systems will then serve as a foundation for their comparison. The systems' management measures are compared based on the factors that are challenging the European Union's Common Fishery Policy. The thesis does not make normative claims about the fishery management systems, but describes them as they are, and offers readers to reflect on the management regimes within analytical framework, that experts in the field have created. It is the author's wish that such approach proves to be practical, and provides a deeper insight into the European Union's and the Icelandic Fishery Management Systems; explaining the

main elements that affect the effectiveness of adequate implementation of marine policy. Fishery management systems are complex management regimes that consist of many different factors. Due to the limited scope of this research numerous issues and questions that shape the management systems are not touched upon, but can nevertheless prove to affect the effectiveness of each system. Furthermore the thesis does not offer an exhaustive account of the legal questions that arise, but merely addresses the main issues. The author acknowledges that there are fundamental differences between the systems. The Icelandic Fishery Management System is managed by an Individual Transferable Quota System, which restricts access to fishing to holders of quota entitlements, while the European Union's Common Fishery Policy is based on the principle of equal access to marine resources, and fishing opportunities are distributed between Member States based on the principle of *relative stability*, and of course the European Union is an international body. Therefore the Icelandic Fishery Management System is influenced by the neoclassical approach, while European Common Fishery Policy is influenced by the cooperative management school. These factors affect their management measure, policy implementation, political decisions, as well as the challenges that the systems face. However, despite their differences the management systems do have certain characteristics in common, which are comparable. Here it must also be noted that that both systems are intended to undergo a reform in the near future. The European Commission introduced a reform of the Common Fishery Policy in July 2011, and legislative proposal on a new Fishery Management Act for Iceland is intended to go before the Icelandic Parliament early 2012.[5]

The concept of sustainable development has in recent years had a substantial effect on the management of the world's common resources, both at the national and international level. Today fishery conservation policies aim at exploiting marine resources at their sustainable levels. Therefore the thesis begins in Chapter 2 by giving a brief overview of the concept on sustainable development, followed by an account of sustainability in fisheries. Chapter 3 gives a descriptive account

[5] Commission COM(2011) 425 final proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011 and legislative proposal for a new Fishery Management Act in Iceland, Legislative proposal for a new Fishery Management Act: http://www.althingi.is/altext/139/s/1475.html.

of the European Union's Common Fishery Policy, its conservation policy, and control and enforcement system. Because of the inertia of the Common Fishery Policy's management system a historical perspective is also given, describing the political process and structural conditions that have shaped the system's development. Chapter 4 gives an account of the new legislative proposal for the Common Fishery Policy, intended to enter into force at the beginning of 2013. The proposal introduces radical changes to the policy's conservation management measures, and the main changes it proposes will be described. Chapter 5 then gives an account of the challenges the EU's Common Fishery Policy is currently facing.

Following a comprehensive account of the European Union's Common Fishery Policy, Chapter 6 gives a descriptive account of the Icelandic Fishery Management System, its conservation policy and control and enforcement system. Like with the Common Fishery Policy a historical perspective is also given of the system, describing political and structural conditions that have shaped the country's fishery management policy. Chapter 7 then contains a comparative analysis between the two management systems, focusing on the conservation, control, and enforcement measures in both systems, and also includes a discussion on the changes introduced in the new legislative proposal for the Common Fishery Policy, and how they are intended to solve the problems that the current CFP faces. This is then followed by final conclusions.

The research is mainly built on primary and secondary law from the European Union and Iceland. Primary and secondary law of the European Union includes the Treaties on the European Union, regulations (mainly Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy) applicable to the Common Fishery Policy and directives, and where relevant case law from the European Court of Justice. In order to offer a deeper understanding and insight into the background of the policy, numerous policy instruments and soft law from the European Union Institutions are also used. Sources on the Icelandic Fishery Management System are also mainly primary and secondary legislation, the Icelandic Constitution and applicable Icelandic fishery management law and regulation, and policy instruments that can shed a light on the reasons and ideas

that have shaped the system. As previously mentioned, scholars have devoted some attention to the, somewhat optimistic, presumption of fishery management system's ability to make the three pillars work together, and have pointed to flaws that exist in the fishery management model's causal chain. Therefore the thesis also relies on academic literature in the field and uses current theories and principles to further explain the fishery management systems.

A comparative analysis of two systems enables a deeper understanding of where the differences in the systems lie and the main dynamics that may contribute to their effective implementation. Furthermore it offers an insight to where changes can be made in order for the management systems to achieve their objectives and also which general lessons can be learned, if any. As was explained above the European Union faces the challenge of depleting fish stocks, but Iceland has been able to manage their marine resources more effectively. The way in which Iceland manages its fisheries can therefore provide the European Union with an understanding of how Iceland implements its conservation policy in order to make their fishery management more effective and efficient. It is the authors wish that this research will help to improve our understanding of successful fishery management system, contribute to both public policy and law making, and more importantly the importance of promoting sustainable fisheries.

2. Sustainable Development

Over the last three decades, public awareness of environmental matters and natural ecosystems has increased substantially. This has affected public policy which has in recent years promoted wider accountability when it comes to managing the world's resources. New theories have emerged that have had substantial effects, on both public and political discourse and changed emphasis in politics, both in the national and the international arena. The term "*sustainable development*" has been the main driver for this development and will undoubtedly be so for years to come. This chapter contains a brief overview of the concept of sustainable development and its main objective, following a discussion on sustainability in fisheries.

The concept of "*sustainable development*" was first used as a special term in the 1980s, even though a notion of the concept probably existed long before that.[6] The term's use was further promoted in a Report of the World Commission on Environment and Development, which has become to be known as the "*Brundtland Report*".[7] Since then sustainability has received a wide recognition as a feasible objective when managing the world's resources. Over time the term has been defined in many ways but the definition put forward in the Brundtland Report is the one that has been the most widely used. The Brundtland Report defines sustainable development as "*meeting the needs of the present without compromising the ability of future generations to meet their own needs*".[8] It can be stated that the definition is in fact twofold. First it stretches that when managing natural resources the needs of the present should be met, and secondly that the ability for future generations to meet their needs should not be jeopardized. As stated above sustainable development has received a wide recognition as an objective when managing the world's resources. However, the meaning of the concept varies to some degree between entities, in particular the economic sector from which modern societies operate.[9]

[6] Bosselman, Klaus, "The concept of sustainable development", p. 22.
[7] Bosselman, Klaus, "The concept of sustainable development", p. 26.
[8] Bosselman, Klaus, "The concept of sustainable development", p. 26.
[9] Bosselman, Klaus, "The concept of sustainable development", p. 34.

Many international organizations and national declarations have supported the concept of sustainable development. In general, the objective of sustainable development is to find a balance between the concepts of the environment, social welfare and the economy, which are all important factors of society. The concepts are referred to as the three pillars of sustainability.[10] To find a balance between the three factors has proven a difficult task for modern society, mainly because of different meanings people put into the concepts and because of clashing interests and opinions, which tend to lean against one of the pillars.

According to the concept of sustainable development humans must take nature into consideration and have to respect its limitations. For the concept to function properly the environment must be considered the strongest pillar of the three. Economics and the social society are the weaker pillars, thus it is said that the environment is the foundation while the other two are reliant on the environment. Therefore the theory advocates long lasting arrangements for management of public resources in modern society, which are dependent on economics and social gain. Economic and social gain would therefore not come into existence without the support of the environment and its natural resources.[11] To maintain modern living standards, natural common resources have thus to be exploited in a manner that ensures both current and future prosperity, and in order to achieve that a balance between the three pillars must be obtained.

The fundamental idea of the concept that the future generations shall not have their opportunities jeopardised is generally appealing for all societies. However, as was stated above, the meaning of sustainable development can vary between entities because of different perceptions of the term, and different interests. There exists no "right" perception on how the environment is to serve humanity, in the present and future. But it can be argued that some common criteria on how to value the environment is important for establishing a proper relationship between humans and the environment. Or as Bosselmann puts it: a meaningful discourse on the nature of sustainable development, not only involves academic disciplines, conducted on the basis of different social-sciences, but ultimately on "*our*

[10] Bugge, Hans Christian and Christina Voigt (EDC): *Sustainable development in International and national law*, p. 25-29.
[11] Bugge, Hans Christian and Christina Voigt (EDC): *Sustainable development in International and national law*, p. 25-29.

interpretations of sustainable development are determined by ethical concepts or world views".[12]

Natural common resources are exhaustible and must be treated with respect by societies for the resources to be able to contribute to human welfare now and in the future. This is especially important when natural resources serve humanity as an important source of food supply; in particular this is true for fisheries which have always provided humanity with a source of food.

2.1 Sustainable fisheries

Fish has always been a part of human food consumption and as a consequence, human activity has had a great impact on marine resources. In recent decades a range of developments have led to a significant improvement in fishing techniques which has resulted in greater fishing capacity. For the larger part of the twentieth century fish stocks were seen as inexhaustible resources, and it was not until the latter half of the century that there was a realisation that some fishing stocks were beginning to suffer the fate of overexploitation. Fish are a common resource and having an open access to this natural resource provides the incentive for fishermen to race to catch fish in the most efficient way they know how, to maximise their own economic gain. This is generally referred to as the economic theory of *tragedy of the commons* where valuable natural resources (such as fish) that are free for the taking will end up being depleted. To avoid the problem of *tragedy of the commons*, state fishery management measures have traditionally been characterised by restrictions to marine resources, but such measures do not counter the underlying problem that fishermen face, whose livelihood is based on fishing, which is the need to maximise their profit. Therefore, management measures that restrict access to the resources have not always been successful in protecting fish stocks from depletion, as fishermen find ways to go around the rules that apply.

The problem is not only how depleted fish stocks have become but also that fishery management has to take into account economic, social and biological

[12] Bosselman, Klaus, "The concept of sustainable development", p. 24.

objectives. The criteria for success in each of these three objectives are different and it can prove difficult to find a management balance that satisfies all three. The level of available marine resources ultimately affects the level of catches, which in turn has an effect on the three objectives mentioned above. Exploitation of marine resources on a sustainable level is thus generally perceived as a premise for the objectives of fishery management to be effective and for fishing activities to serve the community as a whole.

Sustainable exploitation of fisheries is directed at finding the maximum sustainable yield (MSY) of fish stocks, through both fishery science and management measures. MSY means, in theory, that an established but unfished biomass produces fewer fish than the one that is expanding to fill a niche and at the point along the curve of fishery production with the highest rate of increase, fishery harvests can be maximised.[13] Hence, sustainable yield is the yield when fishery harvest can be maximised. In practice, this means that catches should not be higher than what can safely be taken to maintain the fish population at its most efficient productivity. However, due to the nature of marine species, determining their MSY can prove to be a difficult task, especially when it comes to the management role of trying to keep fish stocks exploited at sustainable levels. Factors such as the natural variability of fish, fish reproduction and mortality, and even location, all play a large part in making management measures difficult.

It is therefore evident that for management measures aiming to reach the objective of sustainable exploitation of marine resources, sound scientific data is crucial. This type of management system is often referred to as a *knowledge based management system*, where management decisions are made on the basis of the available scientific data. Today, fishery management systems are putting more emphasis on the accuracy of data collected within the sector, and data collection is playing a bigger role in trying to ensure that fish stocks are exploited at their MSY. Despite the improvement in data collection and available data, some fish stocks around the world continue to deplete. There are two main theories that try to explain why fishery management has not improved despite the increased development in available management measures. One was put forward by

[13] De Alessi, Michael, "Measuring the biological sustainability of marine fisheries: property rights, politics, and science", p. 5.

Pinnegar and Engelhard in 2007 and explains that although fishery modelling is improving, it has become so much more data-intensive and reliant on data collection, which is complex and expensive, that its effectiveness is reduced in newer models. Another explanation was put forward by Daniel Pauly in 1995 and regards the notion of a *shifting baseline*, which describes how each generation of fishery scientists take the current state of the world as the norm, instead of taking more notice of developments in the past.[14] It is understandable that fishery management systems today rely, to a great extent, on data and the accuracy of the data collected; without such sound information the objective of sustainable fisheries could not be met. However, modern management fishery systems must take into account the criticism of the theories mentioned above; i.e. that data collection cannot diminish the effectiveness of the systems and that a comprehensive knowledge of the biological productivity of fish and performance measurements need to be understood for fishery management systems to reach their objectives.

Fisheries are a highly political matter and when politics and fishery science collide, the objective of fish stocks being exploited at the MSY often remains left behind, making short term interests such as social factors prevail, or in other words, short-term interests prevail over the long-term interests of reaching sustainable fisheries. This is mirrored by the fact that Total Allowable Catches (allowed catches permitted by governance over a certain period of time) sometimes exceed the scientific advice given. However, it can be said that politicians are facing increased public pressure to cease putting short term interests before the long term ones and to place more emphasis on sustainable utilisation of common natural resources.

Increased public awareness of common resources being exploited beyond their sustainable level has led to many non-governmental organisations taking an interest in fishery issues all over the world. These organisations try to influence political discourse with their interests and views. Within the European Union, for example, many such organisations exist which have taken interests in fisheries both at regional and national levels. However, representation mostly takes place at

[14] De Alessi, Michael, "Measuring the biological sustainability of marine fisheries: property rights, politics, and science", p. 5.

the national level by Member States' interests groups.[15] One of these non-governmental organisations is the Marine Stewardship Council (MSC), which is a fishery certification program that eco-labels seafood that has been caught and processed according to environmental and sustainable methods. The MSC works with global organisations, scientists, and conservation groups with the aim of providing the best environmental choice in seafood.[16] The criteria the MSC uses for determining that fisheries are sustainable are that: [17]

- It can be continued indefinitely at a reasonable level
- It maintains and seeks to maximise ecological health and abundance
- It maintains the diversity, structure and function of the ecosystem on which it depends as well as the quality of its habitat, minimising the adverse effects that it causes.

For sustainable fisheries to become a reality institutional structure plays a big part; however, due to the complexity of different interests of stakeholders and interests groups, the road to better institutional functioning can be difficult and lengthy. In recent years, there has been a growing demand to increase public participation in fisheries management around the world. Transparency in decision making and of fishery data is necessary for increased public participation in the sector. Such measures also increase accountability and legality within the industry; an example of this can be seen through the measures of organisations such as the Marine Stewardship Council with its eco-labelling, as was mentioned above, and the increased influence consumers can exert on promoting better utilisation of common resources.

[15] Markus, Till: *European Fishery Law. From Promotion to Management*, p. 22.
[16] Marine Stewardship Council. Certified sustainable seafood, www.msc.org. Accessed on 22.09.2011.
[17] De Alessi, Michael, "Measuring the biological sustainability of marine fisheries: property rights, politics, and science", p. 8.

3. EU's Common Fishery Policy – The Current System

The world's seas are rich in resources that have not only been used for human food supply but manifold other purposes for centuries. For oceans and seas to be able to continue providing resources that promote human welfare, their health and sustainability must be maintained. Therefore, it is essential for nations to respect the marine environment and its resources and to ensure conservation and sustainable utilisation when managing those resources.

The EU's Common Fishery Policy (CFP) has, since its inception in the 1970s, had the aim of conserving and managing the Union's marine resources at their sustainable levels. The Policy has, throughout the years, adapted various management measures to reach that objective. This chapter gives a descriptive account of the management measures that are currently in use within the CFP. It will begin by discussing the socioeconomic impact of fisheries for the EU. Socioeconomics often play a large part in decision making in the sector, both at the national and EU level, and it is therefore important to understand the impact fisheries have on livelihood in coastal communities and their economic importance to the Union as a whole.

The chapter then goes on to discuss the history and development of the CFP. The history of the CFP has, in many ways, shaped the development of the Policy, especially factors such as the principle of relative stability, thus, it is crucial to understand important turning points in the Policy. Special emphasis will be put on the 2002 reform, as the current policy is based on the changes it brought about.

When describing EU law it is important to understand the division of competence between the Union and its Member States. The division of competence between the two will therefore be addressed, and a comprehensive account will be given of the nature of the EU competence and where it stems from. The EU only holds powers when they have been conferred upon it by the Member States, and when it is exercising those powers it must do so in accordance with the principles of subsidiarity and proportionality. The principles act as a framework around the exercise of the Union's competence and thus deserve a discussion in the thesis. The CFP legal basis and the EU exclusive competence over its fishery policy will then be discussed.

The main objective of the CFP is to ensure the conservation of European marine resources. In recent years that objective has not been met and the Union is continuously trying to promote measures that counter the problem, however these measures have not been successful in conserving fish stocks. The chapter gives detailed analysis of the CFP conservation policy. In order to fully understand the dynamics behind the policy, the discussion begins by explaining the legal terminologies behind it and their definitions, which are found in the CFP's Basic Regulation No. 2371/2002. It is essential to understand the legal provisions behind the policy because they define the procedures the Community can establish to ensure the conservation of marine resources, and thus what management measures it can adopt. Following that, an explanation will be given of the management measures used by the Union to conserve its marine resources. Also an account will be given of the problem of discarding which exists within the industry and the legal provisions which promote such practices.

For conservation policy to function properly it needs to be effectively controlled and enforced. Therefore, the chapter also gives a descriptive account of the CFP's control and enforcement system. Furthermore, the leading theories regarding enforcement and control of management systems will be discussed. There are certain factors that can contribute to the effectiveness of control and enforcement systems; these are factors such as compliance with fishery law, transparency of data, and available inspection and sanction measures both at the national and Community level. An account and assessment of the existence of these factors within the CFP will also be given.

3.1 Fishing industry in the European Union

Marine resources are valuable natural assets. They contribute to societies in manifold ways, both directly and indirectly. Many of the European Union's Member States have strong fishing sectors, which places emphasis on the importance of responsible treatment of fish in the Union's waters. Without responsible treatment, the likelihood of marine resources to keep on providing value to societies, now and in the future, decreases substantially. Therefore the European Union must pursue good governance when it comes to the management

of the oceans resources. Furthermore, for those Member States, where the fishing industry has substantial impact, such measures should be a priority.

3.1.1 Socioeconomic impact

As explained above the fishing industry has substantial socioeconomic impact in many of the European Union's Member States, and therefore for the Union as a whole. The continent of Europe is surrounded by four seas: the Mediterranean, the Baltic, the North Sea and the Black Sea, and by two oceans: the Atlantic and the Arctic. The European Union has a coastline of 68,000 km, three times the size of the US coastline.[18] Its Exclusive Economic Zone (EEZ) is the world's largest, covering over 25 million km^2.[19] The European Community (EC) is therefore responsible for a vast sea area and its resources.

The sea and its resources are of great importance to the Union's coastal regions and its communities. The EU fishing industry is the third largest in the world, employing more than 400,000 people, and provides 6.9 million tonnes of fish each year.[20] The EU's merchant fleet is the world's largest, with 90% of foreign trade and 40% of internal trade carried by sea.[21] In recent decades these other activities such as industrial operations, urban settlement and tourism, have also been growing. Of the three, tourism plays an ever expanding role and is a large economic factor for some coastal regions, providing for more than 40% of jobs in some places.[22]

Furthermore, 50%[23] of the EU's population lives in the 446 EU Coastal regions, and between 3-5% of Europe's Gross Domestic Product (GDP) is estimated to be generated from marine industries and related services.[24] It is important to mention that these statistics vary greatly between the 27 Member States. For example, three countries, Spain, Greece and Italy, account for 60% of the employment rate

[18] *Maritime facts and figures*. European Commission. www.ec.europa.eu/maritimeaffairs. Accessed on 13.08.2011
[19] *Maritime affairs and fisheries*. www.europa.eu. Accessed on 13.08.2011
[20] *Maritime affairs and fisheries*. www.europa.eu. Accessed on 13.08.2011
[21] *Maritime affairs and fisheries*. www.europa.eu. Accessed on 13.08.2011
[22] Markus, Till.: *European Fisheries Law. From Promotion to Management*, p. 10.
[23] Of countries having a sea border.
[24] *Maritime facts and figures*. European Commission. www.ec.europa.eu/maritimeaffairs. Accessed on 13.08.2011

in the EU fishery sector. Spain alone accounts for a quarter.[25] This is also the case in fishery production, where Spain accounts for the highest production, approximately 16%.[26]

3.1.2 The European Fisheries Fund

As explained above many coastal communities in Europe rely heavily on fishing. In recent years changes in the fishing industry, such as innovations and rice in the price of fuel has hit many coastal communities hard, and affected people's livelihood from the industry. As a mean to support coastal communities in adapting to these changes, and achieving economic, environmental and social sustainability the EU provides funding to the fishing industry and Member States coastal communities through the European Fisheries Fund (EFF). The EFF came into force in 2007, succeeding the Financial Instrument for Fisheries Guidance, and is intended to run until 2013.

The EFF aims at contributing to the financing of all projects in the European fishery sector, whether they are initiated by businesses, representatives' bodies or public authorities.[27] There are five areas that have priority for co-financing from the EFF, these are:

- *Adjustment of fleet capacity to available marine resources*
- *Aquaculture, inland fishing, processing and marketing of fishery and aquaculture products*
- *Measures of common interests*
- *Sustainable development of fisheries areas; and*
- *Technical assistance*[28]

The Member States have the authority to decide how they allocate financial assistance between these five priority areas. To begin with they had to outline a long term *national strategic plan,* where they explained their position towards the development of their national fishery sector, during the operational years of the EFF, describing how they intended to reach the CFP objectives and how financing

[25] European Commission, Facts and figures on the Common Fishery Policy. Basic statistical data, p. 12.
[26] European Commission, Facts and figures on the Common Fishery Policy. Basic statistical data, p. 12-14.
[27] European Commission, *European Fisheries Fund. A User's guide, 2007-2013*, p. 4.
[28] Support for an industry in transition, p. 31.

priorities would be used to achieve those aims. The national strategic plan was discussed with the European Commission, to make sure that it was compatible with the CFP objectives. Following the national strategic plan, the Member States adopted an *operational programme*, which describes in detail how the opportunities from the EFF are to be used in practice during the seven years of its existence. The Member States operational programme then had to be approved and implemented by the Commission.[29]

The EFF offers principal financial support to the European fishing sector. As can be observed from the five priorities areas that receive financing from the fund, the program is intended to support a healthy development of the European fishing industry, by promoting the CFP's main objective of environmental, social and economic sustainable fisheries. The fund therefore is of great importance Union's fishing communities and regions, which have many benefited from the EU co-financing in the fisheries sector.

3.2 Historical background

A historical perspective of the CFP's origin and development is important in order to describe the political process and structural conditions that have shaped the system. Furthermore, such approach sheds a light on the system's institutional inertia, which has affected its progress in reaching sustainable fisheries. In that respect the 2002 reform, is of importance, as it in addition to being the foundation for the current CFP system, introduced changes to the policy which were intended to counter its then challenges, but did not succeed.

3.2.1 The CFP's origin

Fishery management in the EU dates back to the early 1970s, when fisheries were seen as a part of the Common Agriculture Policy. At the time, there was no distinction made between agriculture and fishery production, and the fishery policy was, like the agriculture policy, guided by the general objective to increase food production.[30] It was not until 1970 that specific objectives for fisheries were introduced, with the adoption of two Basic Regulations, one relating to markets

[29] European Commission, *European Fisheries Fund. A User's guide, 2007-2013*, p. 5.
[30] Frost, Hans, "European Union Fisheries Management", p. 474.

(Council Regulation 2142/70) and the other to structural development (Council Regulation 2141/70).[31] The two regulations did not directly address how conservation of marine resources should be conducted, but the structural regulation contained a provision for *equal access* to the Union's waters which has proven to have a great impact on the development of the CFP's conservation policy.[32] The equal access principle gave fishing vessels registered in one Member State the same or equal access to the territorial waters of any other Member State as vessels registered in the latter state.[33] At the time of the adoption of the regulations, the EU was entering into its first enlargement and was starting access negotiations with the UK, Norway, Ireland, and Denmark. The original six Member States decided that in order for other countries to become members of the Community they had to accept the so called "*acquis communautaire*"[34] making it feasible for the original Member States to have reached an *acquis* for fisheries before the negotiations began.[35] The two regulations became part of the *acquis*, which the countries applying to the EU had to accept to join.[36] The applicants had greater fishery interests than the six original Member States and were particularly unhappy with the principle of equal access.[37] The matter proved to be difficult in the negotiations and ended in an agreement of ten year derogation from the principle which allowed Member States to restrict the access to 6 nautical miles (nm), and 12 nm for regions that were heavily dependent on fisheries.[38]

In the middle of 1970s, the international arena for fisheries changed as coastal states began to claim larger Exclusive Fishing Zones (EFZ). Iceland was the first country to do so. Others soon followed and it quickly became evident that international negotiations would lead to a general establishment of 200 nm EFZ.[39] The EU Member States, in an action agreed upon by the Council in Hague in 1976

[31] *The Common Fishery Policy. Road travelled and challenges ahead*, p. 5.
[32] Hegland, T.J, Raakjær, J., "Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities", p. 137.
[32] European Commission, The Common Fishery Policy. A user's guide, p. 6.
[33] Churchill, Owen: *The EC Common Fishery Policy*, p. 5.
[34] Acquis communautaire is a body of EU legislation at any given time and any derogation from the acquis can only be temporary. The principle has been followed in all enlargements of the EU.
[35] Churchill, Owen: *The EC Common Fishery Policy*, p. 5.
[36]Hegland, T.J, Raakjær, J., "Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities", p. 136.
[37] Churchill, Owen: *The EC Common Fishery Policy*, p. 5.
[38] Churchill, Owen:*The EC Common Fishery Policy*, p. 5.
[39] Hegland, T.J, Raakjær, J., "Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities", p. 136.

(the Hague resolution), extended their EFZ's to 200 nm in the beginning of 1977. At the time, the awareness of the risk of overfishing was increasing and Member States' extension of their EFZ meant that they were responsible for an area that was large enough to make conservation of marine resources a significant issue,[40] but in order to be able to conserve stocks, catches had to be limited, which touched upon issues of allocation and access. A major debate progressed on what criteria should be used as a foundation for the allocation, and after long negotiations the Member States finally agreed on a system of allocation keys for different stocks.[41] The keys were based on three core elements: historic catches of the stocks by different Member States, The Hague preferences, and compensation for jurisdictional losses that affected some Member States when non-member states extended their EFZs. The Hague preferences took into account *vital needs* of regions particularly dependent on fishing.[42] The system of allocation keys agreed on has come to be known as the principle of *relative stability*, a principle still in force today, and is one of the fundamental elements of the CFP.[43] Even though the system of relative stability has served well in the political arena, the system has also stood in the way of necessary measures that have to be taken to provide for sustainable exploitation of marine resources and has been referred to by many authors as the "*path dependency of the system*" (further discussed in Section 7.3.3).

During the years when negotiations between Member States took place regarding allocation and access, fishery management in EU waters was regulated by a mixture of national and Union measures.[44] Member States wanted to have the authority to set and enforce rules for their resources, which created a problem when states permitted different fishing gear or measures for conservation in their territory. The European Court of Justice (ECJ) delivered a judgment in 1981 that altered the scope of the CFP. In the case, *Commission v United Kingdom and Northern Ireland*, the Court interpreted Article 102 of the Act of Accession,

[40] Hegland, T.J., Raakjær, J., "Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities", p. 137.
[41] Hegland, T.J., Raakjær, J., "Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities", p. 137.
[42] Leigh, Michael: *European Integration and the Common fishery policy*, p. 90.
[43] Hegland, T.J., Raakjær, J., "Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities", p. 137.
[44] Churchill, Owen: *The EC Common Fishery Policy*, p. 8.

which enabled the Council to adopt conservation measures by the end of 1978. The Court held that the power embedded in the Article meant that measures relating to the conservation of marine resources belonged "*fully and definitely to the Community*" making Member States therefore "*no longer entitled to exercise any power of their own in the matter of conservation measures in the waters under their jurisdiction*".[45] The judgment enabled the Union to take steps towards conservation and enforcement of resources on behalf of Member States, as well as removing hurdles for improved management.[46]

The Common Fishery Policy, in the form we know it today, was then formally created in 1983 with the adoption of several regulations.[47] There was one Basic Regulation (Regulation 170/83), which laid the foundation for the conservation policy and provided the council with the authority of adopting Total Allowable Catches (TACs) for important fish stocks and provided that TACs should be divided into quotas for each Member State based on the principle of relative stability.[48] It was envisioned that this new system would make fishery management more coherent, however it became clear in the years following that the conservation policy needed to undergo changes in order for it to be more effective.

In 1992 a reformed Basic Regulation was adopted, Council Regulation No. 3760/92, which entered into force in January 1993.[49] The new Basic Regulation did not change the fundamental elements of the CFP. The main changes were the prolonging of the derogation from the equal access principle until the year 2002, the possibility of adopting multi-annual TACs, the possibility of using days-at-sea to limit fishing effort, and the adoption of a scheme for the development of an EU licensing system.[50] In addition to the Basic Regulation, a new regulation on control measures was adopted, Council Regulation No. 2847/93. The regulation provided the Commission with greater powers to inspect national monitoring

[45] ECJ Case 804/79 *Commission of the European Communities v United Kingdom and Northern Ireland* [1981], par 1.
[46] Frost, Hans, "European Union Fisheries Management", p. 474.
[47] *The Common Fishery Policy. A user's guide*. European Commission, 2009.
[48] Churchill, Owen: *The EC Common Fishery Policy*, p. 8.
[49] Council Regulation No. 3760/92 of December 1992 establishing a Community System for fisheries and aquaculture.
[50] Hegland, T.J, Raakjær, J., "Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities", p. 146.

authorities and harmonised the level of national penalties.[51] The new framework, established in 1992, was expected to counter many of the problems the CFP was facing under the Basic Regulation from 1983, which manifested in insufficient knowledge of fishing activities, overfishing, and poor economic performance of the industry.[52] However, the 1992 reform did not improve the situation, and as the 2002 reform approached, it became evident that a wider reform was needed.

3.2.2 The 2002 reform

As mentioned before, the reform from 1992 extended the derogation from the equal access principle for the next 10 years, or until 2002. The reform was provided for in Article 14 of the regulation, which stated in paragraph 2 that the Council should decide on any necessary adjustments that needed to be made to the regulation before the 31st of December 2002.[53] In March 2001, the Commission published a Green Paper, which was a formal publication regarding the 2002 reform, and later that year, a legislative proposal for a new Basic Regulation, based on the Commission's findings in the Green Paper, was published.[54] The proposal was then agreed upon by the Council on the 20th of December 2002[55] and is currently in force today as Basic Regulation 2371/2002.

The new Basic Regulation did not change the core elements of the CFP. The TACs and quota allocation on the basis of relative stability remained the cornerstone of the conservation policy and the CFP. The equal access principle also remained in force and the exception from the principle was once again prolonged for ten years, or until the year 2012.[56] Control and enforcement of the system still remained in the hands of Member States and the monitoring role with the Commission.

[51] Agiovlassiti, O., Implementation of New Common Fishery Policy (C.F.P*)*, Ministry of Agriculture – Directorate of Fisheries, http://ressources.ciheam.org Accessed on 10.08.2011.
[52] Agiovlassiti, O., Implementation of New Common Fishery Policy (C.F.P), Ministry of Agriculture – Directorate of Fisheries, http://ressources.ciheam.org Accessed on 10.08.2011.
[53] Article 14(2) Council Regulation No. 3760/92 of December 1992 establishing a Community system for fisheries and aquaculture.
[54] Commission COM(2002) 185 final Proposal for a Council Regulation on the Conservation and sustainable exploitation of fisheries resources under the Common Fishery Policy.
[55] Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[56] Article 17(2) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

The regulation did however bring about some legislative changes to the conservation and structural policy.[57] The first new element was the move towards a more long-term approach in fishery management. The regulation imposes an obligation upon the Council to adopt multi-annual recovery or management plans for certain fish stocks that are "*outside safe biological limits*"[58] or for stocks "*at/or within biological limits*".[59] However, when stocks are at/or within biological limits, the Council, implied by the wording "*as far as necessary*", has the authority to adopt the multi-annual recovery or management plans only if it deems so necessary.[60]

The second new element was the new fleet policy aimed at limiting and reducing overcapacity. A new system of entry/exit scheme was adopted, under which Member States were given much more responsibility of fleet management.[61] Even though recovery plans were to include limitations on fishing effort, such measures were only to be used if it would be necessary to reach the objective of the plan.[62]

The third new element, and the one that most affected the governance of the CFP, was that the new regulation provided a legal basis for the establishment of Regional Advisory Councils (RACs) to improve the governance of the CFP.[63] The RACs were to help achieve the objectives set forth in Article 2 and to advise the Commission on fishery matters in certain regions or fishing zones. Representatives in the councils shall primarily be fishermen, but also included are representatives that possess interests affected by the CFP.[64] This way the CFP could benefit from the experience of stakeholders, and the diversity of the Union's fishery regions would be taken into consideration when decisions were taken.

[57] Luchman I., Grieve C., Des Clers S., De Santo E., *Towards a reform of the Common Fisheries Policy in 2012- A CFP Health Check*, p. 14.
[58] Article 5(1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[59] Article 6(1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[60] Article 6(1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[61] Luchman I., Grieve C., Des Clers S., De Santo E., *Towards a reform of the Common Fisheries Policy in 2012- A CFP Health Chec*k, p. 14.
[62] Article 5(4) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[63] Luchman I., Grieve C., Des Clers S., De Santo E., *Towards a reform of the Common Fisheries Policy in 2012- A CFP Health Check*, p. 14.
[64] Article 31(1)(2) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

Here it must be noted that no decision making powers were delegated to the RACs, their role was merely advisory.

The Basic Regulation also made some changes regarding the objectives of the CFP, which are to be found in Article 2(1) of the regulation.[65] The most important changes made were the legal commitment to apply a precautionary approach when protecting marine resources and the commitment to the principle of sustainable exploitation.[66] Both terms will be explained in greater detail later in the discussions on the Union's conservation policy.

As has previously been mentioned, a proposal for a new Basic Regulation has been introduced. The reform of 2002 did not succeed in overcoming the problems inherent in the CFP, as was intended, and as a result the new proposal introduces radical changes to the system. Even though the 2002 reform did not alter the fundamental elements of the CFP, it did introduce changes to the system that could have reduced the challenges the policy faced.

3.3 The European Union Competence

The European Union consists of 27 sovereign states. Since 1957, which marked the beginning of the Union with the establishment of the European Economic Community, often referred to as the Treaty of Rome (EEC), the European Community has been shaped primarily by continual integration. The Treaty of Rome had the principle objective to "*promote a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it*".[67] The signing of the Treaty marked a new era

[65]The Article as a whole reads "The Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions. For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimise the impact of fishing activities on marine eco-systems. It shall aim at a progressive implementation of an eco-system-based approach to fisheries management. It shall aim to contribute to efficient fishing activities within an economically viable and competitive fisheries and aquaculture industry, providing a fair standard of living for those who depend on fishing activities and taking into account the interests of consumers."

[66] Article 2(1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

[67] Treaty Establishing the European Economic Community (the EEC Treaty), [1957] 298 UNTS 3, Article 2.

with the contracting parties agreeing to mutual obligations regarding economic activities. Since its signing, the Treaty of Rome has been amended a few times with the development of further integration between the Member States. In 1986 the Single European Act was signed. The Single European Act introduced various changes to the Community structure, with the most important one being the political commitment of the completion of the internal market by 1992,[68] with the definition of the internal market being put forward in Article 8A as an "*area without internal frontiers in which the free movements of goods, persons, services and capital is ensured*"[69] The signing of the Maastricht Treaty in 1992 marked the birth of the European Union (TEU) with the most striking change being the institutional change it brought about, the establishment of the *three-pillar structure*. The first pillar is comprised of the European Union Communities with the EEC Treaty becoming the Treaty of the European Community (EC Treaty).[70] The Treaty of Amsterdam and the Treaty of Niece did not extend the powers of the Community as such but amended the previous treaties in some ways.[71] The treaty establishing the Constitution of Europe touched upon sensitive issues such as state sovereignty and the supremacy of EU law. Due to some opposition, it failed to enter into force. As a result, the European Council decided in 2007 to draft a new treaty, which was referred to as the Reform Treaty. The new Treaty included many of the characteristics of the failed Constitutional Treaty but was formulated in a different manner. The Reform Treaty was signed by the Member States in Lisbon in 2007 and entered into force in December 2009, and is referred to as The Lisbon Treaty, in recognition of its place of signing. [72] The Lisbon Treaty does not replace the current EC and EU treaties, only amends them. The Lisbon Treaty and the EC Treaty became the Treaty of the Functioning of the European Union (TFEU), the Treaty of the European Union, however, retains its name. The two treaties now serve the European Union.[73]

[68] Craig and De Búrca: *EU law: text, cases and materials*, p. 12-13.
[69] Single European Act, [1986] OJ L 169.
[70] Craig and De Búrca: *EU law: text, cases and materials*, p. 15.
[71] Craig and De Búrca*: EU law: text, cases and materials*, p. 26 – 27.
[72] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European
Community, [2007] OJ C 306, Article 2(1).
[73] Europa, Treaty of Lisbon.,: http://europa.eu/lisbon treaty/glance/index_en.htm. Accessed the 13.08.2010.

The Lisbon Treaty introduces to the European Union radical changes regarding democratic accountability and European citizen rights. It provides the Union with the legal framework to meet future challenges and to respond to citizen demands of a more democratic procedure within the Union.[74] The Treaty establishes that all legislative acts by the Union will have to undergo a co-decision procedure by the Council and the European Parliament (with a few exceptions). Also, national parliaments will receive all of the Union's legislative proposals beforehand to be able to discuss them.[75] This allows the Member States' public to effectively have a say in the Union's legislation, through the European parliament and their own, which is unique when it comes to international bodies. The Treaty also enhances citizen rights as the EU Charter of Fundamental Rights became legally binding with the adoption of the Treaty, and the Union is applying to become a party of the European Convention on Human Rights.[76] One of the aims of the new Treaty was to make decision making within the Union more effective. Among things to achieve was a new system of double majority voting to be used when reaching decisions in the Council, and to have governments' meetings in the Council decided by qualified majority rather than by unanimity.[77] This should enhance the effectiveness of decision making and ensure that decisions cannot be abandoned because of opposition by nations.

As stated before, the European Union consists of 27 sovereign states. The general understanding of the principle of state sovereignty recognises the States' exclusive competence to complete legislative, judicial, and executive powers within their own territory. The creation of the European Union involved Member States delegating certain national competences to the international body limiting their sovereignty in certain areas by agreeing on mutual obligations. The European Court of Justice confirmed that the Treaty is more than just an agreement that brings mutual obligations between contracting parties. In the 1962 case *Van Gend en Loos,* the Court found that the treaty establishing the European Economic Community *created a new legal order* where legal rights could be enforced by

[74] Europa, Treaty of Lisbon.,: http://europa.eu/lisbon treaty/glance/index_en.htm. Accessed on 13.08.2010.
[75] Mendez-Pinedo, M. E., The Treaty of Lisbon. Draft, unpublished.
[76] Mendez-Pinedo, M. E., The Treaty of Lisbon. Draft. unpublished.
[77] Mendez-Pinedo, M. E., The Treaty of Lisbon. Draft. unpublished.

both national and legal persons before national courts.[78] The judgment is considered to be one of the landmark cases of the European Court as it has had a great impact on the development of European Union's legal order. Two years later, the Court delivered another landmark ruling in the case *Costa v Enel*, where the court established the principle of the supremacy of EU law over national law. It held that in order for EU law to be effective, "*law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions".* The court further held that the Community's institutions had real powers stemming from a transfer of powers from the Member States to the Community that have limited their sovereign rights and created a body of law which binds both their nationals and themselves.[79] Together these judgments show the special nature of EU law and its special position in the international arena.

If a Member State fails to fulfil an obligation under the Treaty's Articles, 258 and 259, TFEU provides for an enforcement procedure to pursue such failures. If the Commission considers a Member State as having failed to fulfil its obligations, it shall deliver a reasoned opinion on the matter after giving the State in question an opportunity to state its observations. If the State concerned does not comply with the Commission's opinion, the Commission may take the matter before the European Court of Justice.[80] A Member State that suspects another Member State of failing to fulfil its obligation under the Treaty may also bring the matter before the European Court of Justice, but before it does so it must bring the matter before the European Commission.[81] If the ECJ has found a Member State in breach of its obligations under Community law, and the Commission considers that the Member State concerned has not complied with the ECJ judgment, the Commission can take the Member State before the Court again and the Court can decide upon an appropriate lump sum or a penalty payment to be paid by the Member State.[82] The Union therefore has the power to severely penalise those

[78] Known as the principle of direct effect. ECJ, Case C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, par 12.
[79] ECJ, Case C- 6/64, *Flaminio Costa v E.N.E.L. (Costa v. Enel)* [1964] summary par. 3.
[80] Article 258 TFEU.
[81] Article 259 TFEU.
[82] Article 260 TFEU.

States which fail to fulfil obligations, therefore making it a strong deterrent. This again shows the special powers of the Union as an international organisation.

Despite the special nature of the European Union's (EU) direct effect and supremacy over national law, the basic principle prevails that the EU may only act within the framework of the competence given to it by the Member States, in accordance with the principle of *conferral*. In practice, this means that the Union must always have legal basis within the Treaties to be able to adopt legislative acts.[83] There are three types of Union competence under the TFEU: *exclusive competence* of the EU, where the Union possesses all powers to act in a relevant field;[84] *shared competence* between the Union and the Member States, where both the Union and Member State exercise their competence to the extent that the Union has not exercised its own [85] (this is based on the principle of *occupying the field*[86]); and the third type is the *supporting competence* of the Union, in which the Union has competence to support, coordinate, or supplement the Member States.[87] Here the Union's action does not supersede the Member State competences and the binding acts of the Union must not entail harmonisation.[88]

When the Union is exercising its competence it must comply with the principles of *subsidiarity* and *proportionality*. However, only when the EU has non-exclusive competence does the principle of subsidiarity have to be respected.[89] The principle of subsidiarity is stated in Article 5(3) TEU saying that the Union may only act in so far as the objective of the proposed action cannot be sufficiently achieved by the Member States, at any national level, but can rather be better achieved at the Union level.[90] The principle of proportionality is stated in Article 5(4) TEU saying that the content and form of the Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

With the adoption of the Lisbon Treaty, the Union's requirements to comply with the principles of subsidiarity and proportionality, when exercising its competence,

[83] Craig and De Búrca: *EU law: text, cases and materials*, p. 88.
[84] Article 2(1) TFEU.
[85] Article 2(2) TFEU.
[86] Tobler and Beglinger: *Essential EU law in charts*, p. 20.
[87] Tobler and Beglinger: *Essential EU law in charts*, p. 20.
[88] Article 2(5) TFEU.
[89] Article 5(3) TEU.
[90] Article 5(3) TEU.

are strengthened. Annexed to the Treaty is a protocol on the application of the principles of proportionality and subsidiarity. The protocol in particular strengthens the role of national parliaments in ensuring compliance with the principles. According to Article 4 of the protocol, the Commission shall forward its legislative drafts to national parliaments at the same time as to other Union institutions. Additionally, national parliaments may send the president of the European Parliament, the Council, and the Commission a reasoned opinion as to why it considers the draft in question not in compliance with the principle of subsidiarity.[91] These provisions ensure national parliaments with extensive powers to review the Commission's duty to comply with the required principles, as well as promote the influence of Member States' nationals in Union legislation through their national parliaments.

When implementing the Union's policy, their institutions primarily adopt regulations, directives and decisions, recommendations and opinions.[92] Regulations, directives and decisions are legislative acts and are binding upon the Member States, but recommendations and opinions fall in the category of "soft law" and are thus not binding, but can give indication as to the Union's preferences regarding its policy.

3.4 The Common Fishery Policy's legal basis

The Common Fishery Policy has its legal basis in Articles 38 – 44 of TFEU, as the common agricultural policy does, and falls under the exclusive competence of the Union.[93] It is EU law itself that determines which field it governs and the legal effects it has in that area. Different theories have tried to determine the scope of the Union's exclusive competence, but the Commission has taken the view that a subject is within the exclusive competence of the Union if the Treaty imposes upon it a *duty* to act.[94] Positioning the CFP under the exclusive competence of the Union emphasises that the Commission considers it its duty to conserve marine resources under the CFP. As mentioned in Section 3.3, exclusive competence of the Union means that all powers to legislate and adopt legally binding acts lies

[91] Protocol on the application of the principles of subsidiarity and proportionality, Article 6.
[92] Article 288 TFEU.
[93] Article 3 TFEU.
[94] Craig, Paul and De Burca: *EU law. text, cases and materials*, p. 101.

with the Union, and the Member States may no longer act within the field, unless they have been empowered to do so by the Commission or for the implementation of the Union acts.[95]

Member States are responsible for the implementation of all legislation the Community has adopted under the CFP. These are rules regulating different areas of fishery management, such as structural policies, market organisation, and external relations.[96] Also, the Commission has delegated certain powers to the Member States to adopt conservation measures, even though the primary responsibility lies with the Community. These are provisions 20(3) and (5) that grant powers to Member States to manage their fishing opportunities in accordance with Community law.[97] Articles 8, 9, and 10 of the same regulation give Member States the power to take unilateral measures protecting the marine ecosystem under their territory.[98] However all measures that Member States adopt under these provisions must be compatible with the objectives of the CFP and no less stringent than the Community's legislation.[99]

Other regulations that empower Member States to adopt conservation measures are Regulation 850/98 on technical measures, Regulation 2187/2005 regarding the Baltic Sea, and Regulation 1967/2006 regarding the Mediterranean Sea.

After the Lisbon Treaty entered into force, all future legislation regarding the CFP would be taken in a co-decision procedure between the Council and the Parliament. Before the Lisbon Treaty, the formal powers of the parliament over EU fishery legislation were limited. There was only a consultation procedure that required that the view of Parliament had to be heard before the council decided on whether fishery legislation should be adopted and in what form it should take (this did not apply to TACs).[100] The Lisbon Treaty clarifies the division of competence between the EU and its Member States. The Treaty states that the EU has

[95] Article 2(1) TFEU.
[96] Markus, Till: *Europeans Fisheries Law. From Promotion to Management*, p. 27.
[97] Article 20(3) and (5) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[98] Article 10(a) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[99] Article 10(b) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[100] Hegland, Troels, "Fisheries Policy-Making: Production and use of knowledge", p. 229.

exclusive competence when it comes to the conservation of marine biological resources but shared competence between the Union and its Member States in relation to fisheries.[101] This is important for the management of fisheries in the future and particularly in relation to the reform the CFP is undergoing.

The adoption of the Lisbon Treaty thus enables the European public to have much more influence on fishery legislation through the European Parliament. As environmental issues are being integrated into the public policy to a greater extent, it results in even greater political influences by the European Parliament in fishery management.

3.5 The CFP's Conservation Policy

It has before been explained, that because of the special nature of marine resources, they have to be conserved, in order to keep on providing value to societies, now and in the future. This has generally been accepted, and States pursue marine policy with the main objective of conserving marine resources. This is also true for the European Union; the main objective of their Common Fishery Policy is to adequately conserve marine resources in order to for them to keep on providing valuables to European Union's Member States. This Section gives a descriptive account of the CFP's conservation policy. It explains the legal framework of the Union's conservation policy, which is to be found in Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (Basic Regulation).[102] And, outlines the main management instruments used by the Union to achieve its' conservation aims.

In Article 2, the Basic Regulation lays down the objectives of the CFP. Article 2(1) states that the "*Community shall apply measures that ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions*".[103] Sustainable economic, environmental and social conditions are then defined in Article 3(e) of the regulation. The Article explains sustainable

[101] Article 4 TFEU.
[102] Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[103] Article 2(1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

exploitation as "*exploitation of a stock in such a way that the future exploitation of the stock will not be prejudiced and that it does not have a negative impact on the marine eco-systems*".[104] This means that exploitation of fish stocks cannot be carried out in a way that seizes future takes nor may it have a negative impact on the marine ecosystem. Article 2(1) therefore limits the Council's ability to adopt measures that favour other interests over conservation objectives and threaten the long-term survival of fish stocks.[105] Paragraph 2 of Article 2(1) goes on to state that the "*Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatics*".[106] The precautionary approach is then interpreted in Article 3(i) which states that the "*precautionary approach to fisheries management means that the absence of adequate scientific information should not be used as a reason for postponing or failing to take management measures to conserve target species, associated or dependant species and non-target species and their environment*".[107]

In addition to setting an obligation for exploitation of marine resources on a sustainable basis, the second paragraph of Article 2(1) of the Basic Regulation states that the Community shall aim for a progressive implementation of an ecosystem-based approach to fisheries management.[108] An ecosystem based approach to fisheries management is, unlike the terminology explained above, not defined in the regulation, but in a Communication to the Council, the Commission states that its understanding of an ecosystem based approach to fisheries management is "*about ensuring goods and services from living aquatic resources for present and future generations within meaningful ecological boundaries*" while ensuring that the benefits from living marine resources are high and impacts of fishing operations on marine ecosystems are low and not detrimental for its

[104] Article 3(e) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[105] Markus, Till: *European Fisheries Law. From Promotion to Managements*, p. 72.
[106] Article 2(1)(2). Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[107] Article 3(i) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[108] Article 2(1)(2) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

future functioning.[109] Thus, using the Commission's understanding of an ecosystem-based approach to fishery management requires the Community to use management instruments that do not jeopardise the marine ecosystem. In the Council's conclusion on the Commission's communication regarding the role of the CFP in implementing an ecosystem approach to marine management, it states that it recognises that for a sustainable exploitation of marine resources healthy ecosystems are essential. Additionally, it calls upon the Commission to continue implementing and developing the ecosystem approach to marine management.[110] This extension of the conservation policy requires the Union to confront the need for better management and understanding of the impact of fishing on the function and health of habitats and ecosystems.[111]

Together, Articles 2(1), 3(e) and, 3(i) impose a requirement on the Community to apply management measures which *conserve* fish stocks, even without adequate scientific information. In general the articles outline the conservation policy of the CFP and render upon the Community an obligation to adopt management measures with the aim of conserving marine resources and to provide for their exploitation on a sustainable basis. Article 3(e) defines sustainable exploitation, as exploitation of marine resources in such a way that does not prejudice their future takings. It does not offer any further account of what is meant by sustainable economic, social and environmental measures. Therefore, policy makers have a wide scope to declare measures sustainable. Here it must also be noted, that the emphasis on an ecosystem approach to fishery management extends the conservation policy beyond the concept of sustainability. It is generally accepted that marine resources cannot thrive without healthy ecosystem, and therefore it can be assumed that an ecosystem approach in fisheries requires that they are conducted in a way that does not alter natural marine habitats in a way that makes it more difficult for marine resources to exist. It can thus be stated, that a healthy ecosystem is a premise for sustainable fisheries. However the Basic Regulation does not offer any definition on what is meant by an ecosystem approach,

[109] Commission Communication COM(2008) 187 final to the Council and the European Parliaments. The role of the CFP in implementing an ecosystem approach to marine management, p. 3.
[110] Council Conclusions on the Commission Communication on the role of the CFP in implementing an ecosystem approach to marine management. Council(2008), par. 12.
[111] Luchman I., Grieve C., Des Clers S., De Santo E. *Towards a reform of the Common Fisheries Policy in 2012- A CFP Health Check*, p. 21.

therefore further widening policy makers' scope to declare measures sustainable, and at the same time weakening accountability. In light of the state of fish stocks within the Union's waters and the Basic Regulation legal provisions, it can be concluded that the Community should strengthen legal obligation to ensure conservation of marine resources.

3.6 Fisheries Management Instruments

In order for the CFP to reach its objective of sustainable fisheries, effective implementation of management instruments, intended to promote conservation of marine resources is essential. Therefore the policy's ability to obtain its aim of conservation is to a large extent determined by the conservation measures it adopts. The CFP's legal framework introduces which management measures can be adopted under the Policy. In order to adequately conserve fish stocks and the marine ecosystems, the Basic Regulation contains provisions that permit both output and input conservation tools. The output measures determine how much of marine resources can be taken out of the European waters, while the input measures determine the way in which fisheries can be carried out. The output measures are the Total Allowable Catches (TACs) and quotas, and can be described as the CFP's main conservation tools, the input measures, referred to as technical measures, can be described as supplementary conservation measures to TACs. This Section gives a descriptive account of the main management instruments used under the CFP. However, the conservation policies' legal framework does have some unwanted side effects which undermines the CFP's conservation objectives, because this Section provides comprehensive account of the legal provisions that determine the management instruments, it is also of relevance to describe the unwanted side effects of the conservation policies' legal framework.

3.6.1 Total Allowable Catches

The principal fishery conservation management tools used by the EU are Total Allowable Catches (TACs) and quotas.[112] In order to get a deeper understanding of the process behind the setting of TACs and the impact that it has on the management of the CFP, it is necessary to begin by reviewing the legal basis for

[112] Churchill, R., Owen D.: *The EC Common Fishery Policy*, p. 132.

its settings and the definitions of the terms that are used in describing its functioning. The European Community defines TACs as *"quantitative limits on landings, almost always expressed in tonnes, that are set at the level of stocks or groups of stocks*".[113] Stocks or groups of stocks are then defined by the Basic Regulation as a living aquatic resource that occurs in a given management area.[114] The principal legal basis for setting TACs and quotas is to be found in the Basic Regulation. Article 4 (2) of the regulation states that measures may be taken to limit fishing activities by limiting catches.[115] Note that the regulation does not use the term "*total allowable catches*" but uses the term "*limiting catches*" instead. It then goes on to define the term "*limiting catches*" in Article 3(m) where it states that "*'catch limits' means a quantitative limit on landings of a stock or group of stocks over a given period...*"[116] The fact that catch limits are defined to be quantitative limits on *landings* rather than catches is considered to have had a significant impact on the handling of marine resources and will be discussed later in further detail.[117] In section (n) of Article 3, the regulation refers to and defines the term "fishing opportunity" by stating that fishing opportunity is expressed either in terms of catches and/or fishing effort, and means a quantified *legal entitlement* to fish[118] but not a guarantee of a certain catch of fish.[119] These terms have proven to be vital in the shaping of the TAC's system and its counter effects, as well as establishing the framework under which decisions on TACs are taken.

Total Allowable Catches are decided upon by the Member States in the Council after a proposal from the Commission.[120] In general, the process of setting TACs can be divided into four stages. The first stage involves provision for scientific advice from the International Council for the Exploration of the Sea (ICES) to the

[113] Churchill, R., Owen D.: *The EC Common Fishery Policy*, p. 133.
[114] Article 3(g) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[115] Article 4(2)(d) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[116] Article 3(m) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[117] Churchill, R.,Owen D: *The EC Common Fishery Policy*, p. 134.
[118] Article 3 (n) Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[119] Churchill, R., Owen D; *The EC Common Fishery Policy*, p. 134.
[120] The European Commission, *TACs and quotas. Fact sheet*, 2009: ec.europa.eu/fisheries/factsheets/tacsandquotas. Accessed on 15.06.2011.

Commission.[121] The second stage involves a provision of advice from the Scientific, Technical and Economic Committee for Fisheries (STECF) to the Commission. In the third stage the Commission proposes a Regulation to the Council based on the recommendation it has received from the STECF and the ICES. The fourth and final stage involves the adoption of a Regulation by the Council where TACs for the commercially most important stocks are set.[122] In the year 2008 the Commission, in its annual policy statement, defined the conservation status of European fish stock by dividing the stocks into 11 categories, based on scientific advice it had received.[123] The purpose of the adoption of such rules for TAC decisions was to give stakeholders an indication, in advance, on what principles and rules the Commission would be relying on in its proposal to the Council. Thus making fishing opportunities for each category transparent while ensuring that stocks in a similar condition are treated in a similar manner, irrespective of where they are located.[124] It must be noted that these principles or rules represent the Commission's policy for their recommendation to the Council and are not legally binding upon the latter, unless they represent what is required by any long-term plans.[125]

As noted above, the first stage in setting TACs involves a provision of scientific advice from ICES to the Commission. The Basic Regulation states that the decision-making process shall be "*based on sound scientific advice which delivers timely results.*"[126] This scientific advice is mainly delivered by the ICES but the Union is also required to involve stakeholders in all stages of the policy making.[127] The stakeholders provide the Commission with information which the Commission considers in its decision making process; however, different stakeholders have different interests, and therefore provide different information and input. This has been a subject of some discussion regarding the balance

[121] For those waters that fall under the ICES.
[122] Markus, Til: *European Fisheries Law. From Promotion to Managements*, p. 68.
[123] The European Commission, *TACs and quotas. Fact sheet*, 2009: ec.europa.eu/fisheries/factsheets/tacsandquotas.Accessed on 15.06.2011.
[124] The European Commission, *TACs and quotas. Fact sheet*: ec.europa.eu/fisheries/factsheets/tacsandquotas. Accessed on 15.06.2011.
[125] Churchill, R., Owen D.: *The EC Common Fishery Policy*, p. 147.
[126] Article 2(b) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[127] Article 2(c) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

between information from different stakeholders in the decision making process. As a result, the grounds for the decision of a management measure can vary between measures. Therefore, it is not possible to describe the decisions of a management measure that is based on scientifically based advice and other information, as a uniform or static process.[128] The ICES provides the EU with information on fish stocks in the North Atlantic, where the EU's most important fisheries are located, as well as providing the Commission with advice on more long term proposals on how EU's fisheries can be managed on a sustainable basis.[129] The Council receives data from various sources, such as fishers, dedicated research cruises, and fisheries authorities in the ICES Member States, and works by comparing and cross-referencing that information. [130] The work of the ICES is carried out in more than a hundred working/study groups. These working groups then report their findings to one of three committees that work inside the ICES and are responsible for delivering advice to clients. The EU receives its advice from the Advisory Committee on Fisheries management (ACFM), which advises on the state of living marine resources. To begin with, the advice from the ICES is received by the Directorate-General for Maritime Affairs and Fisheries (DG Fisheries), and due to the fact that the DG Fisheries has limited scientific capacity, it relies on scientific knowledge from outside organisations.[131] However, the Scientific, Technical and Economic Committee for Fisheries (STECF) is of greater importance relating to the settings of TACs.

The second stage in setting TACs involves provision of scientific advice from the Scientific, Technical and Economic Committee for Fisheries (STECF) to the Commission. The STECF is provided for in the Basic Regulation which states, in paragraph 2 of Article 33, that the Committee shall be "*consulted at regular intervals on matters pertaining to the conservation and management of living aquatic resources, including biological, economic, environmental, social and technical considerations*".[132] The STECF does little original scientific work and the advice it produces for the DG Fisheries is largely based on findings and

[128] Hegland, Troels, "*Fisheries Policy-Making: Production and use of knowledge*", p. 220.
[129] European Commission, *The Common Fisheries Policy. A user's guide*, p. 13.
[130] European Commission, *The Common Fisheries Policy. A user's guide*, p. 13.
[131] Hegland, Troels. "Fisheries Policy-Making: Production and use of knowledge", p. 220.
[132] Article 33(1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

reviews of the work of others, the main source of advice being from the ICES, and thus as a consequence, the difference between the advice from the two organisations is not substantial. The STECF does however broaden the scope of its advice and includes an evaluation for selected fleets of the potential short and long-term economic impact. The economic advice the STECF gives to the DG Fisheries is the only economic advice the DG Fisheries receives and is viewed by the Commission to be an important aspect of STECF's advice.[133] In addition to primarily basing its advice on the findings of the ICES, the STECF receives advice from other scientific advisory organisations, in particular international regional organisations. According to the Basic Regulation, the Commission is required to take into account the advice from the STECF, but is not obliged to follow it. The Commission does also seek advice from other sources, in particular the Regional Advisory Councils (RACs) and the Advisory Committee on Fisheries and Agriculture (ACFA).

The RACs are stakeholder led councils that have an advisory role towards the Commission and DG Fisheries. The Basic Regulation provides the legal framework for the RACs and in Article 31(4) and (5) it addresses the relationship between the RACs and the Commission. According to paragraph 4 of the Article, the RACs may be consulted by the Commission, but the regulation mentions nothing about the impact that the RAC's advice is supposed to have on the settings of TACs. In its review of Functioning of the RACs from 2008, the Commission states that the criteria it uses when evaluating the RAC's advice is "*whether that advice is compatible with Common Fishery Policy objectives and sustainable fisheries*". The review provides no information on how often the Commission has followed the RAC's advice but states that it has, on several occasions, taken it into consideration.[134] As mentioned, the DG Fisheries also consult the Advisory Committee on Fisheries and Agriculture (ACFA) in order to take stakeholder's views into account regarding the settings of TACs. Like the RACs, the ACFA may be consulted by the Commission, but the Commission is not under an obligation to do so. In the year 2008 the Commission published an

[133] Article 2. Commission Decision of 26 August 2005 establishing a Scientific, Technical and Economic Committee for Fisheries.
[134] Commission Communication COM(2008) 364 final to the Council and the European Parliament. Review of the Functioning of the Regional Advisory Councils, p. 9.

evaluation of the ACFA. Even though the evaluation is very detailed and gives a comprehensive account of the functioning of the ACFA, it provides no information on the impact the ACFA opinions have on the Commission's decisions.[135]

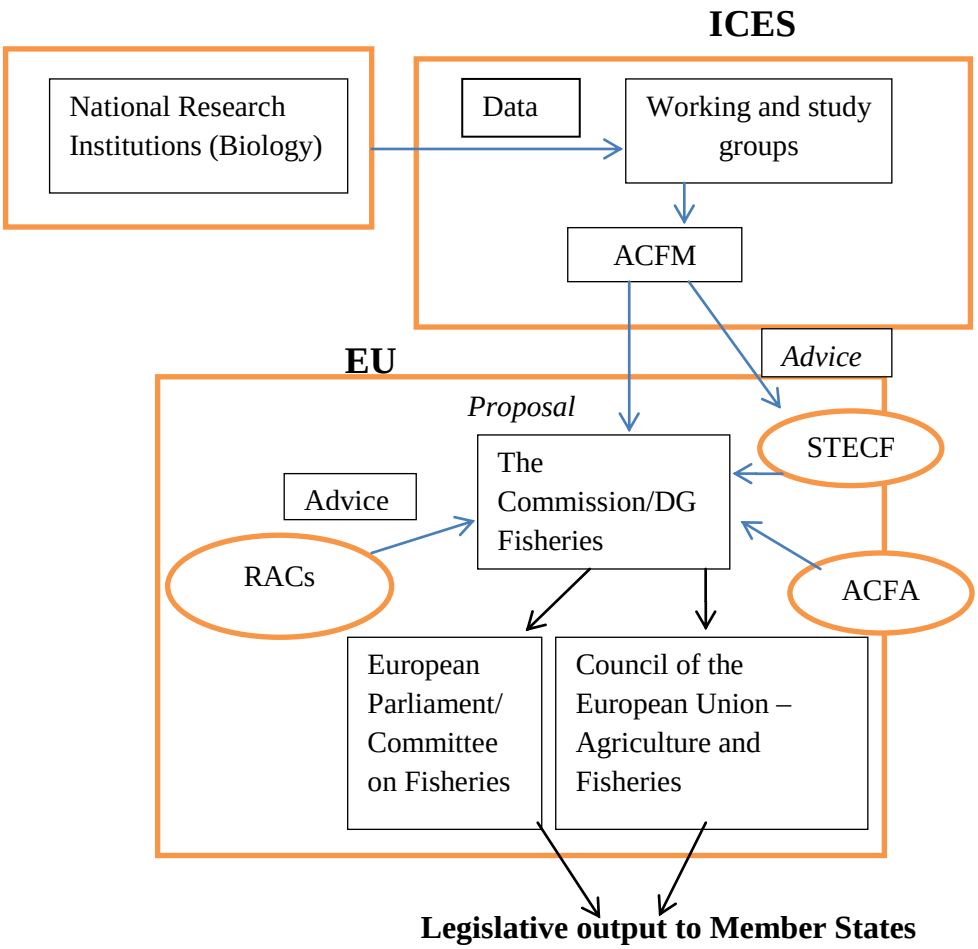

Figure 3.1 The process of generating TACs.

The third stage in setting TACs involves a proposal from the Commission to the Council on a regulation on fishing opportunities, which is based on the recommendations it received from the ICES and the STEFC. It is the Directorate-General for Maritime Affairs and Fisheries that draft the proposals for the settings of TACs for the following year.[136] The proposal is passed upwards from the DG Fisheries through a number of stages ending in the College of Commissioners, which determines the viability of the proposal. The move from the DG Fisheries

[135] COWI. DG Maritime Affairs and Fisheries, Intermediate Evaluation of the Advisory Committee for Fisheries and Agriculture (ACFA), p. 40 – 43.
[136] European Commisson, *The Common Fishery Policy. A User's guide*. p. 14.

to the College of Commissioners is a movement away from pure scientific considerations towards a process where politics and other objectives are increasingly taken into consideration and may, as a consequence, result in higher settings of TACs than scientifically recommended.[137]

The fourth and final stage in setting TACs involves the adoption of a regulation by the Council. The regulation proposal from the Commission is, to begin with, taken into examination by the External Fisheries Working Party on External Fisheries Policy and the Internal Fisheries Working Party on Internal Fisheries Policy, which are working parties of civil servants representing the Member States. The working groups may be opposed to the Commission's proposal which may lead to an amendment by the Commission. After the working parties have examined the proposal, it is passed up the hierarchy to the Permanent Representatives Committee. The Representative Committee consists of higher ranking civil servants and has the authority to question and revise the proposal. After that, the proposal is finally agreed upon by the Fisheries Ministers.[138] The Council decisions on TACs are taken by Qualified Majority Voting (QMV). QMV means that votes in the Council are weight in accordance to the size of the population of each Member State. However, it is adjusted so that small populated countries are relatively over represented in voting.[139] QMV is 258 votes out of 345 or 74,8%. Three larger states and one smaller state can act together and block a decision, often referred to as the blocking majority. However in practice QMV is voting by consensus, which means that in reality Member States are very seldom in a position to determine whether an act on fisheries gets accepted or not. Member States usually form coalitions based on their interests in the field and political positioning. Figure 3.1, shows the process of generating TACs, the blue lines indicate advice, but the black ones a proposal.

It is evident that the decision making process of setting TACs is a complex process that involves many different sources. These sources have different views and as a result have different impact on the Commission's proposal. It is therefore important to stress what was noted at the beginning of the Section, that it is not

[137] Hegland, Troels, "Fisheries Policy-Making: Production and use of knowledge" p. 231.
[138] Hegland, Troels, "Fisheries Policy-Making: Production and use of knowledge" p. 231.
[139] CFP Reform wach. http://www.cfp-reformwatch.eu/2010/05/the-role-of-the-council/ Accessed on 15.12.2011.

possible to describe the process as uniform or static and the grounds on which decisions are made can vary between times.

3.6.2 Member States Quota

Following the Council's decisions on TACs, Member States are allocated fishing quotas, which establish the amount of fish each Member State can fish. The quotas are, like TACs, important management measure to keep a bay overfishing. The TACs are divided into quotas for each Member State according to the principle of relative stability. In practice, this means that Member States are allocated the same fixed percentage of the different TACs every year.[140] It is then up to the Member States to decide on how they allocate quota between their vessels, but they must do so in accordance with the Community's law. The principle of relative stability has been a subject of some litigation before the European Court. The litigation has made some points clear about the nature of the principle, one of which was established in *The Queen v ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd.* from the year 1989, and is of relevance for the division of fishing opportunities into quotas between Member States. In the case, the European Court held that the principle of relative stability was a derogation from the general principle of Member States' equal access to fishery resources in Community waters. Furthermore it held that the creation of national quotas was designed to restructure and adapt the Member States fishing fleets to the available fishery resources.[141] Thus the judgment affirmed that the Community measures of hindering equal access to fishery resources, by dividing fishing opportunities between Member States, based on the principal of relative stability, was only a derogation from the general principle of equal access and justifiable because of the need to align fishing opportunities to fishing capacity.[142]

As mentioned, under Article 20(3) of the Basic Regulation Member States are free to decide for themselves on the method they use to allocate the fishing opportunities between their vessels. This freedom of allocating fishing

[140] Article 20 Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[141] ECJ, Case, C-216/87 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Jaderow Ltd* [1989] ECR 4509, par. 24.
[142] Other judgments regarding the principle of *relative stability* and have established further the essence of the principle are*:* ECJ, Joined Cases C-63/90 and C-67/90 *Portugal and Spain v Council* [1992] ECR I-5191, and ; ECJ, Joined Cases C-87/03 and C-100/03 *Spain v Council* [2006] ECR I-2915.

opportunities has been recognised as being very broad, as no specific system has been laid down or recommended for the management of the allocation. Article 20(5) further specifies that the Member States have the authority to *exchange* all or part of their fishing opportunities, but must notify the Commission of such dealings. The articles provide Member States with the possibility of exchanging fishing opportunities or quotas, thus implying that they do not have the authority to sell or buy quota from each other.

The possibility for Member States to exchange quota has been seen as an opportunity for them to utilise their resources in accordance to the economic principle of comparative advantage, thus adding to economic interests of Member States whose fishing industry is not sufficiently met with the initial quota allocation. Quota exchange can be conducted on a temporary basis but may also take place between countries on a regular basis, resembling a long-term structural instrument.[143] Even though the Article states that the commission should be notified on the exchanging of fishing opportunities between Member States, there seems to be no public data or records available from the Commission providing information to which degree Member States pursue such activities. However, in a research carried out in 2009 it was estimated that quota exchange between EU states between years 2000 – 2006 was 4% of the total turnover.[144]

The legal basis for the administration of Member States' quota is provided for in Regulation No. 847/96 introducing additional conditions for year-to-year management of TACs and quotas.[145] This ensures flexibility for Member States in the management of their quota if they have over- or underutilised it on a year to year basis.

Another method of flexibility regarding Member States' quota is the so called *quota hopping*. Quota hopping is a term used to describe the practice of EU's ship owners who, having the nationality of one Member State, purchase vessels in another Member State and use the national quota of that Member State. Or, when

[143] J.Andersen, Nielsen, L., Lindebo, E., "Economic gains of liberalising access to fishing quotas within the
European Union", p. 3-5.
[144] J.Andersen, Nielsen, L.,Lindebo, E., "Economic gains of liberalising access to fishing quotas within the
European Union", p. 9.
[145]The Regulation has remained unchanged since the year 1996.

an owner of a fishing vessel, having the nationality of one Member State, takes the advantages of rules applying in another Member State (regarding granting nationality to vessels) and re-registers his vessel in that Member State, receiving the nationality of the latter state for his vessel. Under Community law the competence on deciding which conditions to lie down regarding nationality of fisheries and fishing vessels remains with the Member States. [146] Therefore, different rules can apply between Member States regarding the establishment of the nationality of vessels. If some Member States have rules on nationality that are less stringent than other Member States, or if they have more economic advantage, fishermen or fishing companies have an incentive to register their vessel in that state and fly their flag , i.e. for quota hopping. Despite the fact that Member States have the competence of setting their own rules on registration of a fishing vessel, they still have to follow Community principles on the free market, in particular the principle of the *freedom of establishment* and the principle on the free *movement of capital.* During the 1980s and 90s, the practice of quota hopping became subject to litigation before the ECJ, with a landmark decision on the subject delivered in 1991, commonly referred to as the *Factorame II* case. The case regarded the compatibility of the UK's 1988 Merchant Fishing Act with EU law. In 1988 the UK decided to take preventive measures against quota hopping making amendments to the Act that prevented fishing vessels owned by a company to obtain British nationality unless the company, had its principal place of business in the UK and 75% of its directors and shares were owned by British citizens that lived in the UK. Furthermore the vessel had to be managed and operated from the UK and the vessel's characters (deck hands) had to be British citizens with their place of residence in the country.[147] In its ruling, the court found that conditions which require "*that where a vessel is owned or chartered by natural persons they must be of a particular nationality and where it is owned or chartered by a company the shareholders and directors must be of that nationality is contrary to Article 52 of the Treaty*" (Now Article 43 EC).[148] Thus the provisions of the Merchants Fishing Act which stated that fishing vessels had to

[146] See Case C-221/89 *R v Secretary of State for Transport ex p Factorame* [1991] ECR I – 3905, par. 13.
[147] Churchill, R., Owen D.: *The EC Common Fishery Policy*, p. 205.
[148] Case C-221/89 *R v Secretary of State for Transport ex p Factorame* [1991] ECR I – 3905, par. 30.

be owned by British nationals and that its shareholders and directors also had to be British citizens, was in breach of Article 43 EC (ex Article 52 EC), which prohibits discrimination on the grounds of nationality regarding the right of establishment. The court also found that the provisions were contrary to Article 249 EC (ex Article 221 EC), which states that Member States must provide nationals of other Member States the same treatment as their own nationals regarding participation in the capital of companies or firms.[149] In other words, the provision was contrary to the Community's principle of free movement of capital.

Hence, according to the judgment, Member States can determine the conditions that have to be fulfilled for a vessel to be able to fly their flag as long as those conditions are not contrary to the fundamental principles of Community law. Member States can thus limit quota hopping or the opening of their national waters to other Member States by introducing provisions that do not discriminate against establishment on the grounds of nationality nor prevent citizens from other Member States from owning equity in companies and firms. This was affirmed in the *Factorame II*, in which the Court found that the provisions in the UK's Merchant Fishing Act that required a vessel to be managed and its operations directed and controlled from the UK to receive UK nationality, were not contrary to Community law, because Article 43 EC (ex Article 52 EC) required a fixed establishment.[150]

The *Factorame II* judgment established the supremacy of EU law over national law when Member States are exercising their competence under the Union's legislation. The fact that Member States are allocated quota and can define rules for the utilisation of their national quota, does not alter that those rules must be compatible with Community law.

Overall, the distribution of quotas to Member States is an important conservation instrument to manage fisheries within the Union's waters. In order to attempt to prevent overfishing of marine resources, the distribution of TACs into quotas is generally accepted. As explained in the Section the Member States themselves

[149] Case C-221/89 *R v Secretary of State for Transport ex p Factorame* [1991] ECR I – 3905, par. 31.
[150] Case C-221/89 *R v Secretary of State for Transport ex p Factorame* [1991] ECR I – 3905, par. 34 -36.

decide upon measures as how to distribute fishing opportunities among their vessels. This provides Member States with some scope as to how to manage their fisheries, and on what foundation they want to distribute fishing rights. However as was confirmed in the *Factorame II* judgement, those allocation rules may not go against the fundamental principles of the EU.

3.6.3 Technical measures

Functioning alongside TACs as an important conservation measure are various technical measures, which are mainly directed at preventing by-catching of juvenile fish or species that are not targeted by fishers. The Basic Regulation provides the legal framework for the adoption of technical measures for conservation purposes.

Article 4 of the Basic Regulation states that in order to be able meet the objectives of the CFP technical measures may be adopted, which may include measures such as the structure of fishing gear, restriction or prohibition of fishing in certain zones and during certain periods, restriction in size of individuals that may be retained on board and/or landed, and specific measures that may be used to reduce the impact of fishing activities on marine ecosystems and non-target species.[151] The EU's practice suggests that the list of technical measures mentioned in paragraph 4 is not exhaustive, which is understandable considering that the measures are also supposed to be used for the protection of the environment.[152] The measures are provided for in various regulations, three of which cover technical measures for the Baltic Sea, the Mediterranean, and the North East Atlantic (including the North Sea).[153] The technical measures differ between the areas in accordance to their local conditions and sea basin.

3.6.4 Discarding

Discarding can be described as an unwanted side effect of the TAC system. Discarding is commonly recognised as a problem within the CFP. In the Commission's Green Paper from 2009, the Commission recognises that TACs and the quota system has been inadequate in the sense that it creates unwanted by-

[151] Article 4(2)(g) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[152] Churchill, R., Owen, D.:*The EC Common Fishery Policy*, p. 182.
[153] European Commission, The Common Fishery Policy. A User's guide, p. 17.

catches "*when the quota of one species is exhausted while the quota for other species remain, which leaves fishermen with no choice but to discard the fish they are no longer allowed to land*".[154] Discarding prevents the objectives of the Conservation policy to be met as it prevents stocks from recovering and wastes precious resources. It is hard to determine to what exact extent discarding is practiced in the Union's water, as it both varies between regions and fisheries. In research carried out in 2005, published by the Food and Agriculture Organization, it was estimated that discarding in the North Atlantic was 13% of the catches, in the North Sea it ranged from 31 – 90% of catches, depending on the fleets, target species, and depth, in the Mediterranean and Black Sea it was 4.9% of the catches and in the Baltic it was lowest, 1.4% of catches.[155]

In the above discussion of TACs it was noted that the Basic Regulation does not use the wording "total allowable catch" in its legal framework for TACs but uses the term "catch limit", which in turn is defined as "quantitative limit on *landing*…[author's emphasis]"[156] The term limits on landings restricts the amount of fish that can be landed, thus making it feasible for fishers to throw overboard unwanted catch, as caught fish exceeding quota cannot be legally landed under the Union's law. It must be noted that discarding not only takes place because of regulatory reasons; economic reasons also play a role in the practice, as some species have higher market value in the area in which they are landed than in others, a practice which is referred to as *highgrading*. Unwanted catches in turn occur, among other reasons, mainly because of the use of unselective fishing techniques and the failure to reduce fishing effort.[157]

3.6.5 Effort limitation

There only exist a certain amount of marine resources. Therefore, it is important that the numbers of vessels trying to catch fish are aliened to the available amount of fish that is allowed to fish. Fleet capacity is thus an important factor in the conservation policy as it tries to ensuring fishing on a sustainable level. If fishing

[154] Commission COM(2009)163 final Green Paper: Reform of the Common Fisheries Policy, 22 April 2009.
[155] European Commission, The Common Fishery Policy. A User's guide, p. 17.
[156] Article 4(2)(d) and Article 3(m) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[157] Johnsen, Jahn, Eliasen, "Solving complex fisheries management problems: What the EU can learn from the Nordic experiences of reduction of discards*",* p. 131.

capacity is not aligned to the allowable catches of fish the problem of overcapacity can occur, which in turn undermines adequate conservation of marine resources.

The United Nations Food and Agriculture Organization (UN FAO) defines fishing capacity as "*the amount of fish (or fishing effort) that can be produced within a period of time (e.g. a year or a fishing season) by a vessel or a fleet if fully utilised and for a given resource condition.*"[158] Overcapacity, therefore, means that there is more than the minimum fleet or effort to produce the acceptable outcome (e.g. to catch available resources) or that a fisher produces, with its vessel's capacity at any given time, more than the desired level of harvesting.[159] The Basic Regulation imposes in Article 11 (1) a legal requirement upon the Member States to "*adjust their fishing capacity in order to achieve a stable and enduring balance between such fishing capacity and their fishing opportunities.*"[160] Like with TACs and quotas, Article 4 of the Basic Regulation states that in order to for the Council to meet the objectives of the CFP it may adopt measures such as "*limiting fishing effort*".[161] Article 20 (1) then states that the Council shall decide "on catch and/or *fishing effort limits* and on the allocation of fishing opportunities".[162] The Basic Regulation defines fishing effort as "the product of the *capacity and the activity* of a fishing vessel…[author's emphasis]"[163] Thus fishing effort is not only the capacity of the fishing vessel but also the activity of it, with capacity measured in kilowatts of engine power and activity measured in time (days). The Union regards effort limitations or

[158] Instititute for European Environmental Policy, *Overcapacity – what overcapacity? An evaluation of Member States reporting on efforts to achieve a sustainable balance between capacity and fishing opportunities in 2007*, p. 6.
[159] Institute for European Environmental Policy, *Overcapacity – what overcapacity? An evaluation of Member States reporting on efforts to achieve a sustainable balance between capacity and fishing opportunities in 2007*, p. 6.
[160] Article 11 (1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy. Regarding the definition of fishing opportunities, see the discussion on TACs.
[161] Article 4(2)(f) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[162] Article 20(1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[163] Article 3(h) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

reductions as an appropriate management instrument to overcome the problem of overcapacity and a useful addition to TACs and technical measures.[164]

Above it was pointed out that the Member States are under a legal obligation to adjust their fishing capacity to bring it into line with their fishing opportunity. In a report from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, published in July 2011, it was stated that despite the legal responsibility the Member States are under to adjust their fishing capacity to their fishing opportunities, they have not been sufficient in cutting down their fleet capacity, the result being that there is still a significant overcapacity, which in turn is a serious threat to marine resources.[165] Following Article 11(1) is Article 11(2), which is not as general in nature as paragraph 1. Article 11(2) more precisely states that Member States are to ensure that the reference levels, expressed in gross tonnage (GT) and kilowatts (kW) and for fishing capacity, are not exceeded. With the reference levels being the Member States' fishing fleet as a whole.

The primary instrument to meet the capacity adjustments and the required reference levels is the entry/exit regime. The regime is to be found in Article 13 of the Basic Regulation and requires that Member States' new capacity is balanced by withdrawing the same capacity from the fleet, both in term of tonnage and power. This goes for new capacity without public aid. A new capacity, with public aid, is only permitted if at least the same amount of capacity or at least 1.35 times that amount of capacity has previously been withdrawn.[166] An exception to this is to be found in Article 11(5) and (6).

The capacity policy has mainly been criticised for two factors. The first one being that the system does not consider vessels' technical progress/advantages in the management measures. It does not lay down any specific objectives for fleet reduction but only establishes a specific ceiling. This means that when a vessel

[164] Markus, Till: *European Fisheries Law. From Promotion to Management*, p. 79.
[165] Report from the Commission COM(2011) 418 final to the European parliament, the council, the European Economic and Social Committee and the Committee of the Regions, On Reporting Obligations under Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, p. 2-3.
[166] Article 13 (1) (a)(b) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy

experiences a technical progress or development, often resulting in more capacity, it does not get measured into the fleet as a whole, and as a consequence overcapacity occurs.[167] The second criticism regards the relationship between fishing capacity and fishing opportunities, which is hard to determine because fishing opportunities are not decided on the basis of fishing capacity. Therefore a lack of harmonisation can exist between the two elements.

3.7 Control and Enforcement Policy

It is generally recognised that in order for law to be effective it must be enforceable. Without proper enforcement rights and duties derived from law can hardly be of much use. This is also true for the European Union's Fishery Law; in order to ensure its effectiveness, a proper control and enforcement system is essential. Successful conservation of the Union's marine resources requires an effective control and enforcement system. To achieve this, CFP contains a control and enforcement system with rules designed to ensure compliance with EU Fishery Law. The CFP's control and enforcement system is made up of three pillars: The Control Regulation, the IUU Regulation to combat illegal, unreported and unregulated fishing, and the Regulation on Fisheries Authorisation (which deals with control of EU vessels fishing outside EU waters and vessels of third countries fishing in EU waters). As can be gathered from the three pillars mentioned above, the CFP's Control and Enforcement System, is large in scope. Therefore, this summary only covers the main elements of the system, and places emphasis on factors which are likely to have a significant impact on its effectiveness.

Every Community fishing vessel is required to have a valid fishing license.[168] In addition to that, a primary requirement for a Community fishing vessel to be able to take part in fishing activity in Community waters is that it must have a special

[167] Report from the Commission COM(2011) 418 final to the European parliament, the council, the European Economic and Social Committee and the Committee of the Regions, On Reporting Obligations under Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, p. 2-3.

[168] Article 22 Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

authorisation to fish, referred to as "*fishing permit*"[169] All fishing vessels flying the flag of a Member State must be registered in The Community Fisher Fleet Register known as the "*fleet register*".[170]

The current Basic Regulation is the first Basic Regulation on the CFP to contain provisions on its control and enforcement system.[171] When the policy underwent the 2002 reform it was considered necessary to include the main provisions on the matter in the regulation, in order to reinforce the policy's control and enforcement system and clarify the division of responsibility between the Member States and the Commission.[172] These main provisions adopted into the Basic Regulation already existed in the Control Regulation; Council Regulation (EC) No. 2847/93 of 12th of October 1993 establishing a control system applicable to the Common Fishery Policy, which was in force at the time and as a consequence the two regulations contained some of the same provisions. Prior to the 2002 reform, the CFP control system was considered to be inadequate, mainly because of lack of harmonisation in the way the Member States were enforcing the policy, with factors such as administrative measures, legislation and judicial proceeding on enforcement, differing between them. There were also some shortcomings at the EU level. No list of sanctions existed if serious infringement of Fishery Law occurred and the Commission did not possess powers to examine the Member States' inspection. Following the 2002 reform of the CFP, a number of changes were made to the control and enforcement system in order to counter these problems. Firstly, the competence between Member States and the EU was clarified, making it clearer where the responsibility of enforcement measures lay. Member States were made responsible for the implementation of the CFP rules in their territory and waters and for vessels flying their flag outside of their waters. They were also made responsible for placing observers on board of their fishing vessels and for making appropriate decisions regarding fishing activities of their

[169] Commission Regulation (EC) No. 1281/2005 of 3 August on the management of fishing licences and the minimal information to be contained therein.
[170] The Community Fleet Register can be accessed online at ec.europa.eu/fisheries.
[171] Chapter five. Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[172] Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

vessels.[173] While the Commission is only responsible for adopting measures under the Policy and ensuring that Member States meet their obligations.[174] To do that, the reform rendered more powers to the Commission to control the Member States' fishing activities, which will be discussed further below. Another change made was the Member States' obligation to follow sanctions listed by the Council if serious infringements of the Fishery Law occurred.[175] This was done to ensure harmonisation by the Member States when enforcing the Policy so that different enforcement measures would not be used for the same infringements. These improvements have, however, not been successful in turning around the long-running problem of depleting fishing stocks.

The reform also stressed that in order to achieve compliance with the EU Fishery Law, it was necessary to intensify cooperation and coordination between all relevant authorities.[176] This resulted in a Communication from the Commission on the implementation of uniform and effective implementation of the CFP in 2003, in which the Commission, among other things, proposed an establishment of a Joint Inspection Structure to coordinate Member States' enforcement which would take the form of a Community Fisheries Control Agency (CFCA).[177] The CFCA was then formally established in 2005 in Vigo, Spain and its main task is to co-ordinate Member State enforcement activities through the pooling and deployment of national resources.[178] In this way it was envisioned that the rules of the Common Fishery Policy would be more effective and harmonisation in Member States' enforcement means reached. The Agency has no control powers relating to fisheries and does not alter the Member States' or the Commission's competence in controlling the fisheries. Its main functions are, as stated above, to assist the Member States and the Commission in fulfilling their obligations.

[173] Article 23(2) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[174] Article 26(1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[175] Article 25 Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[176] Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[177] Commission Communication COM(2003) 130 final to the Council and the European Parliament, Towards uniform and effective implementation of the Common Fishery Policy.
[178] Commission Communication COM (2003) 130 final to the Council and the European Parliament, Towards uniform and effective implementation of the Common Fishery Policy.

It was mentioned above that at the time of the 2002 reform, Council Regulation (EC) No. 2847/93 was in force. That regulation has now been replaced with a new Control Regulation, Council Regulation (EC) No. 1224/2009, which entered into force in January 2010. The new regulation integrated a number of legal texts on control issues and brought about some changes in the control and enforcement system. These changes were considered necessary as it had become evident that the older regulation had not been efficient enough to ensure compliance with the CFP rules.[179] The regulation applies to all activities covered by the CFP carried out in the territory of Member States, Community waters and by the Community vessels operating outside of Community waters.[180]

3.7.1 Data collection and transparency

Adequate data is essential for reaching the objective of sustainable fisheries. Without data the state of marine resources could not be determined, and therefore no knowledge if fisheries are being carried out in a sustainable manner. Furthermore, transparency of fishery data can improve accountability within the fishery sector and therefore serve as a foundation for the objective of sustainable fisheries becoming a reality.

With technological advances, control measures and monitoring in fisheries have become more effective, cost-efficient and rapid. In a special report published by the Commission and the Court of Auditors in 2007 on the control, inspection and sanction system of the CFP, the Court of Auditors concluded that catch data was neither complete nor reliable, and as a consequence the real level of catch was not accurate.[181] In a system which has TACs and quota as the main conservation tools, the accuracy of data is vital. As has been explained, inaccurate information on catches right decisions regarding conservation of marine resources cannot be taken because the foundation for decision making is unsound, which in turn can jeopardise the sustainable utilisation of marine resources. The use of modern technology on board of vessels is supposed to help make data collection more precise and accurate as the monitoring of catches becomes more transparent and

[179] Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.
[180] Article 2(1) Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.
[181] Court of Auditors. *Special Report 7/2007*, par. 2.

effective. In line with that, the Community's vessels are obliged to use modern technology to ensure that fishing fleets are properly monitored and controlled.

There are two technological methods that are compulsory for the Community's vessels. These are the Vessel Monitoring System (VMS) and the Electronic Recording and Reporting System (ERS).[182] The Vessel Monitoring System is a satellite based monitoring system which allows automatic identification and detection of Community vessels by a remote monitoring system by transmitting position data at regular intervals to control authorities.[183] The obligation for vessels to carry VMS has gradually expanded for different groups of vessels and today all vessels above 15m are obliged to use it and as from the 1st of January 2012 it becomes compulsory for all vessels exceeding 12m.[184]

The Electronic Recording and Reporting System is used to record fishing activities data. It is often referred to as *electronic logbooks* or *e-books*, as it has replaced paper logbooks and sales notes.[185] The system is compulsory for vessels above 15m and from 1st of January 2012 for vessels above 12m. The logbook is a list of the fishing vessel operations, that the master of every vessel must keep, and contains detailed data on catch, landing and sales.[186] Other technological systems such as the Vessel Detection System and the Automatic Identification System are currently not compulsory for the Community's vessels, but their use is encouraged by the EU; however, the Automatic Identification System will gradually become obligatory and by 2014 all vessels above 15m shall be equipped with it.[187]

The most important data from the fishing industry on catch are *landing declarations*, *logbooks* and *sales notes*. In the Court of Auditors' special report, the Court concluded that due to unreliable data, the system of collecting, validating and monitoring data should be improved. The Court identified

[182] European Commission. *Control technologies*: www.ec.europa.eu/fisheries/cfp/control/technologies/index_en.htm. Accessed on 02.09.2011
[183] Article 9(2) Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.
[184] Article 9(2) Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.
[185] For vessels exceeding 12 meters in length.
[186] Article 14 Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy. The Articles list in detail all the information that are to be kept in logbooks.
[187] European Commission. *Control technologies:* www.ec.europa.eu/fisheries/cfp/control/technologies/index_en.htm. Accessed on 02.09.2011

shortcomings of the control and monitoring system, which were linked to rules regarding the logbooks, landing declarations and sales notes. One of the Court findings was that logbooks did not have to be forwarded until 48 hours after a vessel's landing, which gave fishermen the opportunity to alter the quality of figures declared in it, thus the data found in the logbooks was incorrect and gave a false picture of the vessel's fishing activity. Another identified problem was that weighing the quantities of landings was not a general obligation; therefore, quantities entered into the landing declarations were sometimes estimated. If landings were estimated, the tolerance margin was set at the level of 20%, which was considered to be high. For example, if landing quantity was under-declared in the logbook and on inspection that landing turned out to be 20% over the amount declared in the logbook, no penalty was imposed. In addition to this, if no inspection was carried out, the landing declaration could be made 20% under the declared catch in the logbook. These compound to an overall under-declaration of up to 36%. Therefore the landing declarations could be far from giving accurate information on landings which in turn lead to unreliable data on the state of marine resources. The last problem the court identified regarded the quality of information in sales notes. Because some operators both controlled the fishing activity and the processing or distribution of the fish, their interests collided and thus affected the quality of information in the sales notes.[188] On the basis of this critique from the Court of Auditors, the Commission adopted new provisions in the Control Regulation from 2008 that were intended to counter these problems and therefore improve the available data, making it more reliable. Here technical measures were, to some extent, supposed to help. The adoption of obligatory use of electronic logbooks was supposed to combat the problem of inaccuracy, and remove fishermen's ability to alter any figures, as now the masters of the fishing vessels are supposed to send the logbooks' data electronically, at least once a day, to the competent authority. To improve the quality of sales notes, technical measures were also introduced. Registered buyers, auctioneers or other authorised bodies of first sales fish, that annually sell fishery products for € 200,000 or more, shall both record the sales notes data electronically and transfer it electronically to

[188] Court of Auditors. *Special Report No 7/2007*, p. 8.

the competent authority within 24 hours after the first sale.[189] If registered bodies sell fishery products for less than €200,000 annually, they shall, if possible, send sales notes data electronically or the Member States may oblige them to do so.[190] The subject of colliding interests between buyers and sellers is a more difficult one. The Control Regulation does not address the subject directly but states in Article 62(1) that the accuracy of sales notes is the responsibility of the buyers.[191] The electronic transmission of sales notes enables Member States' authorities to cross check their accuracy with landing declaration more effectively. This improves the system that validates data and if the data conflicts, appropriate measures can be taken in a more effective manner. The Control Regulation makes the weighing of quantities landed a general obligation. The weighing is supposed to be carried out *on landing*, on an approved system by a competent authority before any handling of the fish product.[192] The move towards an obligation to weigh catches on landing prevents estimation and thus makes the data in landing declarations more reliable. In relation to this, the permitted tolerance margin was reduced to 10% from the previous margin of 20%, if estimations have to be done on landing.[193]

Data collected by the fishing industry is referred to as *primary data*. As mentioned, the data is supposed to be transferred from fishing vessels or first-hand fish sellers to a Member States' authority that is competent to receive it. Member States shall collect all primary data into a computerised database. They are then responsible for validating and controlling the data before it is transmitted to end users (bodies that have research or management interests in scientific analyses of fishery sector data). The Commission is responsible for verifying that Member States have collected primary data in accordance with their obligation

[189] Article 63(1) Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.
[190] Article 62(1)(2) Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.
[191] Article 62(1)(2) Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.
[192] Article 60(1)(2) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy. In paragraph 1 an exception is given from the general obligation of weighing fisheries products on landing.
[193] Article 14(3) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

under Community law. In order for the Commission to do so, Member States must provide the Commission with effective and unhindered access to the national computerised database.[194] However, due to rules on confidentiality, some data in the fishery sector is protected under Community and national law. This applies to data that concerns individual protection.[195] Personal data refers to data which makes references to a master of a fishing vessel or his representatives, which are responsible for the vessel's activities. Data that includes such information is closely linked to the identification of a fishing vessel. This information may not be exchanged to Member States or Community Institutions and, as a consequence, they only have access to *aggregated data*, which is output data resulting from summarising primary or detailed data for specific analytical purposes.[196] According to Article 113, all data that is collected under the framework of the Control Regulation shall be treated in accordance with rules on *professional and commercial confidentiality* and may not be transmitted to other persons or bodies except for Member States and Community Institutions whose functions require such access.[197] The Article does not make any reference to this kind of data having to in include personal information to be considered confidential. It therefore applies to all professional and commercial data that is collected under the Regulation. However, professional and commercial data may be transferred to individuals working for competent authorities if infringement of the Community Fishery Law has occurred.[198] The confidentiality of professional and commercial data shall thus not hinder that the data is used to ensure compliance with the law.

In the CFP there is a distinction made between data stemming from the fishery sector that concerns the identification of a fishing vessel and data originating from

[194] Article 13, 14, 15 and 16 Council Regulation (EC) No. 199/2008 Concerning the establishment of a Community Framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fishery Policy.
[195] Article 112 Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.

[196] Article 2(h) Council Regulation (EC) No. 199/2008 Concerning the establishment of a Community Framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fishery Policy.
[197] Article 113 (2) Council Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a Community Control System for ensuring compliance with the rules on the Common Fishery Policy.
[198] Article 113 (4) Council Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a Community Control System for ensuring compliance with the rules on the Common Fishery Policy.

the sector that is used for scientific purposes. Data that is collected under the Control Regulation, particularly when Member States are processing personal data activities under the Regulation, is to be treated in accordance with applicable rules on confidentiality, which is Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. When the Commission is processing personal data activities applicable under the Control Regulation, it should be governed by Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community's institutions and bodies and on the free movement of such data.[199]

Data that is collected for scientific purposes is governed by Regulation No. 199/2008 concerning the establishment of a Community framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fishery Policy. According to the regulation, public access to fishery data collected under the Regulation is governed by Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information, and Regulation (EC) No. 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.[200]

According to Directive 2003/4/EC on public access to environmental information, its objective is to guarantee the *right* of access to environmental information held by, or for, public authorities and to achieve the widest possible systematic availability and dissemination of such information to the public.[201] Information about whether fishing is conducted at sustainable levels and the conservation of

[199] Council Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a Community Control System for ensuring compliance with the rules of the Common Fishery Policy.
[200] Council Regulation (EC) No. 199/2008 of 25 of February 2008 concerning the establishment of a Community framework for the collection, management and use of data in the fisheries sector and support for scientific advice regarding the Common Fisheries Policy.
[201] Article 1(1)(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.

marine resources is something the public has a right to access. The *right* of access to environmental information means in principle that information should in general be disclosed and a refusal only permitted in certain circumstances. If a right to information is denied, the refusal shall thus be based on a restrictive interpretation of law and public interests weighted against the conflicting ones. Despite the right to information, the directive only requires public authorities to make environmental information available upon request from an individual, but the individual does not have to state an interest.[202] Despite the fact that an individual does not have to state an interest to get access to environmental information, the requirement limits the transparency and accountability of the policy. It requires the individual to have prior knowledge of what data is collected in the sector and knowledge of what kind of data can benefit them in their inquiries. This also has great impact on the effectiveness of accessing environmental data and may prevent individuals from submitting requests to access information.[203] The directive also contains provisions on refusal to access to information. In general, if the information required is unreasonable, too general or contains information of which the disclosure is not in the public interest, then the authority in question can refuse access to the information.[204] Article 2 of the Directive defines the term "*environmental information*" very broadly to include any information in written, visual, aural, electronic or any other material form regarding the environment. In the ECJ judgment from 1998 in the *Case Mecklenburg v Krieg Pinnerberg,* the Court confirmed that the term was supposed to be defined broadly. The Court held that the wording of Article 2 of Directive 90/313 (which Directive 2004/3/ EC succeeded), of environmental information was to be a broad one and that it include "*all administrative measures designed to protect the environment*".[205] Public access to information relating to the environment is thus very broad and they should be able to access all information about administrative measures that are intended not only to show the state of the

[202] Article 3 of of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003on public access to environmental information.
[203] Article 2 of the Directive defines the term „environmental information" very broadly. There has been some discussion if fisheries' subsidies fall under that definition. This has been a crucial element for some environmental organisations as they consider fishing subsidies having a direct link to overfishing of some vessels and thus affect the environment or are likely to affect it.
[204] Article 4 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information.
[205]ECJ, Case C- 321/96 *Mecklenburg v Kreis Pinneberg* [1998] ECR I-03809, par. 27(1).

environment but also those that are intended as protective measures. Here it must be emphasised that the Directive is a legislative act that does not have direct effect in a Member State until implemented into their national law. Directives are binding in the way that they ensure a certain outcome or that something has to be achieved. Therefore, Member States may have different methods in ensuring their citizens with right to information in accordance to their national legal system. National legislation must thus be followed to obtain documents at the national level.

As previously mentioned, access to data collected for scientific purposes is also governed by Regulation (EC) No. 1367/2006 on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters, often referred to as the "*Aarhus Regulation or Convention.*" Like Directive 2003/4/EC, the Aarhus Regulation guarantees the *right* of the public to environmental information.[206] Environmental information is broadly defined in the Regulation as in the Directive 2004/3 EC. Article 10(1) of the Regulation allows for an internal review procedure by any non-governmental organisation to challenge an administrative act, made by a Community institution or any body, which has adopted acts under environmental law.[207] Article 2(1)(g) defines the concept of *administrative act* as meaning *"any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects*".[208] As previously mentioned, data collected for scientific purposes under the CFP is also governed by the Aarhus Convention. According to Article 10(1), a non-governmental organisation should thus be able to have an internal review procedure to challenge an act that is taken by a Community institution or a body that affects the state of marine resources and ecosystem.

[206] Article 1 Regulation (EC) No. 1367/2006 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.
[207] Article 10(1) Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the applications on the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.
[208] Article 2(1)(g) Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the applications on the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

It must be noted that the new provisions and the compulsory technical measures will only prove to make data collection more effective and reliable if the rules are complied with. In addition, the compulsory technical measures only apply to vessels that are 15m and over. That leaves the Community's small scale fleet free from the obligation of using the VMS and electronic logbooks. Those vessels are supposed to transfer the fishing logbooks as soon as fishing activity ceases and are to be monitored on the basis of sampling plans.[209] The result is that they can still alter the data collected in the logbooks in the same way as the Court of Auditors pointed out in their report from 2007. It must also be noted that to oblige all vessels to be equipped with technical measures, such as electronic logbooks, is costly and in certain circumstances it can be difficult because of the identity and activities of some fishing vessels.

There has long been talk about the lack of transparency within the CFP. This criticism has especially been directed at the decision making process regarding fishing opportunities, but also to the access of fishery data. Transparency is generally considered to be linked to accountability. When it comes to the management of public policy, the term transparency refers to the obligation to publicly report audit findings as well as public access to information. Transparency thus enables authorities and the public to see if legal obligations are being met when decisions are taken. If information reveals that legal obligations have not been met, authorities or individuals can be made accountable for their failings. This is also the case in fishery management. Transparency of fishery data can both improve governance and promote accountability in the fishery sector. Public access to information and transparency plays an important role in ensuring accountability in the CFP, as well as being a premise for public participation in decision making.

In summary, the public has the *right* to access environmental information which relates to the marine system, and the sustainability of fisheries and ecosystems, and which is used for scientific purposes. However, primary data that stems from the fishery sector is governed by confidentiality rules and may thus not be made

[209] Article 16 Council Regulation (EC) No. 1224/2009 of 20 November 2009 establishing a Community Control System for ensuring compliance with the rules on the Common Fishery Policy.

public. If this was not so, accountability of the fishery sector could be improved, and it would contribute to Member States complying with the Community fishery law.

3.7.2 Compliance with CFP rules

Sound data is not the only element that is important for the TAC and quota system to be effective at ensuring that fisheries are conducted at a sustainable level. Compliance with fishery law and enforcement measures is a basic requirement for the successful implementation and effectiveness of the system.

In the Court of Auditors Report from 2007 the Court found, as stated in the Section 3.6.1, several shortcomings of the EU's fishery control and enforcement system. The Court considered it's identified shortcomings of the system those that incentivized low compliance with the Community Fishery Law.[210] Furthermore, the Commission, in its Green Paper from 2009, identified lack of compliance with the Community Fishery law both by Member States and within the fishing industry as one of the structural failings of the system.[211] It is therefore acknowledged by the Community that compliance with EU Fishery Law needs to be improved. This is vital for reaching the objective of sustainable fisheries.

Compliance with rules in the fishery sector is often analysed from an economics perspective. A decision to comply with rules is based on a calculation of the economic gain by bypassing regulations, compared with the severity of the sanction if the bypass is detected.[212] Sanctions therefore need to be aligned with the economic gain of bypassing if they are to be successful in compensating for the conflicting underlying incentives towards non-compliance. This has shaped fishery management systems worldwide by imposing control and enforcement systems into their fishery policy. If non-compliance with fishery rules is detected, the tendency has been to make enforcement and control measures within the systems stricter. This is precisely what the Commission did with the new Control Regulation, as discussed in Section 3.6. Nielsen discusses in-depth the social factors that influence compliance. He names two factors: instrumental and

[210] Court of Auditors, *Special Report No 7/2007*, par. II.
[211] Commission COM(2009)163 final, Green Paper: Reform of the Common Fisheries Policy, 22 April 2009.
[212] Raakjær, Jesper N., "An analytical framework for studying: compliance and legitimacy in fisheries management", p. 425 - 427.

normative. The instrumental factor emphasises external incentives where stakeholders seek to maximise their gain; the normative one, emphasises actions shaped by the behaviour and opinions of peers, as well as personal moral values.[213] Both factors fit with the general culture of non-compliance with the CFP rules. Both individual fishers and the Member States seek to maximise their gain in accordance with the instrumental factor. The normative theory can be extended to include the national level to explain the Member States reluctance to enforce the CFP rules as they too are affected by the behaviour of their peers (other Member States).

As has been explained, Member States are responsible for enforcing compliance with the CFP. The EU does not have competence to take enforcement measures against natural or legal persons within the fishery sector, but are responsible for ensuring that Member States comply with Community law. In 2003 the Commission proposed a compliance work plan that was intended to "*achieve a more effective, uniform and equitable application of the rules of the CFP by all the Member States*".[214] The Commission had found in its report on the implementation of the CFP rules that implementation in the system was weak which led to a lack of uniformity which in turn resulted in "*the absence of a level playing field of control and enforcement at the Community level*".[215] The concept of a *level playing field* is vital; it refers to the notion that everyone in the system is treated equally and that the same rules and sanctions apply to the bodies that have violated Community fishery rules. The lack of a level playing field thus encourages actors in the sector to behave in a way that maximises their own economic gain from fishing because of the fear of an unfair competition. This is in accordance to the theories mentioned above and contributes to the culture of non-compliance in the EU fishing industry.

In Section 3.6.1 the importance of transparency in management of public policy was discussed. Transparency is considered an important factor in promoting accountability in public policy. Transparency in Member States' compliance with

[213]Raakjær, Jesper N.,"An analytical framework for studying: compliance and legitimacy in fisheries management", p. 425 - 427.
[214] Commission's Communication on the compliance with the rules of the Commons Fishery Policy "Compliance workplan and scoreboard", Section 1.1.
[215] Commission's Communication on the compliance with the rules of the Commons Fishery Policy "Compliance workplan and scoreboard", Section 1.1.

the CFP rules can limit the fear of an unfair competition and promote more compliance within the fishery sector. In the Commission's Compliance Work Plan the Commission drew up a compliance scoreboard with the aim of improving transparency of compliance with the CFP rules.[216] The Compliance Scoreboard contains information on Member States' compliance with the CFP, specifically in the areas of: conservation of fishery resources, fleet management, structural policy, and control and enforcement. The Scoreboard also contains an overview of the infringement procedures conducted by the Commission if Member States have been discovered not complying with the CFP rules, as well as an overview of activities carried out by the Commission's inspectors.[217] The Commission's Compliance Scoreboard was first published in the year 2003. Its third edition was published in 2006. The main findings in the 2006 edition were that Member States had to strengthen their enforcement measures to ensure better compliance with the CFP. The 2006 edition also showed, for example, that overfishing decreased from 2% in 2003 to 1.8% in 2004, but varied greatly between countries.[218] The Compliance Scoreboard was based on data from the Member States themselves and not all of them submitted sufficient data to the Commission, which resulted in the data in the Scoreboard being unreliable to a certain extent. The Compliance Scoreboard has now been discontinued.[219]

As previously mentioned compliance with fishery rules is essential for it to be effective. The Community decided to adopt harsher measures to try and counter the problem of non-compliance. However it can be debated is such measures do in fact ensure better compliance, as the basic incentives have not been altered and the conflict between short term and long term interests in managing fishery resources remains.

[216] Commission's Communication on the compliance with the rules of the Commons Fishery Policy "Compliance workplan and scoreboard", Section 3.3.
[217] Commission's Communication on the compliance with the rules of the Commons Fishery Policy "Compliance workplan and scoreboard", Section 3.3.
[218] Fisheries Compliance Scoreboard: http://www.govnews.org/gov/eu/news/third_edition_fisheries_compliance_scoreboard/72111.html . Accessed on 22.08.2010
[219] Email from the Directorate General for Maritime Affairs and Fihseries. Fisheries-info@ec.europa.eu. 04.10.2011

3.7.3 Inspection and sanction measures

Inspection and sanctions play an important role in the control and enforcement system of the CFP, as they can be a foundation for the detection of infringements, thereby ensuring that EU law can be properly enforced. As was explained above, compliance in fishery management is often analysed from an economics perspective, which in practice means that a decision to comply with rules is based on a calculation which compares the economic gain of bypassing regulations with the severity of sanction if the bypass is detected. This seems to have been a driving factor for the Community when the new Control Regulation was adopted, as the Regulations introduced strengthened measures on control, inspection and enforcement, both at the national and Community level. However, all measures that are to be implemented in accordance to the Regulation shall not conflict with the Community principle of proportionality.

Article 24(1) of the Basic Regulation states that Member States shall take all inspection and enforcement measures necessary to ensure compliance with the rules of the CFP inside their territory or in the waters subject to their sovereignty or jurisdiction. They shall also take enforcement measures relating to fishing activities of fishing vessels flying their flag outside Community waters.[220] Thus, according to the Article, the Member States' national inspectors have a wide scope of inspection powers. The Article then goes on to list enforcement measures that Member States are entitled to use. These measures are:

> (a) Spot checks and inspections on fishing vessels, the premises of businesses and other bodies with activities relating to the Common Fisheries Policy
>
> (b) Sightings of fishing vessels
>
> (c) Investigation, legal pursuit of infringements and sanctions
>
> (d) Preventive measures
>
> (e) Measures to prevent the involvement of their nationals in fisheries activities that do not respect the applicable conservation and management measures, without prejudice to the primary responsibility of the flag State.[221]

[220] Article 24 Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[221] Article 24(2) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

Section a) of Article 24 identifies that Member States are allowed to do spot checks and inspections on fishing vessels; Article 74 of the Control Regulation then outlines how Member States shall conduct their inspection. It obliges Member States to keep a list of officials that are responsible for carrying out inspection. The official's inspection shall be carried out in a non-discriminatory manner and may take place "*at sea, in ports, during transport, on processing premises and during the marketing of fishery products*".[222] The Article renders upon inspection officials a vast authority on how to conduct their inspection. They may examine all relevant areas in the vessel such as decks and rooms, all catches made by the vessel, all fishing gears and equipment used by the vessel, and electronic devices stored in it. In addition to this, they also have the authority to question individuals that are deemed to have information on the subject of the inspection.[223] The work of national inspectors thus requires precision and professionalism. The official carrying out the inspections shall complete a report, where he states his findings and send it to competent authorities, preferably by electronic means if possible, as soon as possible. However, if an infringement is detected the report shall be sent without delay. This applies both for fishing vessels flying the flag of other Member States and vessels flying the flag of a third country. If an infringement procedure takes place, the official's or inspector's report shall constitute as admissible evidence in administrating the judicial proceedings of any Member State.

To enhance greater cooperation and harmonisation between Member States regarding control and enforcement measures, Member States shall exchange inspectors when it comes to control and inspection in case of trans-boundary fishing activities.[224] In relation to this, Member States are *always* authorised to inspect vessels flying their flag outside of the Community Waters and in the territory of other Member States. If a fishing vessel is flying the flag of other Member States, Article 28(3) renders upon them the authority to conduct mutual

[222] Article 24(2) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[223] Article 74(2)(4) Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.
[224] Article 28(2) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

inspection.[225] To facilitate their cooperation in fishery inspection, Article 28(4) of the Basic Regulation states that the Commission shall establish on the basis of appointments by Member States a list of "*Community Inspectors, inspection vessels and inspection aircraft and other means of inspection authorized to carry out inspection under in Community Waters and on Community fishing vessels.*"[226] Inspection reports carried out by the Community inspectors shall be equivalent in every way to national inspectors' reports. Greater cooperation between Member States, in control and inspection measures, puts responsibility on all the states to assist each other in fulfilling their obligations under the CFP.

Inspection does not only take place at the national level. To strengthen the enforcement system of the CFP the Commission also carries out their own inspections. The nature of the Commission's inspection is to examine the inspection made at the national level or to evaluate and control the application of CFP rules. This procedure is in accordance with the Commission's role to evaluate and control the application of the Community rules under the Treaty. In order to fulfil this obligation the Commission may carry out *audits, inquiries, verifications and inspections* on the Member States' application of CFP rules. The Commission's inspections may be carried out on *fishing vessels, premises of businesses and other bodies that take part in activities* that relate to the CFP.[227] However the Commission's inspectors shall have "*no powers going beyond those of national inspectors and shall have no police and enforcement powers.*"[228] This is understandable as the EU does not have competence to take any enforcement measures against legal persons in the fishery sector, as has been explained. The Commission's inspectors have access to all information and documents they need to be able to carry out their responsibilities and Member States are obliged to

[225] Article 28 (3) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[226] Article 28(4) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[227] Article 27 (1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[228] Article 27 (1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

cooperate with the Commission and give it the assistance it needs.[229] The work of the Commission's inspectors is of great importance for the Commission as they provide information which proves necessary for the Commission if it needs to take any actions against a Member State. The Control Regulation also contains provisions on the Commission's inspection. The Regulation enables the Commission's inspection officers to be *present* and verify the application of the Control Regulation by Member States. Significantly, the Commission's officials can do so *without* prior notice.[230] The possibility of inspection without notice puts considerable restraint on non-compliance and acts as a deterrent.

In conformity with the special nature of Community law, Member States are responsible for taking appropriate measures against a natural or a legal person if a suspicion arises of breach of CFP rules, in accordance with their national law. However, after the court of Auditors' report published in 2007, which shed light on the lack of harmonisation in Member States' enforcement measures, the Commission considered it necessary to harmonise sanction systems between Member States, to try to create a level playing field within the fishing industry. Therefore, a harmonious system of administrative sanctions has been introduced. The Control Regulation and the IUU Regulation together establish a principle on how Member States are to determine sanctions if Member States become guilty of serious infringements.[231] Member States will have to impose a maximum sanction of at least five times the value of the fishery products obtained by committing the serious infringement, and eight times the value of the fishery products in case of a repeated infringement within a 5 year period for any serious infringement.[232] The idea behind this is to try to ensure the effectiveness of the sanctions by depriving those responsible for the infringement, of the economic gain their breach led to. Thus, the rule tries to minimise the incentive for breaking the rules by applying

[229] Article 27 (1) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

[230] Article 98 (1)(6) Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.

[231] Council Regulation (EC) No. 1005/2008 of 29 September 2008 establishing a Community System to prevent, deter and eliminate illegal fishing, unreported and unregulated fishing.

[232] Article 44(2) Council Regulation (EC) No. 1005/2008 establishing a Community System to prevent, deter and eliminate illegal, unreported and unregulated fishing.

harsh measures if an infringement is detected. However, Member States must always bear in mind, and follow, the Community principle of proportionality when they apply sanctions, thus the sanction must be proportionate to the seriousness of the infringement. Article 90(4) of the Control Regulation states that in fixing sanctions Member States shall also "*take into account the value of the prejudice of the fishing resources and the marine environment concerned*". Here it can be difficult for the Member States to determine the sanction. Deciding on criteria on how to value fishing resources, and especially the marine environment, is a difficult task, and many factors can be of significance.

The sanction system is complemented by a *point system*, which is a system which assigns points for serious infringements. The objective of the point system is to make sanctions more transparent and harmonise sanctions between Member States. Under the system, points are attributed for a specific infringement, thus when a vessel commits a serious infringement it will be attributed the appropriate number of points and registered in the national registry of fishery offences of the Flag Member State. The points are retained by the holder of the fishing vessel's license and will be transferred to any future holder of it. The number of points attributed to a vessel determines the period of which a fishing license is suspended.[233] The point system is not in force yet and the Member States will not have to introduce it until 1st of January 2012.

Articles 16(1), 23(4) and 26(3)(4) of the Basic Regulation provide the Commission with certain sanction powers against Member States if they do not comply with the CFP rules. The Articles provide the Commission with the authority to:

- *suspend financial assistance to Member States*
- *take preventive measures if there is considerable risk that fishing activities could lead to a serious threat to the conservation of marine resources*
- *immediately stop fishing activities if information reveal that Member State quota is being exhausted*

[233] Article 92 Council Regulation (EC) No. 1224/2009 of 20 November 2009 for ensuring compliance with the rules of the Common Fishery Policy.

- *deduction from future fishing opportunities of a Member State if it has been established that the Member State has exceeded its fishing opportunities*

Fishing opportunities are allocated to Member States in accordance with the principle of relative stability. Their allocation is based on a highly political agreement the Member States reached after lengthy negotiations. The Commission's ability to deduct fishing opportunities from Member States as a sanction must therefore be considered to be a harsh measure and touches upon one of the core elements of the CFP, especially as the rule of relative stability is partly based on the Member States' historic right to fish. The Article then goes on to state that quota which has been deducted from the Member State that exceeded its fishing opportunities may be totally or partly reallocated to a Member State that has not been able to exhaust its own fishing opportunities.[234] There has been some discussion about whether or not quota deductions are a sanction which is compatible to the principle of proportionality. The issue was addressed in the ECJ, *Case 9/89 Spain V Council*. Spain argued that the deduction of quota was a sanction which was far out of proportion to the objective of trying to get Member States to effectively enforce the CFP. The Court, however, agreed with the Commission's reasoning for the rule, which was that the rule was not meant as a penalty towards a Member State, but rather that the deductions were necessary for the *proper management* of the quota system.[235] This cannot be understood in any way other than that the objective of the deduction of fishing opportunities is in line with the overall objective of the CFP, which is the conservation of marine resources which the quota system is supposed to contribute to. The Commission has only once exercised its power to deduct quota from Member States. In 2007 it reduced quotas allocated to the United Kingdom and the Republic of Ireland, because they had exceeded their quotas from the years 2001 – 2004. In the Regulation that permitted the action taken by the Commission, [236] the

[234] Article 23(4) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[235] ECJ, Case C- 8/89 *Spain v Council* [1990] ECR l-1383, par. 26 and 30.
[236] Commission Regulation (EC) No. 147/2007 adapting certain fish quotas from 2007 to 2012 pursuant to Article 23(4) of Council Regulation (EC) No. 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fishery Policy.

Commission referred to the overall objective of the Basic Regulation[237] and thus upheld the Court findings in *Case 9/89 in Spain v Council* that the deduction of fishing opportunities is not considered to be a sanction but a way to ensure that the obligation of the CFP conservation policy are met. However it can well be argued that the nature of the quota deduction is quite similar to a sanction.

The Commission's right to take a Member State before the European Court of Justice (ECJ) is the most effective weapon it possesses to ensure the effectiveness of EU Fishery Law.[238] Article 226 of the Treaty lists the infringement procedure to be taken by the Commission against a Member State.[239] If the dispute ends before the ECJ, the ECJ judgment is binding both on the Commission and the Member State in question. Even though the ECJ judgment is binding upon the Member State there is no guarantee that the Member State will in fact enforce the judgment. If that becomes the case, there is the possibility of imposing a lump sum or a penalty upon the Member State.[240] In 2005 the ECJ delivered one such judgment against France. According to the Commission, France failed to fulfil its obligations from a judgment ruled in 1991, as it had failed to comply with the Community rules on technical measures under the CFP.[241] The Court declared that France had not fulfilled its obligations under Article 260 TFEU (ex Article 228 TEC) of the Treaty and ordered France to pay the total lump sum of €20,000,000 and a penalty payment of €57,761,250. The Court's reasoning for ordering France to pay both a penalty and a lump sum was based on the fact:

> "*That those two measures are complementary, in that each of them respectively seeks to achieve a deterrent effect. A combination of those measures should be regarded as one and the same means of achieving the objective laid down by Article 228 EC that is to say not only to induce the Member State concerned to*

[237] Section 5 of Commission Regulation (EC) No. 147/2007 adapting certain fish quotas from 2007 to 2012 pursuant to Article 23(4) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[238] Article 258 TFEU (ex Article 226 EC) and Article 259 (ex Article 228 EC).
[239] First the Member State receives a formal letter of notice from the Commission stating the Member States infringement. Then the Member State and the Commission get to state their legal opinion. If they do not agree the Commission again states its reason and sets a timeframe in which the Member State must comply. If the Member State does not comply within that timeframe the Commission may take the Member State before the ECJ.
[240] Article 228 EC. The Commission must go through the three stage infringement measures as Article 226 EC requires.
[241] Which resulted in undersized fish being for sale.

comply with the initial judgment but also, from a wider viewpoint, to reduce the possibility of similar infringements being committed again.".[242]

As can be read from the Court's reasoning the penalty and the lump sum should be regarded as one measure that has the aim of getting Member States to comply with the Court's previous decisions and to reduce the likelihood of having an infringement of that kind happening again.

The effectiveness of Community law relies to a great extent on Member States compliance with it. If Member States do not comply with the ECJ's rulings the effectiveness of the Court decisions would be seriously undermined. With the judgment against France in 2005, the Court emphasised that Member States must comply with its rulings to ensure the effectiveness of Community law. The judgment is the first one in the area of fisheries in which a Member State is ordered to pay a financial penalty. The ECJ thus underlines that Member States must be more effective in enforcing the rules of the CFP and must themselves comply with both the Community's Fishery Law, and prior judgments, delivered by the Court. Furthermore in its reasoning the Court held that a failure to comply with the technical measures prescribed under the CFP "*constitutes a serious threat to the maintenance of certain species and certain fishing grounds and jeopardises pursuit of the fundamental objective of the common fishery policy*".[243] Thus the Court emphasises that Member States must comply with the policy's rules, in order for it to reach its overall objective. The Courts statement, stated above, underlines the seriousness of non-compliance with the EU Fishery Law and that infringement of the Member States behalf, has serious effects, on both marine resources and the marine environment, and must be taken seriously by Member States. Therefore the penalty sum imposed on France can be viewed as a measure to try and ensure that Member States comply with the conservation measures under the CFP and that non-compliance by them can have serious consequences. In 2007 the Commission opened three new infringement procedures for failures of control of the CFP, relating to under-declaration of landing and overfishing, against Italy, France and Poland.[244] These judgments are still awaited. This

[242] Case C-304/02, *Commission of the European Communities v French Republic* [2005] ECR 1-06569, par. 77.
[243] Case C-304/02, *Commission of the European Communities v French Republic* [2005] ECR 1-06569, par. 105.
[244] European Commission, The Common Fishery Policy. A User's guide, p. 22.

implies that there seems to be a realisation that the Community Fishery Law must become more effective in order for its objective to be reached and to save European fish stocks.

As mentioned, one of the most effective tools for the Commission to try to ensure compliance with the CFP is its ability to bring the Member States before the ECJ if an infringement of the CFP rules has occurred; however, the infringement procedure has been criticised for its lengthy procedure. For example, the ECJ judgment against France delivered in 2005 was based on a judgment from 1991.

3.8 Conclusion

Since the inception of the CFP in the 1970s the EU has tried to ensure the conservation of their marine resources, at a sustainable level, so they can continue to bring value to European societies. To reach that objective the Union has adopted various management instruments and regulatory measures, but despite its effort, the aim of sustainable fisheries has not been reached.

This discussion on the CFP began by given a descriptive account of the historical background of the CFP and the legal framework that establishes its conservation policy. As was covered the Community shall adopt measures that ensure the exploitation of marine resources at levels that provide sustainable economic, environmental, and social conditions. The term sustainable, is then defined as an exploitation of marine resources in a manner that does not prejudice their future takings. The term is not defined any further, and thus it can be argued that policy makers have a wide scope to define which measures are sustainable and which are not. In light of the state of the marine resources within the Union's waters, it can therefore be stated that the sustainable term should be defined further and policy maker's scope of determine what measures are sustainable narrowed. If such measures were to be taken the term would also receive a stronger legal basis, as it would become less objective. As will be described in Section 7.3, the Council has practice setting TACs high above the scientific advice given on what can safely be taken of fish out of the sea. Because TACs are the primary conservation instrument, this practice has largely undermined TACs as an effective conservation tool. If the sustainable term were to be more narrowly defined, the

Council's ability to set TACs as high as they have would be largely diminished and legal accountability under Community law also. However, as was described TACs are distributed between Member States based on the principle of relative stability, which is rooted in a political agreement on allocation keys. Therefore any changes that could prove to diminish Member States fishing opportunities could be very slow in progress. There is another factor that undermines the CFP's conservation policy and can be traced to its legal framework. That is the provision on the limits on landings of fish, and as has been explained the provision makes it illegal to land by-catches, which in turn results in the problem of discarding. Unlike the procedure of setting TACs, the provision could undergo changes fairly easily.

The scarcity of available public data from the fishery sector leads to a lack of transparency within the industry. In turn, lack of transparency affects accountability in the sector. This fuels the fishermen's incentive to disregard the Union's Fishery Law. To make more data public is an effective way to try and improve accountability within the industry; however it is not enough to make data public, it also has to be made easily accessible by the public. Simultaneously, greater accountability could halt the cycle of the Community having to impose stricter enforcement measures to ensure the effectiveness of the policy, as compliance could increase. Furthermore, the lack of transparency reduces the opportunity for public participation in the fishery sector. Therefore, diminishing the public from being able to influence sustainable utilisation of marine resources.

The launch of a proposal for a new Basic Regulation introduced in July 2011 is intended to counter the challenges the CFP is facing. Among the measures that the new proposal introduces, are ban on discarding and decreased ability to set TACs above the scientific advice given. It will be interesting to see which fate the proposal receives.

4. "Getting it right" - The Future CFP

It is general knowledge that the CFP needs to undergo fundamental changes in order for the EU to be able to conserve its marine resources. Without any changes made to the policy, Europe will suffer the fate of losing some of its most depleted fish stocks in the years to come. The Union recognises this and on the 13th of July 2011 a new legislative proposal for a new Basic Regulation for the CFP was introduced. The proposal introduces a radical reform of the policy, intended to ensure that European marine resources will be exploited at a sustainable level.

In the following chapter an account will be given of the proposal for a new Basic Regulation intended to enter into force on the 1st of January 2013. As stated above the main aim of the 2012 reform is sustainable utilisation of marine resources. In order to reach its objective, the reform introduces new management instruments that are intended to counter the challenges the policy faces. This Chapter covers the new proposal and outlines the main measures that it proposes to reach the above stated aim. It also gives a summary of the events leading up to the reform because it is essential to get a clear picture of the motivations behind it.

The proposal is currently going through a normal legislative procedure and for the first time a legislative proposal concerning the CFP, will undergo a *co-decision* procedure, in line with the changes made with the ratification of the Lisbon Treaty in 2009,[245] under which the European Council and Parliament will have to come to an agreed position on the proposal.

Here it is worthy to note that it can be difficult to evaluate a legislative proposal beforehand, as of course changes can be made to during the legislative process and no experience exists on how its provisions will be interpreted and applied in practice.

[245] Seafish. The Authority on seafood, Timeline for the reform of the Common Fishery Policy (CFP): http://www.seafish.org/retailers/responsible-sourcing/protecting-fish-stocks/reform-of-the-cfp Accessed on 25.08.2011.

4.1 The 2012 reform

In Section 3.2.2, in the discussion of the 2002 reform, it was stated that the reform extended the derogation from the equal access principle for ten years. According to Article 17(2) of the Basic Regulation, the Council shall, by the 31st of December 2012, decide if the exception from the equal access principle shall still stand, as well as the provisions that are subject to it.[246] So as the ten year period drew closer to an end, the Commission launched a review of the CFP in the year 2008 and on its basis published a *Green Paper on the Reform of the Common Fisheries Policy* in April 2009. The paper was intended to initiate a wide-ranging public debate on the future of the policy and it was anticipated that the policy would be finalised by the end of 2012.[247] In the Green Paper the Commission made it clear that it is important to rethink the CFP, both because of the failings of the current system and because of global changes resulting from the recent financial crises, growing influence of climate change, and volatile fuel prices.[248] The Commission identified the failings of the CFP to be rooted in five main structural failings of the system: *a deep-rooted problem of fleet overcapacity; imprecise policy objectives resulting in insufficient guidance for decisions and implementation; decision-making system that encourages a short-term focus; framework that does not give sufficient responsibility to the industry; lack of political will to ensure compliance and poor compliance by the industry.*[249,250]

The Commission goes on to identify fleet overcapacity as the fundamental problem of the CFP, leading to low economic performance, weak enforcement and overexploited resources,[251] thus making the 2012 reform a proposal intended to counter these problems and the challenges suffered as a consequence.

In Europe there is a hope that the 2012 reform can put an end to the 40 year bad management of marine resources and the resultant depleted fish stocks, which

[246] Article 17(2) Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[247] Commission COM(2009)163 final, Green Paper: Reform of the Common Fisheries Policy, 22 April 2009.
[248] Commission COM(2009)163 final, Green Paper: Reform of the Common Fisheries Policy, 22 April 2009.
[249] Commission COM(2009)163 final, Green Paper: Reform of the Common Fisheries Policy, 22 April 2009.
[250] The challenges the CFP is facing are further explained in Chapter 4.
[251] Commission COM(2009)163 final, Green Paper: Reform of the Common Fisheries Policy, 22 April 2009.

should be a priority for a continent that prides itself on environmental priorities and protection. However it appears that Damanaki's proposal may face opposition both in the European Parliament and in the Council of Fishery Ministers. In June this year the Council showed a deep division over the international commitment of fishing limits being set at the level of reaching its maximum sustainable yield by 2015 (which is made a legal obligation in the proposal), which raises the fear that the proposal's aim of reaching sustainable fisheries by 2015 and the setting of long-term plans for most marine species will increase the political race over the raising of TACs each year above the scientific advice given.[252] The most noticeable European Parliamentary opposition towards the new proposal is directed at its new system of the Tradable Fishing Concessions, with some members of the European Parliament (MEP) calling for a "*major change*" in that aspect. However there seems to be a more general acceptance by the MEP towards the proposal's introduction of increased regional decision making and the ban on discards.[253]

Politicians must adopt a long-term view regarding fisheries in the European Union, and to do so requires new approaches, which is precisely the objective of the proposal for a new Basic Regulation. Commissioner Damanaki has therefore called for wide support for her proposal both from national governments and members of the European Parliament so the fate of the European fishing industry can be turned around.[254]

4.2 The reform's objective

The overall objective of the new proposal is the economic, environmental and social sustainability of Europe's marine resources. As explained in Section 2.1 sustainable exploitation of fish stocks means that fish stocks should be exploited at their *maximum sustainable yield level* (MSY) or in other words, that catches should not be higher than what can safely be taken to maintain the fish population at its most efficient productivity. The objective of sustainable development is set

[252] European voice, http://www.europeanvoice.com/article/imported/an-end-to-40-years-of-failure-/71686.aspx Accessed on 11.10.2011.
[253] http://www.europarl.europa.eu/en/pressroom/content/20110711IPR23779/html/Fisheries-reform-Commission-proposal-welcomed-with-reservations Accessed on 11.10.2011.
[254] European voice, http://www.europeanvoice.com/article/imported/damanaki-calls-for-support-for-fisheries-reform-plans/71623.aspx Accessed on 11.10.2011.

out in the United Nations Convention on the Law of the Seas, and in 2002 the World Summit on sustainable development adopted sustainability as a target the world should try to reach by 2015 when managing its resources.[255] In the proposed Basic Regulation the objective of reaching maximum sustainable yield is, as stated in a Communication from the Commission, *clearly enshrined,* [256] because the objective to try to ensure the exploitation of marine resources on a sustainable level by 2015 is made into a *legal obligation* in Article 2(2) of the proposal.[257] In light of the state of marine resources in the EU waters today, this is clearly an ambitious timeframe and as was mentioned above, the fishery ministers in the Council do not agree on this ambitious timeframe, even though the European Union is a part of the international agreement signed in Johannesburg in 2002 where the objective of reaching sustainable fisheries by the year 2015 was agreed upon. In the Explanatory Memorandum accompanying the proposal, the Commission states that this target was establish because the impact assessment carried out on the reform of the CFP demonstrated that achieving maximum sustainable yield by 2015 could lead to "*to significant economic and social improvements*".[258] Also, the impact assessment carried out before the reform showed that if fish stocks were repaired it could generate an extra €2.7 billion for the European Fishing industry, [259] which would help reach the goal of better economic performance and social sustainability. Hence, the core changes the proposal introduces are intended to make the objective of sustainable fish stocks by 2015 become a reality so the objectives of environmental, economic and social sustainability can be reached.

[255] Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[256] Commission Communication COM(2011) 417 final to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Reform of the Common Fisheries Policy, 13 July 2011.
[257] Article 2(2) Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[258] Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[259] Maria Damanaki, presentation of the reform of a new Common Fishery Policy to the European Parliament Committee for Fisheries, ""Getting it right". The birth of a new Common Fishery Policy", Brussels, 13 July 2011.

4.3 Proposed management instruments

As previously mentioned the main objective of the reform is to reach sustainable fishing in Community waters. To reach that objective the proposal introduces some fundamental changes to the CFP's management instruments, intended to increase effective implementation of the conservation policy.

4.3.1 Transferable fishing concessions

Transferable Fishing Concessions is a new system of regulating access to marine resources and can be describes as the most radical change introduced in the legislative proposal. The Community does not abandon the TAC system nor did the division of quota between Member States found on the principle of relative stability. The Transferable Fishing Concession system is to be implemented no later than the 31st of December 2012 and shall apply to all vessels 12m or over and all vessels fishing with towed gears. The proposed system is supposed to be applicable to fish stocks for which fishing opportunities are allocated.[260] The reason behind this new system is to eliminate overcapacity and to improve the economic results for the fishing industry as a whole.[261]

Article 5 of the proposal defines the term *Transferable Fishing Concessions*, stating that they are "*revocable user entitlements to a specific part of fishing opportunities allocated to a Member State or established in management plans adopted by a Member State in accordance with Article 19 of Regulation (EC) No 1967/2006, which the holder may transfer to other eligible holders of such transferable fishing concessions*". Transferable fishing concessions are thus a user *entitlement* to a specific part of the fishing opportunities that are allocated to a Member State. Article 5 goes on to define the term *individual fishing opportunity* as annual fishing opportunities allocated to holders of transferable fishing concessions in a Member State.[262] According to these definitions, users of transferable fishing concessions are thus entitled to an individual share of the Member States' fishing opportunities, however the Union's marine resources are a

[260] Article 27(1)(a)(b) Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[261] Commission Com(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[262] Article 5 Commission Com(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.

common good and the user entitlement to a fishing concession can be recalled in accordance to established rules on the matter.[263]

The allocation of Transferable Fishing Concessions and individual fishing opportunities lies in the hands of the Member States. The allocation is to be done in accordance to Article 28 and 29 of the proposal, but both articles establish a general framework of how the allocation is to be conducted. Member States are to allocate Transferable Fishing Concessions for fish or fish stocks, which fishing opportunities have been allocated for by the Council. They shall then allocate individual fishing opportunities to holders of Transferable Fishing Concessions.[264] According to Article 28(2) the allocation of Transferable Fishing Concessions is supposed to be done on the basis of transparent criteria, paragraph 4 of the Article states that Member States are allowed to allocate Transferable Fishing Concessions "*to an owner of a fishing vessel flying the flag of that Member State or to legal or natural persons for the purpose of being used on such a vessel*", thus making only fishermen eligible for Fishing Concessions. The Article also states that transferable fishing concessions may be "*pooled together for collective management by legal or natural persons or recognised producer organizations*", having said that, it is important to note that Article 28(4) provides Member States with the authority to limit the eligibility for receiving transferable fishing concessions on the basis of objective or transparent criteria.[265] A time period with the minimum of 15 years is established for the validity of transferable fishing concession and if no time limit has been established, Member States have the authority to recall them with at least 15 years' notice. The Fishing Concessions can also be recalled if a serious infringement has occurred or if it has not been used by a fishing vessel for a constituted period of three years.[266] The requirement

[263]Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[264] Article 29(1) Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[265] Article 28(4) Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[266] Article 38(5)(6)(7) Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.

for a fishing vessel to be able to take part in fishing activity is the possession of sufficient individual fishing opportunities to cover their future catch.[267]

One of the main arguments for the establishment of the transferable fishing concession is that it will contribute to a better economic performance for the Union's fishing industry. In the presentation by Maria Damanaki, the European Maritime Affairs and Fisheries Commissioner, on the reform of the CFP, she stated that within the European fishing industry 35% of businesses are operating at a loss and 11% of segments have negative cash flow, resulting in a negative impact on coastal regions and fishing communities.[268] There are mainly two characteristics of the transferable fishing concessions that are supposed to lead to better economic performance of the industry: they are to be both transferable and leasable. In practice it means that fishermen are able to obtain quota that suits their fishing patterns and if they find themselves in quota shortage for their catch, they can lease the quota needed, in real time, from their producer organisations.[269] This decentralises the management of fishing opportunities towards the fishing industry. According to Article 31(1) and Article 31(2) transferable fishing concessions can be fully or partially transferable and leasable at the national level. It is then up to the Member States themselves to establish rules on how the transfer is to be conducted. The only requirement is that it has to be based on transparent and objective criteria.[270] The flexibility of the transferable fishing concessions is supposed to create an incentive for operators to increase their fishing concessions while others may decide to leave the industry.[271] Because of this, it is predicted that the system could raise income figures by 20% and crew wages by 50% - 100%, by the year 2022.[272]

[267] Article 29(3) Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[268] Maria Damanaki presentation of the reform of the Common Fishery Policy, ""Getting it right". The birth of a new Common Fishery Policy", Brussels, 13 July.
[269] Maria Damanaki presentation of the reform of the Common Fishery Policy, ""Getting it right". The birth of a new Common Fishery Policy", Brussels, 13 July, p. 11.
[270] Article 31(3) Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[271] Press release. "Questions and answers on the reform of the Common Fishery Policy", http://europa.eu/rapid/ Accessed on 20.08.2011.
[272] Press release. "Questions and answers on the reform of the Common Fishery Policy", http://europa.eu/rapid/ Accessed on 20.08.2011.

The system of Transferable Fishing Concessions is supposed to contribute to the objectives of environmental, social and economic sustainability within the Community.[273] 77% of EU's total vessel number is categorised as small-scale.[274] Therefore the small-scale fleet plays an important role within the Union's fishing industry and is equally important for the Union's fishing communities and the cultural identity of many coastal regions. This importance is recognised in the proposal, which introduces a specific safeguard for small–scale fleets, which enables Member States to exempt small-scale fleets from the transferable fishing concession system.[275] Member States shall decide on how they allocate fishing opportunities to vessels that are not subject to transferable fishing concessions and inform the commission thereof.[276]

It was mentioned above that it lies in the hands of Member States to regulate how the transfer of fishing concessions is to be conducted. This enables them to set additional safeguards to ensure the livelihood of their fishing communities. They can, for example, limit transferability in such a way to ensure a close link between coastal communities and the fishing concessions, as well as prevent excessive concentration of the concessions. Furthermore, the Member States can impose fees for the use of individual fishing opportunities to help finance fishery management costs.[277]

Not everyone agrees that the system of transferable fishing concessions is an appropriate system for the future structure of the CFP or for fishing communities. Of the Member States, the French and German fisheries ministers have stated that marine resources are a common good and that they are opposed to any *privatisation* of the resources. They also claim that the safeguards introduced in

[273] Here it is interesting to note, that not everyone agrees that this system is the right way forward for the Union to reach sustainable fisheries. In a report published in August 2011 by the Organization Client *Earth*, *Justice for the planet*. The organization considers the system of Transferable Fishing Concessions that regulates access to marine resources by introducing, a mandatory right based management scheme, to be unlawful, and in breach of Article 345 of the TFEU as well as the principles of subsidiarity and proportionality.
[274] Press release (IP/11/873): "Questions and answers on the reform of the Common Fishery Policy", http://europa.eu/rapid/. In terms of vessel tonnage or size the small-scale fleet accounts for 8% and in terms of vessel power the small-scale fleet accounts for 32%.
[275] Article 27(2) Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[276] Article 33 Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[277] Article 29(6) Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.

the proposal are not adequate to ensure the livelihood of coastal communities. The Scandinavian countries, on the other hand, are more in favour of the system.[278]

4.3.2 Multi-annual plans

As has been explained the main objective of the proposal for a new Basic Regulation is to preserve marine resources in order to reach sustainable fisheries. The proposal introduces multi-annual plans to manage EU fisheries. Multi-annual plans are a move away from the current CFP's single-stock plans, and are intended to cover EU's major commercial fish stocks, in fewer plans.[279] It is the characteristics of multi-annual plans that are supposed to contribute to sustainable fisheries.[280]

Multi-annual plans are in essence long-term plans of managing fish stocks. The plans are supposed to provide a foundation for the fixing of fishing opportunities and quantifiable targets, for stocks that are applicable to the plans. According to Article 10 of the proposal the objective of multi-annual plans is to provide plans for adaptations of fishing mortality rate, that enables all stocks capable of producing MSY by 2015, and where that is not possible the multi-annual plans shall provide for precautionary measures that aim to ensure the conservation of stocks.[281] Article 11 of the proposal, then goes on to cover what the content of multi-annual plans is to be. The Article offers a detailed account of what is supposed to be included in the plans, which as was stated above, are measures that are supposed to provide a base for the fixing of fishing opportunities, and as well what quantifiable targets shall be included in the plans. Therefore multi-annual plans not only provide a base for the setting of TAC, but also introduce other measures that support the sustainable utilisation of the stocks in question.[282] Fishing stocks that are not under multi-annual plans are to be managed by fishing

[278] Eckstein, Anne, "Minister cut to the heart of CFP reform" http://www.europolitics.info. Accessed on 03.08.2011.
[279] By covering either fishing exploiting single fish stocks or fisheries exploiting a mixture of stocks. Article 9(3) Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[280] Multi-annual plans (or recovery plans) were first introduced with the 2002 reform, but were only introduced for stocks that had been depleted to dangerously low levels. In the new proposal, no distinction is made between stocks that are in danger and those that are not, the main target is to achieve sustainable fishing in all fisheries.
[281] Article 10(1)(2) Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[282] Article 11 Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.

opportunities by the Council, which shall be aimed at exploiting stocks at their MSY, by catch and/or fishing effort limits.

The introduction of multi-annual plans, for the management of major commercial fish stock in Europe is an attempt to prevent the Council's practice of setting TACs high above the scientific advice given, which will contribute to conservation of marine resources and the marine environment. Furthermore multi-annual plans decentralize the micro-management by the Council.

4.3.3 Ban on discarding

In the Commission's 2009 Green Paper, the Commission stated that "*the future CFP should ensure that discarding no longer takes place*".[283] In the new legislative proposal that becomes a reality as the proposal introduces in Article 15 an obligation to land all catches. Paragraph 1 of the Article, states that all fish that is subject to catch limits caught in the Union's water or by the Union's vessels shall "*be brought and retained on board the fishing vessels and recorded and landed, except when used as live bait…*" These changes are supposed to take place within specific timeframes, which apply to different species.[284] The obligation to land all catches is not supposed to lead to economic gain for the fisher, and an incentive to avoid unwanted catches is to be found in paragraph 2 of the Article. The paragraph states that the sale of catches, of species mentioned in paragraph 1 which are under adequate conservation size, shall be restricted to the use of fish meal or pet food.[285] Member States are then required to ensure that their vessels are equipped with adequate equipment to monitor compliance with the obligation to land all catches.

The move towards an obligation to land all catches is an important step to solve the problem of discarding within the CFP, although it must be noted that the obligation only applies to the species mentioned in Article 15(1) of the proposal, thus it does not address the problem of discarding of some species in mixed fisheries or the by-catch of non-commercial ones.

[283]Commission COM(2009)163 final, Green Paper: Reform of the Common Fisheries Policy, p. 15.
[284] Article 15 (1) (a)(b)(c). Commission COM(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[285] Article 15 (2) Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.

4.3.4 Technical measures

In the legislative proposal for the new Basic Regulation, which also covers the main principles for technical conservation measures, the Commission proposes to move away from a micromanagement system by co-legislators, towards decentralisation, where Member States have the authorisation to apply the technical measures necessary to achieve the policy's conservation objectives using a toolbox of measures provided for under the policy, with the change providing more flexibility and simplicity.[286] This is to be done by the Member States through the adoption of a technical measure framework, which must be compatible with the Union's legislation.[287] Member States are required to inform relevant parties on any measures they decide to undertake and the Commission has the authority to carry out, at any time, an assessment of the effectiveness and compatibility of those measures. If the Commission deems the measures undertaken by a Member State insufficient, it then has the power to adopt delegated acts, which must meet the objectives of the Technical Measure framework.[288] The Union has always been seen as a top-down management system and the move towards more regional competence, when it comes to conservation measures, is a step towards allowing Member States to have a more say in conservation measures themselves, which has been an increasing demand by the industry. The legislative proposal puts emphasis on the importance of technical measures in reaching the objectives of the conservation policy. It does not lay down how the objectives are to be met, just that they should be achieved. Article 8 of the proposal contains a list of possible technical measures. In comparison to Article 4(4) of the Basic Regulation No. 2371/02, the measures are on the whole compatible, but Article 8 of the proposal gives a much more detailed account of the possible measures whereas Article 4 is of a more general nature.

4.3.5 Effort limitation

Overcapacity is addressed in the new legislative proposal on the Common Fishery Policy. The proposal does not change the Member States' general obligation to adjust their fishing fleet to their fishing opportunities. It is still considered

[286] Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[287] Article 14 Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[288] Article 21 – 24 Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.

necessary to maintain a fleet management policy that contains a fishing capacity ceiling for each Member State, which is decided upon by the Commission.[289] As has been noted, the most radical change the new proposal introduces is the mandatory requirement to use Transferable Fishing Concessions (TFCs) to regulate access to resources. The Commission envisions that the TFCs will accelerate fleet capacity reductions, thus justifying the rule established in Article 35(2) of the proposal where vessels operating under the TFC system are excluded from the fishing capacity ceiling imposed by the Commission. However, overcapacity of the fishing fleet has been portrayed as one of the main problems of the system. The introduction of the mandatory Fishing Concessions system will probably take some time in establishment before a decrease in fishing effort will be seen.

4.4 Conclusion

Previously it was stated that in light of the state of the European fish stocks the objective of reaching sustainable fisheries by the year 2015 is very ambitious. Even though the new proposal makes sustainability a legal obligation, it seems highly unlikely that the objective will be reached, mainly because uncertainty exists regarding the timeframe in which it takes fish stocks to recover, and the objective requires fish stocks to have recovered; and furthermore, it is unlikely because the reform is not supposed to enter into force until 2013. Therefore, there seems to be no point in making the objective of sustainable fisheries legally binding by the year 2015 if in reality it would prove highly impossible. Furthermore, it races questions, if Member States can be held legally accountable if the objective is not met due to reasons such as fish reproduction, which they cannot be held accountable for.

The changes the reform proposes on the CFP management measures can be regarded as adequate measures for tackling some of the problems the policy is facing. If the Commission succeeds in getting the reform agreed upon by the Council and the European Parliament, without any major changes, the measures will, without a doubt, improve many problems challenges the policy. The

[289] Article 34 and 35 Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.

decentralisation of the management of fishing opportunities towards the fishing industry can increase fishermen's incentive to comply with the Community's Fishery Law. Also, the management of fishing opportunities through multi-annual plans will hopefully put an end to the political race to set TACs above the scientific advice given, resulting in TACs becoming effective as a conservation tool. Furthermore, the clarification of the objectives of the CFP will help to establish that short-term interests will not prevail against long-term ones when it comes to the setting of TACs. Regarding the problem of overcapacity of the European fleet, the system of Transferable Fishing Concessions will probably accelerate a decrease in the Union's vessels.

Overall, the measures introduced in the proposal seem to be able counter many of the problems challenging the CFP; however it is too early to speculate on what the fate of the proposal will be because it relies, to a great extent, on the political view of the Member States. The challenges the CFP faces are manifold and result in other problems, in particular problems of a social nature. To ensure that marine resources continue to bring value to societies the aim of their conservation should be of highest priority.

5. Challenges facing the Common Fishery Policy

It has been stated that the CFP faces challenges that hinder its conservation policy from being effective. The policy's lack of effective conservation of marine resources has also resulted in other challenges that are of economic and social nature.

This chapter will discuss and assess the challenges the CFP is facing. The policy's problems are divided into three categories; those relating to conservation, control and enforcement, which correspond to the CFP's main pillars. That way it is easier to comprehend and analyse the nature of the problems. The problems of the CFP can be attributed to flaws in the Community's fishery policy and its fishery laws, which means that in order for the CFP to overcome its challenges a fundamental change is needed in the policy and the laws applying in the sector.

This Chapter begins by discussing the problems identified by the European Commission in its Green Paper from 2009. It then goes on to discuss the problems outlined in the *Explanatory Memorandum* accompanying the proposal for a new Basic Regulation (the 2012 reform). An explanation then follows on the importance of conservation, control, and enforcement pillars to function properly together in order for fishery management systems to be effective.

5.1 The Green Paper from 2009; Identified challenges

As discussed in Chapter 3, a reform of the CFP is underway. In Chapter 2, an account is given of the main changes that were made to the CFP following the 2002 reform which were supposed to contribute to achieving sustainable fisheries within the EU.[290] The changes were, however, not successful in reaching the objective of sustainable fisheries and as a consequence the CFP is undergoing a new round of structural reform. In the Commission's Green Paper published in 2009 it reviews the outcome of the 2002 reform and concludes that the failings of

[290] Commission COM(2009)163 final Green Paper: Reform of the Common Fisheries Policy, 22 April 2009, p. 7.

the reform lie in systematic structural failings.[291] The Commission divides the problem into five main structural failings:

- *fleet overcapacity*
- *imprecise policy objectives*
- *decision-making system that encourages short term focus*
- *insufficient responsibility to the industry*
- *poor compliance by the industry and lack of political will to ensure compliance*

The structural problems that the Commission outlines in the Green Paper can be divided into three main categories as problems concerning conservation, control, and enforcement of the system, which in turn are results of flaws in the fishery policy and law.

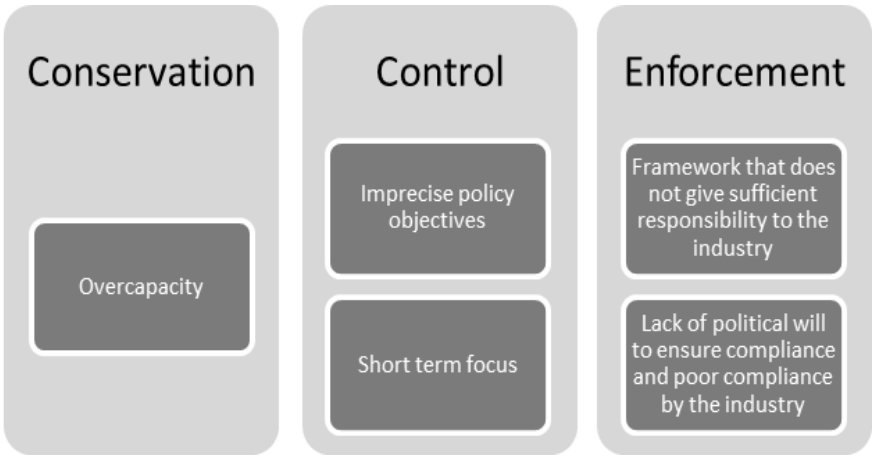

Figure 5.1 Problems outlined in the Commission's Green Paper from 2009

5.2 2012 Reform; identified challenges

The problems outlined by the Commission in the Green Paper have been used as a foundation in the legislative proposal for a new Basic Regulation on the Common Fishery Policy. In the *Explanatory Memorandum* accompanying the proposal, the grounds and objectives for the need of the reform are listed. It identifies both the

[291] Commission COM(2009)163 final Green Paper: Reform of the Common Fisheries Policy, 22 April 2009, p. 8.

main problems the current policy is facing and the justifications for the changes the proposal introduces.

The main problems the *Explanatory Memorandum* lists are in line with the structural problems that are outlined in the Green Paper. Although the *Explanatory Memorandum* does contain a much more detailed account of the problems the policy is facing, many of which are a consequence of the structural problems pointed out in the Green Paper. The main problems outlined in the *Explanatory Memorandum* are: [292]

- *Lack of focus in the objectives on environmental, economic and social sustainability.*
- *Unacceptably high levels of discards.*
- *Fleet overcapacity, overfishing, total allowable catches (TACs) that are set too high and low compliance have resulted in a large majority of Union stocks being overexploited.*
- *Low profitability and low economic resilience for a significant number of fleets.*
- *Insufficient integration of environmental concerns into the policy.*
- *Lack of reliable data to assess all stocks and fleets.*
- *Substantial public financial support to fisheries that does not contribute to achieving the objectives of the CFP.*
- *Low attractiveness of the fishing activities and decline of some coastal communities dependent on fishing.*
- *Top-down micromanagement at Union level, lacking flexibility and adaptation to local and regional conditions.*
- *Insufficient development of aquaculture in the Union.*
- *Legislation and management are costly and extremely complex, which fosters lack of compliance.*
- *Trade policy facing the challenge of globalisation and increased interdependence.*

The problems can be divided into problems of a social, economic and environmental nature and categorised into problems concerning the conservation, control and enforcement of the system. But as has been pointed out, the problems that are listed in the *Explanatory Memorandum* are of much more detailed nature

[292] Commission COM(2011) 425 final Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011, p. 1-2.

than the ones listed in the Green Paper and some of them are regarded to be a result of structural failings within the system.

In Figure 5.2 the problems from the *Explanatory Memorandum* have been divided into three categories: conservation, control, and enforcement which represent the structural problems of the Policy. Low profitability and low economic resilience for many of the Union's fleets are then listed as problems resulting from those structural failings. Finally, low attractiveness of fishing communities and the decline of some coastal communities, as well insufficient development of agriculture, are regarded to be a result of insufficient economic turnout. However, it can very well be argued that social problems, such as the decline of coastal communities within the Union, also result from the overall policy structure.

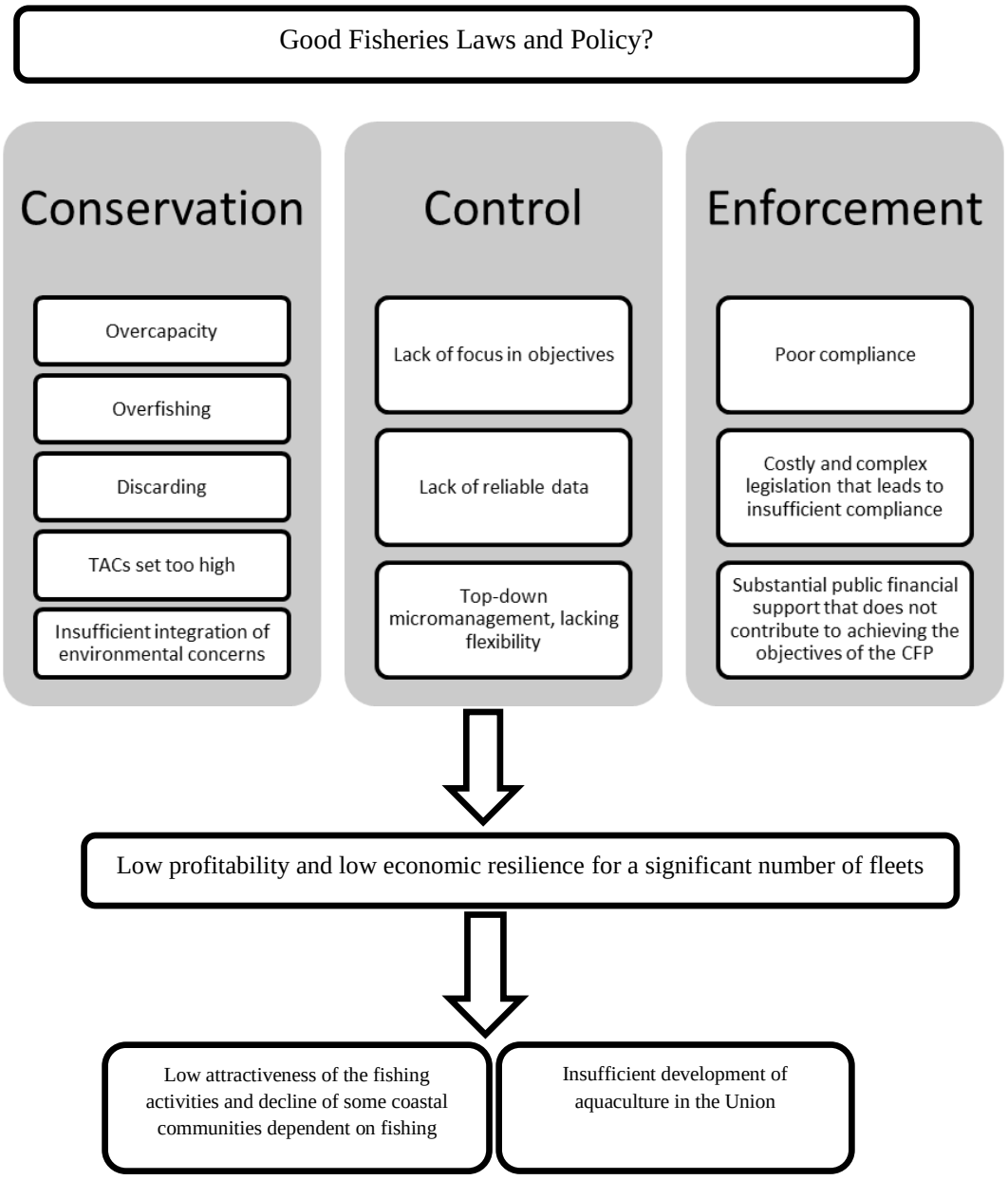

Figure 5.2 Problems outlined in the Explanatory Memorandum

5.3 The three pillars of effective fishery management systems

Conservation, enforcement and control can be described as the three fundamental pillars for the fishery management systems to be effective. The policies on control and enforcement seek to ensure that regulations of a system are respected. Thus, the pillars are all connected and it can be said that they form an on-going cycle. The keystone being the conservation of marine resources, which cannot be reached without effective enforcement and control. In other words, efficient control and enforcement must be respected for an effective implementation and administration of a system.

Figure 5.3 The three pillars: Conservation, control and enforcement.

Because of the interdependent relationship between the three pillars it may prove difficult to draw a clear line between managing instruments that are used to benefit each sector. For example, managing instruments that are used to promote the control policy can also be of significance for the enforcement of system. It must also be noted that the term *conservation* includes measures that are directed for achieving sustainable fisheries and the term *management* refers to the measures that adopt and implement conservation measures.

5.4 Conclusion

The challenges the CFP is facing can be traced back to flaws in the EU's Fishery Law and its policy. These challenges hinder the goal of conservation of marine resources from becoming a reality, and, without a change, the problems will continue to plague the policy. The division of problems into the pillars of conservation, control, and enforcement, enables a comprehensive understanding of the nature of the problems and how they relate to the three pillars. This chapter explained that in order for a conservation policy to be effective, all three pillars must work effectively together. A flaw in one of the pillars will negatively impact the ability to meet the objective of conservation of marine resources. The CFP's problems are manifold. Understanding the nature of the problems and the effects they have on society as a whole can reveal where changes must be made to obtain the objective of sustainable utilisation of fish stocks.

Unlike the CFP, the Icelandic Fishery Management System has been able to manage Icelandic fish stocks in such a way that the objective of sustainable utilisation of marine resources has been better met. There is a fundamental

difference between the two fishery management systems, but despite that, they do have some common ground. After an analysis of the CFP, it is now of interest to describe and analyse the Icelandic Fishery Management System, its main management instruments and controversial issues.

6. The Icelandic Fishery Management System

The overall objective of the Icelandic Fishery Management System is an effective utilisation of marine resources inside Iceland's territory, in a manner that contributes to the welfare of the Icelandic nation. The Icelandic Fishery Management System has by many been as a system of great success,[293] but by others it is perceived as an unjust system serving the interests of a few instead of the nation as a whole. This following chapter gives a descriptive account of the Icelandic Fishery Management System (FMS) and covers contemporary views of Icelandic legal scholars on the nature of the Individual Transferable Quota System, which entered into force in the 1990s. Having said that, it is important to note that the chapter does not give a detailed account of Icelandic constitutional law in relation to the Individual Transferable Quota System, but merely covers the main literature and jurisprudence on the subject.

Fisheries have always been of great importance for the Icelandic nation and the country has owed much of its living standards to marine resources inside its territory; fisheries are a part of the nation's identity. Understandably, the management of marine resources has been a crucial issue for the country. In the 1990s the Icelandic Fishery Management System adopted an Individual Transferable Quota System (ITQ). The nature of the ITQ system has been a subject of great public discourse in Iceland and it can be stated that it lacks both public and political acceptance. Due to the opposition towards the ITQ system, the Icelandic government has proposed an overhaul of the current fishery management regime by introducing a new Fishery Management Act, which is expected to be taken before the Icelandic parliament early in 2012. However, this proposed reform has met criticism and opposition from various entities within the country, in particular from the fishing industry itself. It is therefore too early to predict what will be the fate of the proposal. Despite opposition towards the ITQ

[293] See for example a report published in September 2011 by Nofima, a Norwegian organization that conducts research in aquaculture, fisheries and food industry. In the report, it was concluded that the Icelandic FMS was the most effective and profitable fishery management system out of the Scandinavian countries.

system, it is generally not disputed that the system has improved the overall economic performance of the Icelandic Fishery Management System.[294]

This chapter begins by explaining the socioeconomic significance of the fishing industry for Iceland, and then proceeds to give an account of the history and development of the system. The history and development of the Icelandic FMS is of relevance because it offers an insight into both political and structural conditions that have shaped the system, and furthermore knowledge of how the current ITQ system came into being. Because of the nature of the ITQ system, and public and political perception of the system in Iceland, the chapter also explores contemporary views of Icelandic legal scholar and Icelandic jurisprudence regarding quota holders rights, as previously mentioned. The chapter then examines the Icelandic FMS and describes the main elements of the system's conservation policy, and provides a descriptive account of the management measures the FMS uses to promote its conservation policy.

As has already been explained, every fishery management system requires a control and enforcement system to ensure the effectiveness of fishery law. The chapter therefore also explores and analyses the enforcement and control system of the Icelandic FMS, and offers an account of the main elements the system consists of.

6.1 Socioeconomic significance

Icelanders identify themselves as a fishing nation, as historically fisheries have always been a fundamental part of the country's economy. Iceland is a fairly large island, the second largest in Europe; its geographic size is 103,000 km^2 and its exclusive economic zone is 200 nm or 758,000 km^2.[295] Fisheries are one of the country's main natural resources, making its fishing territory of great importance for the country.

It is generally accepted that fisheries are amongst the most important industries in Iceland. This century, the economic importance of the industry, or its share of the country's total Gross Domestic Product (GDP), has decreased as a result of rapid

[294] See for example: http://eng.sjavarutvegsraduneyti.is/news-and-articles/nr/9306.
[295] www.fisheries.is/Iceland/ Accessed on 16.10.2011.

growth in other sectors, such as the financial and aluminium industry. However, after Iceland's financial market collapse in 2008, the relative importance of the fishing industry has risen again.[296] It has been estimated that in recent years the fishery sector has accounted for around 6-8% of the country's total GDP, and in the year 2009 the fishing sector accounted for 5.8% of the country's total GDP.[297] In recent years the fishing industry has contributed to around 30% of the country's total export, and throughout the 20th century it usually accounted for around half of its total exported goods; in the year 2010 the total export of marine products was 31.3% of the country's total export.[298] Therefore, the industry is a large contributor to the international trade of Iceland.

Most Icelandic marine products are exported to Western Europe, with the UK being the country receiving most of the products.[299] Cod is the most valuable fish in Icelandic waters and has in recent years held around 35% of the total marine export value.[300]

The percentage which the fishing industry accounts for in the country's GDP may seem small in light of the emphasis that has been placed on the industry's importance for the country, but the percentage does not tell the whole story. The externalities of the industry also explain its importance for the Icelandic nation. In recent years many Icelandic companies have been established that specialise in innovation within the industry, using Iceland's extensive knowledge of fisheries and fishery products as a base for their innovation. These companies provide the fishing industry with services and supporting products, in areas such as fishing technology, fish processing machinery and in marketing of seafood products.[301] Many have extended their service and products to the international arena, making their innovations important for the country's economy as a whole. Thus, the fishing industry contributes to the country's economy in ways that cannot be been seen from the percentages in the country's GDP. Therefore it is estimated that on

[296] www.fisheries.is/economy/fisheries-impacts/gdp/. Accessed on 16.10.2011. For example the change in export value of marine products from 2008 – 2010 is around 33%.
[297] *Statistical Series, National Accounts. Gross Domestic Product 2010 – Revision, 2011:10,* 8 September 2011, p. 15.
[298] Statistics Iceland. Export of marine products, www.statice.is. Accessed on 17.10.2011.
[299] www.fisheries.is/economy/fisheries-impacts/export Accessed on 17.10.2011
[300] www.fisheries.is/economy/fisheries-impacts/export Accessed on 17.10.2011
[301] www.fisheries.is/economy/fisheries-impacts/gdp/ Accessed on 16.10.2011.

the whole (directly and indirectly) the fishing industry contributes to 23.12% of Iceland's GDP.[302]

Iceland is sparsely populated, with a population density of only 3 people per km^2.[303] Towns and villages around the country are mainly located by the coast, many of which were settled because of good access to fisheries. Throughout the 20th century, levels of employment in the fishery sector varied between decades. The diversity of employment in the sector has primarily been due to the state of fish stocks around the country and arrivals of new fishing techniques. Employment in the fishing industry reached its peak in the 1980s with 16,000 people working in the sector. Since then its employment rate has steadily been decreasing, and in the year 2010 5.2% of the Icelandic workforce was employed in the industry or 8,600 people.[304] The decrease in the employment rate in the sector results primarily from advantages in technology used in fishing activities and innovation in the sector. However here it must be noted that these employment rates only portray direct employment in the sector, and do therefore not include indirect employment that the fishing industry contributes to.

Above it was stated that Iceland is a sparsely populated country and that many towns and villages were primarily settled because of access to fishing grounds. Fisheries are still very important for the country's coastal communities and regions, where people's main livelihood often stems from the fishing industry. The highest employment rates in the sector are in the Northeast, the Southwest and the capital area of the country, but a different picture emerges when the percentage of people working in the sector is compared between regions. Then it can be seen that the sector's significance is the highest in the Westfjords, where the highest percentage of people are employed in the fishing industry, and is of least significance in the capital area, where employment opportunities are more diverse.[305] Despite the difference in the regional significance of the sector, the

[302] Bryndisardottir, Linda B., "Ekki er allt sem sýnist. Mat á þjóðhagslegri arðsemi íslensks sjávarútvegs". BA thesis., University of Iceland, 2011.
[303] *Iceland in figures 2011. Statistical yearbook of Iceland*, chapter on fisheries. http://www.statice.is/?pageid=452&itemid=bfd2aafb-84f5-4ec9-81e3-461a43276bca. Accessed on 17.10.2011.
[304] Statistics Iceland. Labour market, www.statice.is. Accessed on 17.10.2011.
[305] www.fisheries.is/economy/fisheries-impacts/employment. Accessed on 18.10.2011. The capital area and the Southwest regions operate a diverse fleet and a large part of the trawler fleet. A large

trend in recent years has been that employment in the fishing industry is declining in all regions of the country. Coastal communities have suffered a decrease in population, and urbanisation has characterised the development in both industry and habitation. The Icelandic ITQ system has been held accountable by many for the decline of coastal communities and the livelihood of people that depend on fisheries and the fishing industry as their main source of employment because of quota concentration and the transfer of value from the Icelandic coastal communities. However, it is not only the ITQ system that can be held accountable for the decline of coastal communities around the country, other factors also play a part, such as: fish intended for export processed near airports, and vessels land near fishing grounds. The ITQ system and its main criticisms will be discussed in further detail in Section 6.2.1.

Overall, the fishing industry has always been, and still is, of great importance for the Icelandic nation, both through national identity and economy. It is fair to say that innovation in the fishing industry will indeed continue to advance in the years to come, and therefore affecting employment in the sector in Iceland even more. However, despite effects on employment, the overall importance of the fishing industry for Iceland will remain, both because externalities in the industry will undoubtedly continue to increase in the years to come, contributing to the country's total GDP, and because throughout the years Icelandic fish and fishery products have received wide recognition for its freshness and quality, and therefore, it is likely that the export of Icelandic marine products will continue to be a high percentage of the country's total export, at least in the near future. Having said this it can be stated that it is in the nation's interest to maintain a healthy marine industry and production. It should therefore be a political objective to manage the fishery system in a way that obtains its aims in accordance with the nation as a whole and promotes its welfare.

part of the small scale fleet is located in the West regions and the Westfjords. The Northeast and the East also have a number of small scale fleet.

6.2 Historical background

To understand the nature and development of Icelandic fishery management, the role of the industry in the nation's economy has to be examined. Since the settlement of Iceland, fish has been an important source of food for the nation. Because of the country's geographical position and weather conditions its soil is not suitable for vegetation, thus through the ages fish has provided the nation with a secure food source. From initial settlement until the 20th century, fisheries and agriculture (animal husbandry) were the two main pillars of the country's economy. Nearly no distinction was made between the two pillars and farmers and fishermen took part in both occupations. Farmers relied on fishing as a means of household food supply and most of them were part-time fishermen. Fishermen or coastal dwellers likewise worked part-time in agriculture. It was not until the end of the 19th century that fisheries started to be seen as an independent industry in the country's economy. During the 20th century the importance of the fishing industry grew substantially, which was due to evolution in fishing gear, fishing methods and the extension of the Icelandic fishery jurisdiction to 200nm, which became internationally recognised in 1976. All of this enabled the nation to develop from a poor agricultural country to a prosperous modern society. However, the impact of fisheries on the economy was largely dependent on international fish prices and the conditions of fish stocks in Icelandic waters, as it still is today.

From the years 1901 to 1952, Iceland had a fishing limit of 3nm. In the 1950s scientific knowledge on marine resources increased and concerns started to arise about the conditions of the fishing stocks in Icelandic waters. It became evident that fishing stocks around the country were under severe pressures and being overfished and that stricter management measures were needed to turn the development around.[306] At the time, the fish stocks in Icelandic waters were not in Icelandic waters, as such, but in international waters, with foreign fleets taking up to half of the valuable demersal catches and a third of total catches.[307] Therefore, Icelanders started to campaign for full jurisdiction over their fishing grounds and internationally for coastal states' rights to manage fisheries within their waters

[306] www.fisheries.is/management/ Accessed on 19.10.2011.
[307] OECD, *Country note on national fisheries management systems--Iceland* p. 11, www.oecd.org/dataoecd/ Accessed on 19.10.2011.

and to prevent overfishing. In 1958 an important milestone was reached in the campaign with the extension of Iceland's Exclusive Economic Zone (EEZ) to 12nm, and in the year 1972 it was extended again to 50nm. The current 200nm EEZ has been effective and internationally recognised since 1976. All of the extensions on Iceland's jurisdiction were strongly opposed by neighbouring states that had practiced fishing activities in Icelandic waters, in particular by the UK which also had great interests from fishing within the jurisdiction. This resulted in clashes between the two countries, generally referred to as the "*cod wars"*.[308]

After Iceland extended its fishery jurisdiction to 200nm, and with the elimination of foreign fishing activity in Icelandic waters, the country was able to adopt management measures it deemed necessary for the protection and conservation of important fish stocks under its exclusive territory. Icelandic authorities were now able to introduce new fishery management regimes to control fishing under its jurisdiction. Since 1976 several fishery management systems have been implemented to try to restrict fisheries. Those included *catch quotas, fishery access licensing, fishing effort restrictions, investment control and vessel buyback programs,* and *individual vessel catch quota*.[309] However, these management measures were not successful in turning the depletion of important fish stocks around, and vessels kept on competing for shares in TACs. As a consequence, fishing effort exceeded the reproductive capacity of the fish stocks and catch value did not follow the development of fishing capital.[310] Hence, Iceland's extension of its fishery jurisdiction to 200nm did not alter the pattern of the *tragedy of the commons,* as far as domestic fisheries were concerned.

This led Icelandic authorities to decrease further access to fisheries. The system of Individual Vessel Quota (IQ) was gradually adopted for specific fisheries in the 1970s and 1980s. The IQ system evolved during the 1980s and gradually became the current Individual Transferable Quota System (ITQ) that primarily manages Icelandic fisheries today. Two events in particular marked the development of the system: one in 1984 with the adoption of Individual Transferable Quota in

[308] www.fisheries.is/management/, Accessed on 19.10.2011. The United Nations Convention of Law of the Sea, held in 1973, codified coastal states rights to 200nm territorial sea and entered in to force in 1994.
[309] OECD, *Country note on national fisheries management systems--Iceland* p. 11, www.oecd.org/dataoecd/ Accessed on 19.10.2011.
[310] Runolfsson, B., Arnason, R., "Initial allocation of ITQ's in the Icelandic fisheries", p. 24.

demersal fisheries, and the other with the 1990 adoption of a new Fisheries Management Act (Act No. 38/1990) which introduced the ITQ system in practically all fisheries.[311]

6.2.1 Quota holders rights; Initial allocation of quota and ownership of marine resources

One of the most interesting questions regarding the Icelandic FMS, and the one that is most heatedly debated in the Icelandic society, is if quota holders' rights to extract fisheries provide them with private property rights or ownership of a particular quantity of fish. The question also touches upon other fundamental issues of marine resource management, such as who should benefit from the value that fishing quotas and rights provide fishermen with; the citizens of a particular society, the fishermen or the quote holders themselves? An answer to the latter question is largely dependent on people's perception on what kind of management of natural resources best serves citizens' interests. An answer to the first question, on the other hand, among other things, requires an examination of how law defines ownership of natural assets and jurisprudence. Therefore in order to explore if Icelandic quota shares can be viewed as providing their holders with private property rights, the initial allocation of harvesting rights must be explored, as well as to whom, if any, Icelandic law confers ownership of marine resources.

Icelandic fisheries were, until 1976 (with the extension of fisheries' jurisdiction to 200nm) international and open-access fisheries. After trying various management measures to restrict access to fisheries without adequate results, and still suffering a significant decline in certain fish stocks, authorities decided that the rule of open-access had to be abandoned. In practice this meant that the size of a fleet that could participate in fishing activity had to be restricted by limiting the eligibility for vessels to receive a fishing license, and a system was adopted that allocated quota to individual vessels, generally known as the IQ/ITQ system.

The initial allocation of permanent IQ/ITQ shares varied somewhat between fisheries. In the *pelagic fisheries* the quota share was based on a vessel's historic catch of herring in the late 1960s and if the vessel was still in operation in 1975.

[311] OECD, *Country note on national fisheries management systems--Iceland* p. 11, www.oecd.org/dataoecd/ Accessed on 19.10.2011.
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Only vessels that fulfilled this criterion were eligible for quota share. In the *capelin fisheries* eligible vessels were also the ones that had a recent history of participation in the fishery, however, one-third of the quota shares were allocated on the basis of vessel hold capacity. The initial allocation of quota shares in the *demersal fisheries* in 1984 equalled the vessel's average share in the total catch during the three prior years.[312] However, an important exception was installed regarding quota shares in demersal fisheries that enabled vessels to modify quota shares by opting for effort restrictions instead of catch quotas. In 1988 the Icelandic Parliament agreed on a general vessel quota legislation that applied to all demersal fisheries and was in force between the years 1988-1990. Lastly, the initial quota share allocation in *shrimp, lobster and scallop fisheries* was founded on a vessel's historic catch record during certain base years.[313] As stated, all the fisheries became a uniform part of the ITQ system when the Fishery Management Act from 1990 was adopted. Because of public and political opposition towards the ITQ system, amendments were made to the Act several times during the 1990s, such as some restrictions of transferability within the system.[314] The Fishery Management Act from 1990 has now been replaced by the Fishery Management Act No. 116/2006, which contains the main rules on Icelandic fisheries.

Even though the initial allocation of quota share differed between fisheries, it was mainly allocated to vessels on the basis of their catch history with little variation. Therefore, it can be stated that the *general rule* for entitlement to quota share is a vessel's catch history in specific fisheries. When it was decided that access to fisheries had to be limited, the policy behind distributing the quota shares was that it was to be done in a "*fair* " way, and that it was fair to distribute quota shares to those who had previously had fishing as their occupation. As pointed out by Runolfsson and Arnason regarding the initial allocation of quota shares, the main goal of the introduction of IQs and ITQs was to improve the economic efficiency

[312] It was the Fishery Association of Iceland, a broad forum of fishery participants that put forward a proposal to the Ministry of Fisheries to try IQ for the demersal fisheries for one year, the year 1984. After the trial year, vessel owners were generally satisfied. That and because of the favourable results of the system it was decided to extend it to the years 1985, 1986 and 1987. However to secure political support for the system the exceptions were put into the Fishery Management Act of 1976, but were abandoned in the Fishery Management Act of 1990.
[313] Runolfsson, B., Arnason, R., "Initial allocation of ITQ's in the Icelandic fisheries", p. 24-29.
[314] Runolfsson, B., Arnason, R., "Initial allocation of ITQ's in the Icelandic fisheries", p. 27.

of Icelandic fisheries. The allocation was then decided upon by the national administration, in collaboration with the parties that had the most fishery interest, i.e. vessel owners, fishermen and regional representatives.[315] The initial distribution of quotas has been a central issue in the debate on the Icelandic Fishery Management System. Many see the allocation of quota shares, as an unjust allocation of common resources, with the main arguments being that certain vessel owners received fishing rights for free, i.e. received quotas free of charge. And furthermore, that because fishing rights are transferable, the system has been criticised for having developed into a *two-tier* system, where some vessel operators have been obliged to buy their quota shares, while others received theirs free of charge.[316] This is the subject of an article published by Thorvaldur Gylfason in Morgunbladid,[317] in 2008, where he argues that the opposition towards the system lies in the initial allocation of quota shares but not in the system as such.[318]

As has previously been explained, the ITQ system and the nature of vessels' quota share has been a subject of manifold discussions in Icelandic society, and been fiercely criticised. It has also been explained that the main objective of establishing the ITQ system was to improve economic efficiency of Icelandic vessels. The economic theory of the efficiency of the ITQ system suggests that the "*efficiency of an ITQ system stems from its creation of private property in harvesting rights*".[319] Hence, the alteration from a common property to a private one makes the right holder treat the property in a different manner because of their ownership. Their treatment of the property becomes more effective and results in more economic efficiency; fishers gain more economic benefit from selling the quota they hold to fishers that are more efficient in harvesting the fish, than in keeping it themselves. Therefore, fishers do not compete with each other for catches, thus private property excludes the problems that stem from common properties, i.e. the problem of the *tragedy of the commons*.

[315] Runolfsson, B., Arnason, R., "Initial allocation of ITQ's in the Icelandic fisheries", p. 30.
[316] Gretarsson, Helgi A.: The Nation and Fishing Quotas: On the Icelandic Fishery Management System 1991 – 2010 and constitutional Issues, p. 150.
[317] One of Iceland's most widely read newspaper.
[318] Gylfason, Th., "Unlawful and Unethical". Frettabladid.is Accessed on 19.10.2011.
[319] Runolfsson, B., Arnason, R., "Initial allocation of ITQ's in the Icelandic fisheries", p. 28.

One of the debated issues of the nature of ITQs is if the system establishes permanent property rights for holders of quota share,[320] or if it establishes any other kind of rights for those that have received rights to utilised marine resources within the country's territory, and have for that purpose used their financial means. Article 1 of the Icelandic Fishery Management Act No. 116/2006, has been a central issue in that debate. The article states that:

"*The exploitable marine stocks of the Icelandic fishing banks are the common property of the Icelandic nation. The objective of this Act is to promote their conservation and efficient utilization, thereby ensuring stable employment and settlement throughout Iceland. The allocation for harvest rights provided for by this Act neither endows individual parties with the right of ownership nor irrevocable control over harvest rights*"[321]

The wording of the Article indicates that Icelandic marine resources are a common property of the Icelandic nation and that the allocation of quota does not provide individual parties with the right of ownership, nor does it give them irrevocable control over marine resources. It can be said that the latter sentence highlights the first sentence; that marine resources are the nation's common property. But despite the wording of the Article the phrase *common property* has been criticised for being unclear, and has been one of the major issue in the debate of who can receive the benefits from the right to extract fish inside Icelandic jurisdiction; quota holders or the Icelandic nation as a whole.

The issue has also been a subject to some debate between legal scholars in Iceland, in particular if marine resources can be a subject to the ownership of the Icelandic nation or the State.[322] There seems, however, to be a general consensus amongst them that the phrase *common property* does not imply a private ownership over marine resources of quota holders, but rather that it represents a legislative statement or policy that marine resources should be utilised in a way that benefits the nation, as a whole in the best possible way. Thus, the article is not considered to confer legal rights to the Icelandic nation, but rather that it can

[320] Permanent because the Fishery Management Act does not contain any provision on a timeframe for the system.
[321] Article 1, The Fishery Management Act No. 116/2006.
[322] See for example the following Icelandic articles: Lindal S., and Orlygsson, Th., "*Um nýtingu fiskistofna og töku gjalds fyrir nýtingu þeirra*"; Dr. Gauksdottir, G., "*Eru aflaheimildir "eign" í skilningi 72.gr. Stjórnarskránnar*".

be used to interpret general objectives of Icelandic Fishery Law.[323] In a judgment delivered by the Icelandic Supreme Court in the year 2000, No. 2000/1534[324], the Court discussed the meaning of the then-current Article (the Article did not change with the Fishery Management Act No. 116/2006) the Court held that:

"According to the 3rd sentence of Article 1 of the Fishery Management Act, the allocation of quota shares does not create a right of ownership nor irrevocable control over harvest rights for individuals. Therefore quota shares are only permanent in the sense that they will not be downgraded nor changed without changes in legislation. The parliament can thus decide in legislation on the right to fish, fishing restrictions or to collect higher fishing fees than is presently done, in the light of changed views towards the allocation of the Icelandic nations' common property that marine resources are".[325]

Hence, quota shares do not establish private ownership for individuals irrespective of how they became holders of the ITQ. According to the judgment, the Icelandic parliament can change the rules on access to Icelandic fishing grounds and revert to open access if it deems so fit. The Court's interpretation of Article 1 of the Fishery Management Act is important to the discussion on the nature of the ITQ system, especially concerning the permanence and exclusivity of the system. In light of the Court's judgment and the view of legal scholars in Iceland, one can say that the Icelandic ITQ system resembles more user rights, or rights to extract certain fisheries, but not private ownership of quota shares.

However, it is commonly viewed by Icelandic legal scholars, and has also been confirmed by Icelandic courts, that Article 1 of the Fishery Management Act provides holders of quota shares with certain rights. Because of this, it is not considered admissible to confiscate quotas from their holders without making it up to them in some way, thus the possession of quota shares has created a *right* for quota holders to be able to pursue their occupation.[326] Now that a proposal has been put forward on the reform of the Icelandic ITQ system, this view is upheld and the proposal introduces a so called *negotiation way* with quota owners. Generally speaking, the negotiation way still proposes quota shares, but the

[323] Gretarsson, Helgi A.:The nation and the Fishing Quotas: On the Icelandic Fishery Management System 1991 – 2010 and Constitutional Issues, p. 29.
[324] At the time of the judgement the Fishery Management Act from 1990 was in force. Article 1 of the current management act is identical to Article 1 from the previous act.
[325] Icelandic Supreme Court H 2000, p. 1534 (case no. 12/2000) (Vatneyri case). www.haestirettur.is, Accessed on 20.10.2011. Translated by the author.
[326] For further information on the subject see a Judgement from the Icelandic Supreme Court H 1998, p. 617 (Case No. 145/1998) (Valdimar case).

current ITQ system is to be changed over to contractual rights for quota holders.[327] In Section 6.3.2 the relationship between the Icelandic Constitution and the ITQ system will be discussed in further detail.

At the beginning of the section it was explained how the initial distribution of quota shares between Icelandic fishing vessels was conducted. The allocation was to be done in a "fair" way, and a fair way was considered to be a distribution of quotas to vessels based on vessel's catch history in specific fisheries. It was also explained that the main objective of the establishment of the IQ/ITQ system was to improve economic efficiency of the Icelandic fishing fleet. The emphasis on economic improvement of the fishing industry and the close cooperation with stakeholders on how fishing rights should be distributed implies that there seems to have been a lack of *political objective* on how the allocation was to be conducted. It is of course important that the fishing industry's views and interests are taken into consideration when changes are made to fishery management systems, but it is not the only entity that should be taken into consideration; other objectives such as social factors also have to be taken into account. It can be argued that because of the lack of political objective when the initial allocation of quotas took place, and the emphasis of distributing the quota in accordance to the will and interest of the fishing industry, the public has, to a great extent, seen the system as an unfair distribution of common resources that only few enjoy. This perception, that the system is *unjust*, seems to place emphasis on the wording in Article 1 of the Fishery Management Act, that marine resources inside of Icelandic jurisdiction are the *common property* of the Icelandic nation, and therefore that the nation has ownership over Icelandic marine resources, and should receive some benefits associated with fishing. The general perspective of legal scholars that the wording has a limited legal meaning has not altered this perception. Thus legal analyses by Iceland's legal experts have not exceeded to divert public discourse, and as a consequence the debate about the system circles around the wording of Article 1 of the Fishery Management Act.

[327]Ministry of Fisheries and Agriculture. *Report regarding the reform of the Fishery Management Act. Issues, analyses, reports and options regarding the reform of the Fishery Management System*, p. 30, http://www.sjavarutvegsraduneyti.is/media/Skyrslur/meginskyrsla_uppsett_lokaeintak.pdf Accessed on 22.10.2011.

6.3 Conservation of marine resources

This thesis has previously explained that because marine resources are exhaustible it is generally accepted that they have to be conserved. In modern times this has been the responsibility of governments. They have established policies to ensure the conservation of marine resources that are enforceable by law, in order to protect the rights of future generations, and to deliver value to society. Nations have mainly carried out this task by limiting catches, by creating rights to extract a particular amount of fish from the sea. In order to conserve Icelandic marine resources, Icelandic governments have done just that, established a fishery policy or a fishery management system, with the aim of conserving Icelandic fish stocks, which is enforceable by law.

The Icelandic Fishery Management System (FMS) is primarily governed by The Fisheries Management Act No. 116/2006. The Fishery Management Act contains the main provision on the country's fishery management system. According to Article 1 of the Act, the overall objective of the Icelandic fishery management system is to "*promote conservation and efficient utilization of the Icelandic exploitable marine stocks, thereby ensuring stable employment and settlement throughout Iceland*".[328] Article 1 refers to *exploitable marine stocks*; the term is further defined in Article 2 of the Act, which states that the Fishery Management Act "*applies to all marine resources that are found within Iceland's territory*".[329] Article 3 then goes on to state that in order to *ensure the conservation* of Icelandic fish stocks, the Minister of Fisheries and Agriculture annually decides, in a regulation, on the Total Allowable Catch (TAC) of marine species that are subject to quota regulation.

The settings of TACs are based on scientific assessment of the state of the fish stocks and the condition of the ecosystem around the country. It is the Marine Research Institute (MRI) that carries out wide and extensive scientific analysis on the state of the marine resources, and it is on that foundation that the Minister of Fisheries and Agriculture bases its annual regulations.[330]

[328] Article 1 The Fishery Management Act No. 116/2006.
[329] Article 2 The Fishery Management Act No. 116/2006.
[330] Article 3 The Fishery Management Act No. 116/2006.

As was previously stated, according to Article 3 of the Fishery Management, it is the Minister of Fisheries and Agriculture that determines in a regulation, after having received thorough scientific advice from the MRI, the TAC of marine species that are subject to quota regulation. The MRI's main activity is to conduct wide scientific analysis on the state of Icelandic marine resources and long-term analyses on the Icelandic marine ecosystem.[331] However here it is noteworthy that the minister is not obliged to follow the scientific advice given from the MRI.

The scientific advice given to the Ministry of Fisheries and Agriculture generates from both national and international institutions. In general, the process of generating management advice can be divided into two processes; *the national one and the international one*. To begin with, the process of generating management advice at the national level, carried out by the MRI, will be described. The MRI uses all available data from the Directorate of Fisheries as a foundation for its management advice, as well as scientific advice generated from the MRI scientific evaluations. The data includes: data on landings, data from logbooks, surveys and other sources that may prove helpful in determining the state of marine resources. To begin with, individual experts evaluate the collected data on the fisheries that are subject to TACs. Their evaluation is then presented to the TAC Advisory board. The TAC Advisory board is a group of nine assessment experts that analyse the results presented by the individual experts. After analysing and assessing the experts' results, the group gives its own projections and advice; this is an interactive procedure with individual experts. The end results are then put together in an annual report on the state of stocks and prospects. This annual report is the management advice that the Ministry of Fisheries and Agriculture receives before deciding on the annual TAC in a regulation.[332] As mentioned, scientific advice for the annual TAC regulation also stems from an international institution, the International Council for the Exploration of the Sea (ICES). Scientific advice from the ICES is used because most of the fish stocks that the MRI analyses and assesses are also evaluated by

[331] Icelandic Marine Research Institute, *Activities of the Marine Research Institute,* 2008, p. 2.
[332] *The process of generating management advice*, Björn Ævarr Steinarsson. MRI Advisory Committee, Reykjavik 3-5 Sept. 2008.

the ICES.[333] The process within the ICES begins with three working groups assessing the evaluations made by the Icelandic experts. The evaluation from Iceland first goes to the North Western Working Group. The North Western Working Group assesses the state of fish stocks and their short-term and long-term outlooks. The group then produces a so called draft advice and a report of the work that the group carried out. The draft advice and report are then sent to the Review Group of on the North Western Stocks that consists of independent scientists who provide a technical review of the work carried out by the North Western Working Group. Their technical review of the advice then proceeds to the Advice Drafting Group that consists of 20 members from different member states that the Advisory Committee has appointed. The Advice Drafting Group drafts its advice based on the draft advice from the expert groups and the report of the Review Group.[334] Their draft advice is then passed on to the Advisory Committee that produces the final recommendation for the setting of TACs. The Icelandic Ministry of Fisheries and Agriculture then receives the recommendation from the Advisory Committee. Hence, before deciding on TACs in the TAC regulation the Ministry is presented with advice from both the MRI and the ICES. Based on the information in these reports, the minister decides upon TACs in the regulation.[335]

[333] Icelandic Marine Research Institute, *Activities of the Marine Research Institute,* 2008, p. 28 - 29.
[334] Icelandic Marine Research Institute, *Activities of the Marine Research Institute,* 2008, p. 28-29.
[335] *The process of generating management advice*, Björn Ævarr Steinarsson. MRI Advisory Committee, Reykjavik 3-5 Sept. 2008.

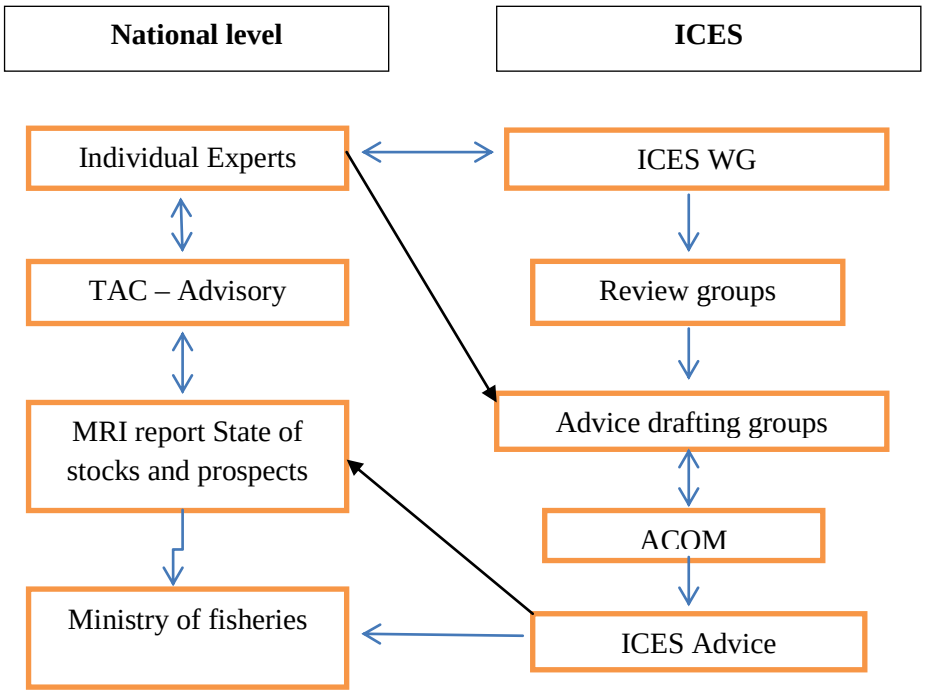

Figure 6.1 Process of generating management advice - Icelandic FMS.

The conservation policy of Icelandic fish stocks is primarily based on two main management measures; on the one hand it is based on the system of Total Allowable Catches, as previously mentioned, and on the other, various protection and conservation measures.[336] The conservation policy thus consists of both input and output measures, the input measures are the protection and conservation rules, and the output measures are the TAC system that limit the allowed catches of fish and rules regarding the distribution of TACs between fishing vessels.

Together Articles, 1, 2 and 3 of the Fishery Management Act spell out the conservation policy of the Icelandic FMS. It can be inferred from the articles that the main aim of the Icelandic Fishery Management System is to conserve fish stocks in a manner that ensures its efficient utilisation and contributes to the employment and settlement throughout the country. This objective requires that marine resources are exploited at a sustainable level, which according to the Article, is a premise for acceptable level of employment in the fishery sector and settlement throughout Iceland. The objectives of the Fishery Management Act

[336] Palsson, Ottar, Stefansson, Stefan, M.:*The Icelandic and the European Union's Fishery Management rules. Development, comparison and Iceland's position*, p. 126.

thus also touches upon the issue of Iceland's identity as a fishing nation, as many coastal communities are dependent on fisheries for their livelihoods and the fishing industry has been an important source for employment within the country. As was discussed Icelandic authorities have adopted several management measures to carry out the conservation policy; in particular TACs and various other protection measures. Together these measures are envisioned by Icelandic policy makers to adequately conserve marine stocks within Iceland's territory. These measures will be discussed in further detail in the following sections.

6.3.1 The Individual Transferable Quota System and its main rules

This thesis has discussed earlier that the Icelandic ITQ system has been the subject of manifold discussions in Icelandic society. The discourse is mainly directed at the validity of the system, but lesser attention has been given to the rules that govern the ITQ system itself. The system is heavily regulated, and therefore a discussion to describe its main rules and features is warranted. However it must be noted that this discussion does not offer an exhaustive account of the rules governing the system; instead it focuses on the major ones.

In order to conserve Icelandic marine resources the Icelandic legislator has created rights for operating vessels to catch a particular quantity of fish. The premise for Icelandic fishing vessels to be able to conduct commercial fishing is a possession of a general fishing permit. General fishing permits are indefinite, but permits for particular fisheries are issued on a year-to-year basis. There are two kinds of general fishing permits: *fishing permits that are subject to quota and fishing permits that are subject to hook-and-line catch quota*. Each vessel is only allowed to be in possession of one of those permits each year. In addition to the general fishing permits, there are fishing permits for particular fisheries. If a fishing vessel does not use its permit for one year, the fishing permit becomes invalid.[337] Fishing permits are distributed to individuals in charge of vessels holding fishing certificates of seaworthiness and registered in the Registry of Vessels of the Icelandic Maritime Administration, or the special registry of the Administration for boats less than 6m in length.[338] If a vessel does not fulfil the criteria put

[337] Article 4 The Fishery Management Act No. 116/2006.
[338] Article 5 The Fishery Management Act No. 116/2006. Here it is noteworthy that owners and operators of the vessels must fulfil the criteria put forward in the Act on Investment by Foreign Parties in Industrial Operations and the Act on Fishing and Processing by Foreign Vessels in

forward in Article 5 of the Fishery Management Act, the vessel will not be granted a fishing permit. However, if it does fulfil the criteria, authorities cannot deny them of a general fishing permit. A vessel that has possession of a commercial fishing permit is free to fish all marine species that are not subject to TACs, although the vessels are subject to other general conservation rules.[339] Fishing stocks that are economically important are included in the ITQ system, which counts up to about 95% - 97% of the total catch value. [340] Therefore, there are not many valuable species that are not subject to TACs, and furthermore if a marine animal, which is not subject to TACs, becomes desirable to fish, a special fishing permit to conduct those fisheries is usually issued. If a TAC is set for a new marine animal, which has not been subject to TACs before, quota share to vessels shall, according to Article 9 of the Fishery Management Act, be "*allocated on the basis of catch performance for the last three fishing periods*".[341] If no such uninterrupted experience exists, the Minister of Fisheries and Agriculture can determine the allocation to individual vessels based on certain criteria.[342]

The main features of the ITQ system are explained in Article 8 of the Icelandic Fishery Management Act No. 116/2006, specifically in Articles 8(2), (3) and (4). After the Minister of Fisheries and Agriculture has decided in a regulation on the annual TAC, TACs are distributed to vessels that have quota share. Each vessel's catch quota, or quota share, is thus a specific share of the TACs.[343] Hence, vessels are obliged to have a catch quota for their catches for all species which are subject to the TACs. Article 8(2) a vessel's quota share shall remain unchanged from year-to-year. However, not all TACs are distributed to vessels that are holders of ITQ share. A part of the TAC shall be deducted from the national TACs and used

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Iceland's Exclusive Fishing Zone. According to the Act on Investment by Foreign Parties in Industrial Operations only the following may conduct in fishing operations within the Icelandic fishing territory: Icelandic citizens or Icelandic persons, Icelandic legal persons which are wholly owned by Icelandic persons or Icelandic legal persons that: are controlled by Icelandic entities and are not under more than 25% ownership of foreign residents calculated on the basis of share capital or initial capital. However, if the share of an Icelandic legal person conducting fishing operations in the Icelandic fisheries jurisdiction or fish processing in Iceland is not above 5%, the share of the foreign resident may be up to 33% or in other respects under the ownership of Icelandic citizens or Icelandic legal persons controlled by Icelandic persons. Source: Article 4(1) of the Act on Investment by Foreign Parties in Industrial Operations no. 34/1991.

[339] Article 8(1) The Fishery Management Act No 116/2006.

[340] The Directorate of Fisheries, *General information*, 2011.

[341] Article 9(1) of the Fishery Management Act No 116/2006.

[342] Article 9(2) of the Fishery Management Act No 116/2006.

[343] Article 8(3) The Fishery Management Act No.116/2006.

for other purposes prior to allocating TACs to vessels. Article 8(4) gives a detailed account of the deduction the minister of Fisheries and Agriculture shall conduct prior to distributing TACs to vessels on the basis of their quota share and how that quota shall be utilised.[344] The deductions are fourfold. First the Article states that the minister of Fisheries and Agriculture shall deduct quota for *coastal fishing*. The provision on coastal fishing is found in Article 6.a of the Act, which is a provision adopted in the year 2010. According to the Article, the Minister of Fisheries shall each fishing year deduct 6000 tonnes of ungutted demersal fisheries from the TAC. Coastal fishing is defined as fisheries with handlines which may only be conducted from 1 May – 31 August, and which is subject to permission from the Directorate of Fisheries.[345] Article 6.a then explains in further detail who is eligible for such a permission from the Directorate of Fisheries and when the fisheries can be conducted. According to the Article the quota depleted from the TAC and used for coastal fishing shall be divided amongst four regions. It is the Minister of Fisheries and Agriculture that decides in a regulation on how the four regions shall be chosen and how quota shall be divided between them. Secondly according to Article 8(4), the minister shall, each fishing year, deplete 12,000 tonnes of ungutted demersal species to withstand anticipated changes due to significant changes in the catch quota for individual fish species and for regional support. Regional support is then defined as a support for communities that are facing difficulties because of downturns in fisheries and communities that have suffered cutbacks in the total catch quotas of vessels which affect employment in the area.[346] Fourthly, the minister shall, according to Article 11, deplete from the TAC's long line quota discount, which means in practice that when a vessel exceeds its catch quota for some species, its catch quota for other species will be reduced in proportion to the relative value of each species.[347] According to the Articles the usage of the depleted quota from the TACs is mainly to be used for social means. Both depletions, in accordance to provisions 6.a and Article 10, are conducted to meet problems that communities that are dependent on fisheries and the problems the fishing industry is facing.

[344] Article 8(4) The Fishery Management Act No. 116/2006.
[345] Article 6.a The Fishery Management Act, No. 116/2006. Article 6 of The Fishery Management Act gives a detailed account of how coastal fisheries are conducted.
[346] Article 10(1)(2)(a)(b) of the Fishery Management Act No. 116/2006.
[347] Article 11(1) of the Fishery Management Act No. 116/2006.

As has been explained, the ITQ system provides vessels with a quota share in fisheries that are subject to TACs, the quota share is thus a fixed percentage of the allowable catch in certain fisheries. In practice, this means that each vessel's quota is secured and restricted by its share which eliminates the problem of fishermen competing for shares in allowable catches. In the ITQ system, each vessel's quota share is transferable. Allowing transfer of quota shares between vessels rests on the economic theory of efficiency. According to the theory, the transferability of catch quotas creates a market for catch quotas, and the because of the quota market, the quota will move to the most efficient fishing firms, which in turn leads to a more efficient fishing industry.[348] Thus, in accordance to the theory, the ITQ system ensures that the TACs are secured by the most efficient fishers and fishing firms, which in turn results in a more efficient fishing industry. However, this also results in quota concentration. Both the quota shares and the annual catch quotas of vessels are transferable. The transferability of quota shares is governed by Article 12 of the Fishery Management Act. According to the Article vessels' quota share can be transferred, wholly or partially. The transfer of quota shares is subject to some restrictions. First, the transfer of quota may not exceed the receiving vessels quota entitlement, and furthermore neither its fishing capacity. Secondly, the Directorate of Fisheries must approve the transfer. Thirdly, the transfer of quota shares is prohibited unless those that possessed an operating lease in the vessel in question on the 1st of January 1991, agree to the deed, and furthermore a written agreement is required from those that possessed an operating lease in the vessel from the 1st of January 1998. And fourthly before a transfer of quota share can take place a formal written agreement is required from the requisite council, depending were the vessel is situated.[349] It can thus be stated that the transfer of quota shares is fairly free.

The transfer of annual vessel catch quotas are, also, subject to some restrictions according to Article 15 of the Fishery Management Act. First, a vessel cannot transfer more than 50% of its annual catch quota and the transfer must take place

[348]Arnason, Ragnar, "Advances in ITQ Fisheries Management", p. 31.
[349]Gretarsson, Helgi A.: The Nation and Fishing Quotas: On the Icelandic Fishery Management System 1991 – 2010 and constitutional Issues, p. 54-55.

within the fishing year. Secondly, the transferred quota may not result in a vessel's fishing quota exceeding its fishing capacity. And lastly, if a fishing vessel fishes less than 50% of its quota share during two consecutive fishing seasons it loses its quota and other vessels' quotas are enlarged by that quota share. [350] Quota transfer must be approved and executed by the Directorate of Fisheries. Prices and quantity of the transfer shall be accessible at the Directorates of Fisheries website. The main reasons for the installation of the restriction were to prevent speculation in quota prices and holdings and to stabilise local employment in the short run.[351] On the whole, the restrictions on the transfer of annual vessel catch quotas, and quota entitlements, are insignificant and it can be said that the transfer is fairly free despite the restrictions; however, they may prove to prevent speculation in quota prices and holdings, therefore making them less frequent.
After the adoption of the ITQ system in Iceland a quota market has emerged.

The ITQ system is subject to administrative procedures that result in some flexibility of the system, these are:

- 15% of each vessel's catch quota can be transferred to the following fishing year
- 5% can be caught in excess of a vessel's catch quota which is then deducted from next year's quota
- Species conversion (demersal species only)
- Undersized fish are only partially withdrawn from catch quota
- Logline quota discount (20%)
- Permission to land up to 5% in excess of quotas - monetary value of excess catch goes into a special development fund run by the minister[352]

Article 13 of the Fishery Management Act introduces the maximum quota share that can be owned by natural or legal persons or by connecting parties, of the combined quota share of each vessel. The maximum quota share held by any legal entity depends on fish species and varies from 12% for Cod and 35% for Redfish. The Article further states that the total quota share of fishing vessel, owned by individual parties, whether natural or legal persons, may never amount to more than 12% of the total value of the catch shares of all species that are subject to

[350]Unless the reason lies in damage or a major breakdown of the vessel. Article 15(5)(6) of the Fishery Management Act No. 116/2006.
[351]Runolfsson, B., Arnason, R., "Initial allocation of ITQ's in the Icelandic fisheries", p. 27 – 28.
[352]Directorate of fisheries. *General introduction 2011*, and Article 11 of the Fishery Management Act No. 116/2006.

TACs.[353] Article 13 is supposed to prevent quota concentration by legal entities. A common argument against the ITQ system is that by distributing quota to fishing firms it may lead to the concentration of quota being in the hands of a few big companies or the quota being situated in a few big fishing towns. This would have devastating effects on many fishing communities that rely on the fishing industry, as employment would disappear and thus people would be forced to move elsewhere to make a living. Also, the concentration of quota in the hands of a few big companies leads to the disappearance of small-scale vessels and fishermen from the scene. In Iceland there is, as mentioned in Section 6.2, a clear trend towards urbanisation. Around the country people are moving away from the villages and towns and towards the capital area. Lack of employment opportunities are often mentioned as the main factor for this development, and many blame the ITQ system, as quota has been transferred to bigger fishing towns. It is clear that many towns have lost a large amount of their quota; this can be seen from looking at landing and employment statistics (as explained in Section 6.2). Employment in the fishing industry is highest in the capital area and landing in that area is also the highest in the country. Thus, there has been a certain movement of the quota towards the south of the country. However, not everyone shares this view, in a newspaper article published in Morgunbladid in 2011, Ragnar Arnason, a professor of economics at the University of Iceland, denies that the ITQ system has any connection to the decrease in population in coastal communities in Iceland. On the contrary, he points out that after the implementation of the ITQ system, population decrease in communities that are dependent on fisheries has slowed down from what it was in the 1980s.[354]

As has previously been pointed out the ITQ system has been criticised for the initial distribution of quota rights to operating vessels free of charge. Therefore in the years following the system's enforcement, a discussion on the adoption of a special *fishing fee* had both some political and public support. It was then in 2004 that a legal provision entered into force that introduced a special fishing fee on

[353] Article 13(2) of the Fishery Management Act No. 116/2006.
[354] Arnason, Ragnar *"On the ITQ system and rural development",* Morgunbladid, 7. March 2011.

distributed annual quotas.[355] Chapter V of the Fishery Management Act contains provisions that regard the charging of a fishing fee. According to Article 20 of the Act, a fishing fee shall be charged from fishing operators, in correlation to their annual quota allocation. It is the minister that decides on the fishing fee for each year. The fishing fee is a special fee calculated on the aggregated profits of the fishing industry. It is the Directorate of Fisheries that collects fishing fees and administrates them.[356] The fishing fee goes into the Icelandic Treasury, but 15% of its total income can be distributed to municipals.[357]

In the beginning of this section it was mentioned that in Iceland there are two kinds of general fishing permits: fishing permits that are subject to quota, which were explained above, and fishing permits that are subject to hook catch quota. Hook-and-line vessels are vessels that are less than 15 GRT. According to Article 7 of the Fishery Management Act, vessels with fishing permits for hook-and-line catch quota may both fish species that are not subject to catch quota and those which they hold quotas for. However, the vessels' catch quotas may only be used for long-line and hand-line fishing. The minister for Fisheries and Agriculture may though set further rules regarding the Hook-and-line vessels' fishing activities.[358] The transfer of a hook-and-line vessels' quota may only be to a boat that holds a fishing permit for hook-and-line fisheries.

This section has covered the main rules that govern the Icelandic ITQ system. These rules must be viewed in light of the overall objective of the fishery management system. As has previously been discussed Article 1 of the Fishery Management Act outlines the main objective of the FMS. It can be argued that the objective of the system is in fact twofold. Firstly, it is economic in nature, because of its aim to ensure an efficient utilisation of marine resources. And, secondly that it is social in nature, as it aims to promote stable employment and settlement throughout Iceland. The economic aim can be projected through the rules that govern the ITQ system, in particular the rules regarding the transferability of quota entitlement and the quota market. This is also true for the social aim, as it

[355] Gretarsson, Helgi A.: The Nation and Fishing Quotas: On the Icelandic Fishery Management System 1991 – 2010 and constitutional Issues, p. 76-77.
[356] Articles 21, 22 and 23 of the Fishery Management Act No. 116/2006.
[357] Article 23(1) and (2) of the Fishery Management Act No. 116/2006.
[358] Article 7 of the Fishery Management Act No. 116/2006.

can also be projected through some of the rules that govern the ITQ system, in particular the rules that regard the distribution of TACs to certain areas of the country. With the implementation of Articles 6.a and 10 in 2010, Icelandic authorities intended to strengthen the coastal communities of Iceland that are dependent on the fishing industry for livelihood and have, in recent years, suffered because of the nature of the ITQ system, i.e. because of quota concentration to other areas of the country, therefore it can be stated that the Articles are in agreement with one of the main objectives of the Fishery Management Act, which is to ensure stable employment in the industry throughout Iceland.

6.3.2 The Individual Transferable Quota System and the Icelandic Constitution

The right to fish a particular quantity of fisheries is valuable. Therefore fishing rights provide its holders with certain privileges over those that do not possess such rights. It has previously been explained that the Icelandic legislator established the ITQ system in order to conserve fish stocks in Icelandic territory, and to increase economic efficiency in the sector. However it has been debated before Icelandic courts if the distribution of fishing rights, within the system, goes against fundamental rights protected by the Icelandic Constitution, in particular the principles of freedom of employment and equality. Furthermore, because of the nature of quota entitlements, the question has also risen whether the right to fish, constitutes as a possession by law, and is therefore protected by the Icelandic Constitution, as a property right. This coverage explores these questions, and gives an account of the main judgements delivered by the Icelandic Supreme Court and international Courts regarding the issue.

In Section 6.2.1 the initial allocation of quota shares to vessels was described; it was mentioned that with the adoption of the ITQ system open-access to Icelandic fisheries was eliminated and restrictions were imposed on a vessel's ability to receive a fishing licence. In practice this means that those that wish to engage in the fishing profession are not able to receive quota for those marine resources that are subject to TACs, but they can, however, fish species that are not subject to allowable catches.[359] The Fishery Management Act, No. 38/1990, which

[359] Here it is worth noting that they can buy or rent quota, but will not be distributed a quota from the Icelandic State. An exception from that is quota that is distributed for coastal fisheries.

established the permanent (did not include a specific timeframe) allocation of fishing quotas to operating vessels did, however, only provide those that owned operating fishing vessels in the 1980s and 90s with a fishing licence.[360] Individuals that were not in possession of an operating vessel during that time period could therefore not receive a general fishing licence. In a judgement delivered by the Icelandic Supreme Court the 3rd of December 1998, in case No. 145/1998 (Valdimar case), the Supreme Court addresses the compatibility of the Fishery Management Act (the ITQ system), in particular the rules that regarded the right to receive a commercial fishing permit, to Article 65 of the Icelandic Constitution, the principle of equality. In its ruling the Court held that the requirements laid down in Article 5 of the Fishery Management Act, was incompatible with Article 65 of the Icelandic Constitution, as only those who had ownership over an operating vessels at a certain time, had the right to receive a fishing permit, but not those that had not been in a possession during that period, to possess such ownership.[361] Thus, it was against the principle of equality to distinguish the allocation of fishing rights, on the grounds of an ownership of an operating fishing vessel during a specific time period. Following the judgment, the Icelandic legislator made changes to the Fishery Management Act No. 38/1990, which enabled all Icelandic citizens who owned a licensed vessel, to receive a general fishing permit, and to fish species that were not subject to TACs, i.e. in accordance with the rules of the current Fishery Management Act No. 116/2006.

It has also been debated before Icelandic courts if the restrictions to marine resources (fish) go against Article 75 of the Icelandic Constitution No. 33/1994, concerning the freedom of occupation. According to the Article everyone is free to pursue the occupation of their choosing and the legislator is only allowed to restrict this right if it is in common interests to do so.[362] Here two judgments from the Supreme Court of Iceland are of importance: the judgement delivered by the Icelandic Supreme Court the 3rd of December 1998, in case No. 145/1998 (Valdimar case), that was mentioned above, and the Supreme Court's judgment

[360] Article 5 of the Fishery Managment Act No. 38/1990.3
[361] Gretarsson, Helgi A.: The Nation and Fishing Quotas: On the Icelandic Fishery Management System 1991 – 2010 and constitutional Issues, p. 103-105.
[362] Article 75 of the Icelandic Constitution No. 33/1944.

from the 6th of April 2000, in case No. 12/2000 (Vatneyri case). In brief, the Court held in both judgments that the Icelandic Parliament had the authority to legislate access to marine resources, if the state of marine resources required that special measures had to be adopted to ensure their conservation. In the Valdimar case, which was explained above, the Court held that Article 5 of the then-current Fishery Management Act was not compatible to Article 65 of the Icelandic Constitution, and the principle of equality that has to be taken into account when occupational rights are restricted, in accordance to Article 75 of the Icelandic Constitution.[363] In the Vatneyri case, the Supreme Court held that the Fishery Management Act (the ITQ system) was compatible to Article 75 of the Icelandic Constitution.[364] In its ruling the Supreme Court found that the nature of the ITQ system, which restricts individuals from pursuing commercial fishing, was based on "*objective considerations*" and the fact that the nature of catch quotas are permanent and assignable, made it possible for operators to plan their catch entitlements for the future in a way that suited them the best.[365] The Court's ruling therefore establishes that the nature of the ITQ system is not incompatible with Article 75 of the Icelandic Constitution, as the restrictions it imposes are reasonable. Furthermore, by referring to the fact that the nature of the ITQ system, made operators able to plan for the future, the Court makes a reference to the objective of the Icelandic Fishery Management Act, which states that one its aims is to ensure efficient utilisation of Icelandic exploitable marine stocks[366], which is in line with the general economic theory that being able to plan ahead enables people to take decisions that are better suited to promote economic efficiency.

Following the Icelandic Supreme Court's Vatneyri case, where the constitutional validity of the Fishery Management Act was confirmed, the defendants brought their case before the United Nations Human Rights Committee. They claimed that according to the Icelandic Fishery Management Act, they were victims of a violation of Article 26 of the United Nations International Covenant on Civil and Political Rights, which prohibits discrimination of any kind unless it is justified on

363 Icelandic Supreme Court H 1998, p. 4076 (case no. 145/1998) (Valdimars case). www.haestirettur.is Accessed on 05.12.2011.
364 Article 65 of the Icelandic Constitution No. 33/1944 regards the principle of equality.
365 Icelandic Supreme Court H 2000, p. 1534 (case No. 12/2000) (Vatneyri case). www.haestirettur.is Accessed on 23.11.2011. Translated by the author.
366 Article 1 The Fishery Management Act No. 116/2006.

reasonable and objective grounds.[367] The defendants based their claim on the fact that the Icelandic Fishery Management Act discriminated between two groups of fishers. The first group of fishers that received a free quota share (the ones that were initially allocated quota shares), and the second group of fishers that must buy or rent quota from the first group in order to be able to conduct commercial fishing.[368] After reviewing the merits and reasons of each party, the Icelandic States and the defendants, the Human Rights Committee concluded that this kind of distinction between groups of fishers, founded on a certain reference period, was equivalent to a distinction based on property, which is prohibited under Article 26 of the Covenant. Furthermore, it concluded that the nature of the Icelandic quota system provided property privileges permanently to the original quota owners, to the detriment of the authors (the defendants), was not based on reasonable grounds.[369] Therefore the Committee concluded that these facts "*disclosed a violation of article 26 of the Covenant*".[370]

By becoming a party of the International Covenant on Civil and Political Rights and the Optional Protocol, Iceland has recognised the Human Rights Committee competence to determine whether there has been a violation of the Covenant, and furthermore according to Article 2(3) of the Covenant, the country has undergone an international obligation to ensure its citizens with the rights recognised in the Covenant and to provide effective and enforceable remedy if a violation of the Covenant has been established.[371] With the Human Rights Committee concluding that the Icelandic FMS was in violation to Article 26 of the Covenant, the Icelandic State is thus under international obligation, to address the Views of the Committee. Therefore, according to its international obligation, the Icelandic State has to provide its citizens with adequate remedies.

[367] The International Covenant on Civil and Political Rights and the Optional Protocol entered into force in Iceland on 22. November 1979. Article 26 of the Covenant regards prohibition of discrimination on unreasonable grounds.
[368] International Covenant on Civil and Political Rights, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights*. Communication No. 1306/2004, par. 10.3.
[369] International Covenant on Civil and Political Rights, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights*. Communication No. 1306/2004, par. 10.4.
[370] International Covenant on Civil and Political Rights, *Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political rights*. Communication No. 1306/2004, par. 10.5.
[371] Article 2(3), the International Covenant on Civil and Political Rights.

It is generally recognised that quota systems limit access to marine resources and provide those with access to the resource some privileges over those that do not have such access. However it is also recognised that such distributional measures may not be discriminatory and must be based on objective and reasonable criteria. As was mentioned above the Icelandic Supreme Court, came to the conclusion in the Vatneyri case that the restrictions imposed by the ITQ system were based on objective considerations, and then it was described how the Human Rights Committee came to the opposite conclusion that the restrictions on access to marine resources under the ITQ was not based on a reasonable ground. Following the View of the Human Rights Committee the Icelandic government sent the Committee a letter, responding to its Views, and gave account of the measures the State would undertake in light of its international commitments to give effects to the Committee's Views. According to the letter the Icelandic government would in the near future undertake a comprehensive study of the Icelandic Fishery Management System, and accompany the View of the Human Rights Committee to the fullest extent possible.[372]

In light of the discussion above it is of relevance to mention Article 1 of the first protocol of the European Convention of Human Rights, which regards property rights. Iceland ratified the European Convention of Human Rights with Act No. 62/1994, and shortly afterwards the Icelandic Constitution was reviewed, and the European Convention of Human Rights incorporated into the Constitution. Therefore the European Convention of Human Rights has direct applicability in Iceland. According the Article 1 of the first protocol of the European Convention of Human Rights "*no one shall be deprived of its possessions except in the public interests and subject to the conditions provided for by law and by the general principles of international law*".[373] It is the articles wording "*no one shall be deprived of their possession*" that refers to the right to property. The right of possession under the article has been interpreted very broadly by the European Court of Justice, it is considered to cover possessions that provide its holders with a range of economic interests. These are economic interests such as: movable and

[372] *Views, adopted by the Human Rights Committee on 24 October 2007, concerning communication No. 1306/2004*: http://eng.sjavarutvegsraduneyti.is/news-and-articles/nr/9306 Accessed on 24.11.2011.
[373] Council of Europe. *The European Convention of Human Rights*, First protocol, Article 1(1).

immovable property, and tangible and intangible interests.[374] However the Article only applies to existing possessions or property, but not to the right to acquire property in the future.[375] In determine whether a right falls under the scope of Article 1, of protocol No. 1, the European Court of Justice has applied three distinct rules. The first rule is the principle of peaceful enjoyment of possessions, the second one whether there has been a deprivation of property, and the third one is the control of property.[376] As mentioned the Article also states that the right to property can be deprived if public interests require, and furthermore that such measures must be provided for by law and be compatible with general principles of international law. Thus, if a property is considered by the European Court of Justice to fall within the scope of the article, based on its application of the three rules, a deprivation of the property by the State can be justified if such measures are done in the interests of the general public and serve a legitimate objective. It is generally accepted that any derogation from human rights law, in the name of public interest, must be based on the principle of proportionality. According to the principle all interests that are of relevance have to be investigated, and weighed and valued with the operation in question.[377] In its rulings, the European Court of Justice has applied the principle of *striking a fair balance* between the protection of the right to property and the general interests. The Court has held that the principle of fair balance has not been met if the property owner has to bear "*individual and excessive burden"* of the State's action. The Article's reference to measures having to be "*provided for by law*" also has to be met, to justify interference of property rights by states, the wording refers to the legality of such measures which requires that a measure has to be in compatibility with domestic

[374] Carss-Frisk, Monica: *The right to property. A guide to the implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights*, p. 10 – 17. Interests that have been considered to fall within the scope of the article include interests such as; shares, patents, arbitration award, entitlement to rent and pension, the exercise of a certain profession, legitimate expectation that something stays the way it is, legal claims and economic interests that are connected to the running of a certain business.
[375] Carss-Frisk, Monica: *The right to property. A guide to the implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights*, p. 6.
[376] Carss-Frisk, Monica: *The right to property. A guide to the implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights*, p. 21.
[377] Craig, Paul and De Burca: *EU law. text, cases and materials*, p. 545. In general there are three stages in proportionality inquiry; (i) whether the measures is suitable to achieve the desired end, (ii) whether it was necessary to achieve the desired end ,(iii) whether the measure imposed a burden on the individual that was excessive in relation to the objective sought to be achieved.

law, and furthermore that domestic law is compatible with general principles of law.[378]

As explained above, Article 1 of protocol 1 of the European Convention of Human Rights states that the deprivation of property right by a State is justifiable if such measures are done in the interests of the general public and in accordance to the principle of legality. If a state fulfils these conditions as laid down by the Article, and property rights are deprived, the questions have risen whether those, who have been confiscated of their possessions, have to be compensated by the States, and if so, if they have to be fully compensated or not. The wording of the Article does not provide adequate answers in this regard, and therefore jurisprudence from the European Court of Justice, is of importance. In its judgments the Court has emphasised that compensation is implicitly required, in the case of deprivation of property.[379] Here the Court's wording in its judgment from 1986, in the case *James and others v. the United Kingdom*, can shed some light on the court's considerations regarding the matter where it states that "*As far as Article 1 of protocol 1 is concerned, the protection of the right to property its affords would be largely illusory and ineffective in the absence of any equivalent principle*".[380] Therefore, in view of the Court, if compensation is not to be afforded to those that have had their property taken, the *right* to property would be largely undermined. However, in its judgements the Court has also established that if a deprivation of property right takes place, the compensation afforded by the State does not always have to be a full compensation. If the objectives pursued are legitimate, and in the public interests, such as; economic reform or social justice, the State may compensate the property owner for less than the full market value. However the compensation must be reasonably related to the property right. And, furthermore, that compensation may depend on the measures taken, as well as the property right in question.[381] Therefore, the nature of the property right

[378] Carss-Frisk, Monica: *The right to property. A guide to the implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights*, p. 8-9.
[379] Carss-Frisk, Monica: *The right to property. A guide to the implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights*, p. 37.
[380] *James and Others -v- The United Kingdom* 8793/79; [1986] ECHR 2 (21 February 1986), paragraph 54.
[381] Carss-Frisk, Monica: *The right to property. A guide to the implementation of Article 1 of Protocol No. 1 of the European Convention on Human Rights*, p. 38-40.

and the means of its deprivation ultimately define the compensation afforded to the holder of the possession by the state.

In relation to the Icelandic Fishery Management System, the determination if ITQs provide its holders with property rights that fall within the scope of Article 1 of Protocol No. 1 has to be assessed on the basis of the three rules the European Court of Justice (ECJ) has applied in its assessments of the matter, i.e. does the interference with the property fall under any of the three rules. If quota holders are seen to possess rights that fall within the Article, the Icelandic State may only deprive them of their right, if public interests so require and in accordance to the principle of legality. As has been stated before, there exists a general consensus among Icelandic legal scholars that quota entitlements provide their holders with rights that fall within the scope of Article 1, protocol 1 of the European Convention of Human Rights. They do, however, differ in their opinion regarding the specific nature of the rights.[382] Here it is interesting to note the view of Helgi A. Gretarsson, an Icelandic legal scholar, which offers a new approach on the subject, and considers quota entitlements provide its holders with rights that are special in nature and fall under a new category of property rights, which can be called *quota rights,* because they represent a usage of exhaustible natural resources, and are subject to law as it stands at any given time and place. According to Gretarsson the right of quota entitlements enjoys richer protection than is associated with general employments rights, but lesser protection than is associated with direct property rights. [383]

In 2005, in case No. 455/2004 before the Icelandic Supreme Court, which regarded landowners' right, who owned land adjacent to the sea, to fish lumpfish and other species within the land's net zone. The Supreme Court came to the conclusion that the restrictions imposed by the Fishery Management Act, which requires landowners to have fishing permit to be able to conduct such fishing, did not violate land owners property rights.[384] Following the Supreme Court's decision the defendant took the case before the European Court of Human Rights,

[382] I.e, traditional rights: employment rights, user rights or direct property rights.
[383] Gretarsson, Helgi A,: The Nation and Fishing Quotas: On the Icelandic Fishery Management System 1991 – 2010 and constitutional Issues, p.147.
[384] Since ancient times landowners in Iceland, that own land adjacent to the sea, had the right to fish lumpfish within net zone.

and claimed that the Icelandic ITQ system violated his property rights, which were protected by Article 1, protocol 1. In its Judgment the European Court of Human Rights, accepted that the landowners' right to fish lumpfish and other species, constituted as possession, and therefore fell within paragraph 2 of Article 1, protocol 1. However, the Court did not consider any deprivation of property rights in the sense of the first paragraph of the Article.[385] Hence, the European Court of Justice accepted that landowners rights to fisheries within their land's net zone was protected by Article 1, protocol 1 of the European Convention of Human Rights, but did not consider any violation of individual property rights having taken place, and therefore acknowledged the right of the Icelandic State to control fisheries within Iceland's territory with the aim of ensuring conservation and efficient utilisation of marine resources. Here it must though be noted that the case regarded landowner's rights to fish within their land's net zone; a right which they had enjoyed for centuries and is protected by several Icelandic legal provisions and acts. Therefore it is difficult to generalise based on the judgment to what conclusion the Court might come to, if the nature of the rights of quota entitlements were to be brought before it. Having said that, it can be assumed, based on the previous judgments delivered by the European Court of Human Rights and the Icelandic Supreme Court, that it would be accepted that Icelandic authorities have a *wide margin of appreciation* to decide upon means to achieve the objectives of the Fishery Management Act, i.e. to control fisheries to ensure their conservation and efficient utilisation. And in turn, it can also be assumed that Icelandic authorities have wide powers to interfere with quota holders entitlements when implementing marine policy, especially in order to reach a certain state of affairs, which they consider to be in the general interests of the Icelandic nation, without such measures being considered to constitute as a deprivation of property rights.

[385] Case: *Bjorn Gudni GUDJONSSON v. Iceland-40169/05* [1998] ECHR 1772 (2 December 2008). In relation to that the Court found that Icelandic authorities struck a fair balance between the demands of the general interests of the community and the need to protect requirements of individual fundamental rights. Furthermore the Court also found that there was a reasonable relationship between the means employed and the aims pursued, i.e. the principle of proportionality had been respected.

6.3.3 Other conservation measures

In order to adequately conserve marine resources and environment, other conservation measures are used alongside TACs. These measures tend to be input measures, i.e. management measures that control how fishing is to be carried out. They can be described as supplementary measures to TACs, as TACs are most often the primary conservation tool. The main purpose of supplementary conservation measures or technical measures, as they are often referred to, is to hinder harmful side effects of fishing, such as; the capture of juvenile fish, and damage to the marine ecosystem.

As has been previously stated, conservation measures of Icelandic marine resources also include supplementary conservation measures to the ITQ system. The ITQ system can be described as the main measure within the system to achieve sustainable fisheries. Provisions regarding the supplementary conservation measures can be found in various Acts, such as Act No. 57/1996 on the Exploitation of Exhaustible Marine Resources, and Act No. 79/1997 on fishing within Icelandic territory.

First, regulations exist on technical measures that prohibit certain fishing gears with the aim of protecting undersized fish. These regulations include regulation No. 115/2006 regarding cod nets and regulation No. 724/2006 on the construction and equipping of measures to protect undersized fish, and the use of 155 mm bag in the bottom trawl for fishing. These regulations are set in accordance with Article 14 of Act No. 79/1997 on Fishing within Icelandic Territory.[386] Secondly, there are measures that prohibit or restrict certain fisheries that are subject to TACs. Thirdly, there are measures on the temporary and permanent closure of fishing grounds to protect juvenile fish. The minister of Fisheries and Agriculture can, in a regulation made after consultation with the MRI, decide that certain fishing grounds shall be made into special conservation zones. In the regulation the Minister can then decide if fishing shall be all together prohibited or restricted in any way in the zone.[387] The MRI has the authority to temporarily close fishing grounds if it has received information on *harmful* fishing in the area. Harmful fishing, are determined as fisheries, that can hinder marine resources from being

[386] Article 14 of the Act on Fishing within Icelandic Territory No. 79/1997.
[387] Palsson, Ottar, Stefansson, Stefan M.: *The Icelandic and the European Union's Fishery Management rules. Development, comparison and Iceland's position*, p. 144.

exploited at sustainable levels.[388] Fourthly are conservation measures that permit closure of fishing grounds during the spawning season. Article 14 of Act No. 79/1997 on Fishing in Icelandic Territory provides the minister of Fisheries and Agriculture with wide regulatory powers to adopt conservation measures for the exploitation of marine resources on a sustainable level.

Another important element of the Icelandic Fishery Management System's conservation policy, is that if vessels don't have sufficient catch quota for their *by catches* it is required that sufficient catch quota is transferred to them from other vessels. Collecting and bringing ashore any catches in the fishing gear of fishing vessels is obligatory.[389] Discarding is therefore prohibited and such conduct is subject to penalty according to law. In practice this means that if vessels do not have sufficient catch quota for their probable fishing, they are not allowed to conduct fishing activities. The ban on discarding is considered to have contributed to the conservation objectives of the Icelandic FMS being better met. The flexibilities of the quota system enable the rule on the ban on discarding to be a functional solution, by attempting to decrease the need for fishermen to practice discarding. Furthermore, technical measures, such as the closure of fishing grounds for a short period of time, are increasingly being used to protect juvenile fish, as a means to prevent it from being fished, and therefore hindering that it will be discarded.

6.4 Control and enforcement system

This thesis has before explained that for fishery law to be effective it requires a control and enforcement system. For the Icelandic ITQ system to be effective it needs to be effectively monitored. Without effective control, Icelandic fishery management would not reach its main objectives of being efficient and sustainable. Effective monitoring in the ITQ system is to ensure that vessels' catches do not exceed their quota share.

It is the Ministry of Fisheries and Agriculture that is responsible for the management of fisheries in Iceland. The Ministry is responsible for the general

[388] Palsson, Ottar, Stefansson, Stefan M.: *The Icelandic and the European Union's Fishery Management rules. Development, comparison and Iceland's position*, p. 144.
[389] Article 6(6) The Fishery Management Act No. 116/2006.

administration of fishery management in the country, such as issuing annual regulations on TACs, long-term planning of the fishery system and relations with international fishery institutions and international fishery relations. The day-to-day administration and enforcement of the Icelandic FMS is in the hands of the Directorate of Fisheries and the Icelandic Coast Guard, respectively. Even though the two institutions work closely together, their enforcement tasks are quite different. The Directorate of Fisheries' main responsibility is to ensure compliance with the Fisheries Management Act; it is entrusted with the day-to-day administration of the fishery system and is responsible for implementing legislation on fishery management.[390] The Icelandic Coast Guard oversees fishing activities in Icelandic waters; it monitors areas closed to fishing and is responsible for the inspection of mesh sizes and other gear related practices.[391] It is evident that for effective enforcement of the FMS, both institutions must work together.

6.4.1 Enforcement and sanctions

Just as enforcement is important for the effectiveness of fishery law, sanctions are an important factor for the effectiveness of enforcement and control. In Section 3.6.2 it was explained how compliance with rules in the fishery sector is often analysed from an economic perspective. Therefore a decision to comply with fishery rules is based on a calculation of the economic gain by bypassing regulations, compared with the severity of sanction if the bypass is detected. Sanctions therefore need to be aligned with the economic gain of bypassing if they are to be successful in compensating for the conflicting underlying incentives towards non-compliance with fishery rules and regulations. This theory has also shaped the Icelandic FMS; enforcement measures within the system are designed to be prompt and effective, and sanctions are intended to set astray any non-compliance with Icelandic fishery legislation.

The Directorate of Fisheries is subject to Act No. 36/1992 and is responsible to the Ministry of Fisheries and Agriculture. Articles 1 and 2 of Act No. 36/1992 define the role of the Directorate. According to the Articles, the Directorate of Fisheries is responsible for ensuring compliance with the Fisheries Management Act, monitoring the day-to-day activities of fisheries, administration and related

[390] The Ministry of Fisheries and Agriculture, *Close to the sea*, 2005.
[391] www.fisheries.is Accessed on 07.10.2011

acts, and processing, collecting and publishing data on fisheries, as well as being responsible for other projects that may be assigned to it through legislation or by the Minister of Fisheries.[392] According to the Fisheries Management Act No. 116/2006, all commercial fishing is subject to the authorization of the Directorate of Fisheries.[393]

The Icelandic Coast Guard carries out several duties by law. One of them is law enforcement on the sea which includes fisheries patrol.[394] According to Article 18 of the Act on the Icelandic Coast Guard No. 52/2006, the Coast Guard shall also be in charge of remote surveillance of fishing vessels and shall receive and mediate information on both Icelandic and foreign fishing vessels.[395] All members of a fishing crew have a duty to obey orders issued by the Coast Guard.[396]

The Directorate of Fisheries employs special fisheries inspectors that monitor the fishing activities of vessels in order to ensure effective enforcement of the Fisheries Management Act.[397] The fisheries inspectors' main responsibility is to ensure that catches are correctly weighed and registered and that fishing vessels do not exceed their catch quota. The inspectors also have the authority to monitor fishing activities at sea. According to Article 18(3) of the Fishery Management Act, inspectors may accompany fishing vessels on voyages or board vessels to check their cargo and fishing gear. They shall also be allowed access to all storage areas in the vessel and land processing. The vessel's master is obliged to assist them in any way they need to carry out their duties by law.[398] Fishing inspectors shall also "*supervise the landing, weighing-in and processing of catch, as well as the export of catches or products as specified in this Act, in regulations adopted in accordance with it, and in the formal statement of their duties*".[399] The work of the fishery inspectors requires great professionalism and they have a large responsibility to ensure that the Icelandic Fishery Law is correctly carried out by the operating vessels.

[392] Articles 1 and 2 of Act No. 36/1992.
[393] Article 2 of Act No. 36/1992
[394] Article 4(2) and Article 5(2) of Act on the Icelandic Coast Guard No. 52/2006.
[395] Article 18 of Act on the Icelandic Coast Guard No. 52/2006. The article only applies to foreign vessels that Iceland has international agreements with.
[396] Article 7 of Act on the Icelandic Coast Guard No. 52/2006.
[397] Article 18 of the Fishery Management Act No. 116/2006.
[398] Article 18(3) of the Fishery Management Act No. 116/2006.
[399] Article 18(2) of the Fishery Management Act No. 116/2006.

Article 10(2) of Act No. 79/1997 on Fishing within Icelandic Territory, states that if fishery inspectors from the Directorate of Fisheries, mission managers from the MRI, or the employees of the Icelandic Coast Guard come across illegal fishing they must report their findings to the MRI or other competent authority. On the basis of such information, the MRI can prohibit a certain type of fishing in the area where the illegal fishing was conducted up to a period of fourteen days. All competent authorities shall be made aware of the closure of the fishing ground so appropriate measures can be taken.[400]

If a violation of the Fishery Management Act occurs, the offence may also be subject to administrative sanctions. These sanctions are:

- A vessel which has taken catches in excess of its catch quota may suffer a suspension of its fishing license.
- Suspension of fishing license if the vessel's operator or crew, or others acting on its behalf, have violated the provisions of fisheries management legislation
    - First offence: minimum period of one week; maximum period of twelve weeks
    - Repeated offences: minimum period of four weeks; maximum period of one year
- For overfished quota a levy is imposed
- Information on vessels and vessel operators which have had their fishing license suspended or levies imposed on them is published regularly.[401]

Violations of the Icelandic Fishery Law are also subject to penalty sanctions. Violations are subject to fines regardless of whether they are committed wilfully or through negligence.[402]

    - First offence: maximum fine of ISK 4,000,000
    - Repeated offences: minimum fine of ISK 400,000, maximum fine of ISK 8,000,000[403]
- If an offence is major or repeated wilfully: detention or imprisonment for up to six years[404]
- If gear is used for illegal catches it can be confiscated

[400] Article 10(2)(3)(4) of Act No. 79/1997 on Fishing within Icelandic Territory. According to the article illegal fishing is defined as fish that is under its appropriate size and if fishing in the area is not in accordance to efficient utilisation of marine species.
[401] Directorate of fisheries. *General information*, 2011 and Act No. 57/1996 on the Treatment of Exploitable Marine Resources.
[402] Article 25(1) of the Fishery Management Act No. 116/2006.
[403] Article 25(2) of the Fishery Management Act No. 116/2006.
[404] Article 25(1) of the Fishery Management Act No. 116/2006.

It is hard to determine whether an enforcement system constitutes of adequate measures for a management system to be effective; there are many factors which can be of relevance regarding the effectiveness of a system. However, as previously stated, sanctions are considered to play a big part in the effectiveness of control and enforcement. In light of the discussion above, it can be concluded that sanctions within the Icelandic FMS are fairly harsh, especially if an offence is major or wilfully repeated, as such measures can lead to imprisonment up to six years.

6.4.2 Data collection and transparency

This thesis has before discussed the importance of reliable data in reaching the objective of sustainable fisheries, and the importance of transparency in public management. Sound and prompt data is a foundational necessity for the success of any fishery management system that aims at exploiting marine resources at a sustainable level. Without adequate information from the fishery sector, measurements on the biological state of fish stocks would be inadequate, which would it turn have an effect on management measures taken.

The purpose of the management of fishery data in the Icelandic FMS is to ensure that data collection from the fishing industry results in prompt and accurate information on catches and quota. As has been explained, it is the Directorate of Fisheries that is responsible for the monitoring of day-to-day administration of fishing activities. The Directorate is also responsible for the implementation of Icelandic Fishery Law. It therefore lies in the hands of the Directorate to make sure that adequate data is collected by the fishing industry and transferred to the competent authority, according to law.

To make data collections more effective, efficient and trustworthy, Icelandic vessels make use of modern technology for data collection. Icelandic vessels are obliged to be equipped with an electronic *Vessel Monitoring System (VMS)* and *electronic logbooks*. The VMSs are vessel tracking systems. There are two kinds of vessel tracking systems in Iceland. One is used for safety reasons and is mandatory for all Icelandic vessels; the other is for fisheries control, which is obligatory for certain vessels because of their fisheries and fishing area. Generally speaking, the purpose of the VMS is both for vessels' safety and to monitor

compliance with fisheries law and regulations. The VMS is compulsory for all vessels that conduct commercial fishing. The system sends real time information every hour to the competent authority on the whereabouts of the vessel.[405] If it becomes apparent that a vessel is conducting illegal fishing activities, appropriate measures can be taken.

The primary data used by the Directorate of Fisheries regarding catch and quota, comes from the fishing industry itself. This is data that is found in *sales notes,* the *weighing of catches* and *vessels' logbooks.* According to Article 6 of Regulation No. 557/2007, Icelandic vessels are required to keep logbooks which are to be accessible by the fisheries inspectors. The logbooks contain extensive information on mesh sizes, fishing gear and catch. The information that is collected in the logbooks is used for both *scientific and enforcement* measures and must keep all information on the vessel's catch. The information that is to be found in the logbooks is used by the MRI and by the Directorate of Fisheries. Vessels that are under 10m, and some which are less than 15m, are allowed to keep paper logbooks, but all other vessels are required to keep electronic logbooks. Logbooks are to be handed in to the competent authority once a month and no later than two weeks after the end of each month.[406]

Important data for the operation of the Icelandic Fishery Management System is information gained from the weighing of catch. It is obligatory to weigh the catches of all vessels, according to Article 5 of Act No. 57/1996 on the Treatment of Exploitable marine resources. Any catch brought ashore by a vessel is to be weighed by accredited harbour officials who are located at approved ports.[407] Upon completion of weighing, the relevant harbour authorities register the catch in the central database of the Directorate of Fisheries and landing ports.[408] All results shall be registered immediately or as soon as possible. The weighing results are of great importance for the Icelandic quota system as the TAC is based upon them. The basis for quota deduction is also reliant on weighing results, as quota is deducted from a vessel as soon as weighing results are known. As a

[405] Article 2 Regulation No. 770/2008.
[406] Article 9(3) Regulation No. 557/2007.
[407] Article 6(1) of Act No. 57/1996 on the Treatment of Exploitable Marine Resources.
[408] Even though it is obligatory to weigh all catches. Weighing can be conducted in different ways, for example unprocessed fish that is sent to foreign fishery markets to be weighed there.

result, quota information can be accessed in real time which allows necessary measures to be taken if fishing has been conducted in excess of a vessel's quota. All harbours approved for landing, as well as service providers, are registered into the Directorate of Fisheries central database and are under the control of the Directorate.[409]

The third source of data from the fishery sector is sales notes. Sales notes are collected from fish markets and fish processing locations. Sales notes are registered in the VOR database (the weighing and disposal report database) of the Directorate of Fisheries and contain information on the amount, the type, and value of catch in the first sale and information on the seller, buyer, and the vessel in question. The VOR database also holds information on fish processing measures and on species and quantity, but this information is not traceable to vessels. The information that is collected in the VOR database from the sales notes is used for control purposes, for statistical purposes and to assess catch value.[410]

The Directorate of Fisheries is also responsible for verifying the accuracy of the information that is entered into its databases through sales notes, logbooks and the weighing of catch. This is done electronically between databases by cross-checking data from logbooks, sales notes and weighing. If any inconsistency occurs it is followed up by the competent authority.

Part of what makes the Icelandic Fishery Management System efficient and trustworthy is the transparency of available data. Transparency of data can improve accountability in the fishery sector and the fishery management system, as well as promote compliance with fishery law. Marine resources are a common resource and therefore it is commonly viewed that information in the sector shall be publicly available. According to Article 22 of the Act on the Treatment of Exploitable Marine Resources, *species information on quota allocation, vessel's quota share, vessel´s catch and quota transfers* are all public information.[411] Furthermore, the Article states that the Directorate of Fisheries shall regularly display information on vessels that have made catches in excess to their quota

[409] Article 8 of Act No. 57/1996 on the Treatment of Exploitable Marine Resources.
[410] *Data Collection* : At *the Directorate of fisheries.* Helga Sigurros Valgeirsdottir, 2011.
[411] Article 22 of Act No. 57/1996 on the treatment of exploitable marine resources.

share, as well as information on sanctions because of illegal catches. All information is transferred to the Directorate of Fisheries' database after catches have been weighed and registered. Data is immediately made available on the internet and is updated every 6 hours.[412] However, if the information in question is not subject to Article 22 of the Act, then it is not mandatory to make the information public.

From the discussion on the transparency of data, it can be gathered that there is much transparency of data within the fishery sector in Iceland. This has, without a doubt, contributed to the legitimacy in the sector, and the fact that information on illegal catch is open to the public has encouraged accountability within the sector.

6.5 Conclusion

This chapter has investigated the Icelandic FMS. It explained that Icelandic authorities adopted the ITQ system, in the 1990s in an effort to turn around the problem of depleting fish stocks within Icelandic territory. The initial allocation of fishing rights, according to the ITQ system, has been a subject of much controversy in Icelandic society, with many arguing that Iceland's common pool of marine resources only benefits a few and not the nation as a whole. This has resulted in a multi-year public debate about the fairness of the system, and been a subject of some litigation, both before Icelandic courts and international ones.

The right to catch a particular quantity of fish is valuable, and brings holders of such rights various benefits. When the initial allocation of fishing rights took place within the ITQ system, these valuables were distributed to operating vessels on the bases of their historical catches, during a specific time period. This meant that valuables associated with fishing rights were allocated to operating vessels at that time, and therefore exploitable only to the owners of those vessels. However, because of the nature of marine resources, i.e. they are a natural common resource, it can be stated that the valuables of the distribution of fishing rights should have gone to the Icelandic nation as a whole. That is, that those that received the right to catch a particular quantity of fish, and as a result the valuables that come with those rights, should not have received them free of

[412] Directorate of fisheries. *General information*, 2011.

charge. If authorities had kept other objectives than the efficiency of Icelandic fisheries in mind when the initial allocation of fishing rights took place, the allocation would most certainly have been conducted in a different manner, and the creation of the so called *two tier* system could have been avoided. As explained, the ITQ system has been a subject of some litigation before Icelandic and international courts, as constitutional validity of the system has been contested, and furthermore if it violates fundamental human rights protected by international covenants. One of the central issue in this debate is the meaning of Article 1 of the of the Icelandic Fishery Management Act, which states that fish stocks within Icelandic territory are the *common property* of the Icelandic nation. The wording "*common property*" has been a source of some discourse among legal scholars in Iceland, and it can be argued that in general their view is that the wording does not have any particular legal meaning, but rather that it is a policy statement on how marine resources should be utilised. However, because many see the system as being unfair, legal interpretation has not altered the emphasis that is placed on the wording in Article 1 of the Fishery Management Act, and as a consequence the debate and discourse is still focused on Article 1. Therefore it can be assumed that in the years to come public discourse on the system will continue to place emphasis on the wording of Article 1 of the Fishery Management Act, unless the Article undergoes changes.

Above it was stated that it is the general view of Icelandic legal scholars that the wording "*common property*", found in Article 1 of the Fishery Management Act, does not have any particular legal meaning, but rather that it should be used as a mean to interpret fishery legislation. Hence fishery legislation should be interpreted in the interests of the Icelandic nation as a whole. In accordance to that, when fishery rules and regulations are implemented and carried out to meet the objectives of the Fishery Management Act, the interests of the Icelandic nations as a whole shall be kept in mind. Opinions can differ on how these interests are best reached, but overall it would be fair to say that it is the view of many, that the interests of the Icelandic nation collide, at least to certain extent, with social gains. That is not to say that sustainable fisheries shall not be obtained and social gains placed as a primary objective, rather that sustainable fisheries should be the primary goal of the fishery management, but that the interests of the

nation of the whole should be kept in mind when distributing the valuables that are associated with fishing rights. The initial allocation of fishing rights cannot be undone. Therefore future policymakers should concentrate on distributing fisheries rights to those that wish to engage in the profession. This does not mean the Icelandic Fishery Management System has to revert to open-access to fisheries, but rather that some of the value associated with fishing rights should be distributed to the nation, which can for example be done in the form of quota auction.

The distribution of fishing rights to those that wish to engage in the fishing profession touches upon the issue if quota shares can be seen as property rights of their holders, and should therefore be protected as such. This has, as has been explained, been a subject to some litigation before Icelandic and international courts. It is generally accepted that quota shares constitute as property rights, and therefore if they were to be confiscated from their current holders, they would have to be compensated for. This view is understandable in light of jurisprudence from the European Court of Human Rights (explained in Section 6.3.2) and jurisprudence from the Icelandic Supreme Court. However it can be argued that in light of the Icelandic Supreme Court's interpretation of Article 1 of the Fishery Management Act in the Vatneyri case, together with the wording "*common property*", in Article 1 of the Fishery Management Act, as a policy objective when interpreting fishery law, and furthermore the nature of fish as an asset, that quota shares can be seen as *user rights* of quota holders.

It is generally accepted that the ITQ system has improved the economic efficiency of Icelandic fisheries. Furthermore, it is also generally accepted that the system has been a large contributor in eliminating the problem of depleting fish stocks, which was a problem in the years leading up to the system's legalisation. In light of the objective of the FMS, which is to ensure the conservation and effective utilisation of marine resources, in order to promote stable employment and settlement throughout the country, the two factors mentioned above have fulfilled the objective of the FMS up to a certain extent. The elimination of depleting fish stocks to the conservation objective, and the increased economic efficiency of Icelandic fisheries to the aim of effective utilisation. However, the objective of the Fishery Management Act is also of a social nature, which is to promote

employment and settlement throughout Iceland. On that issue, there exists much more controversy whether the objective has been met. In 2010 the Icelandic government introduced new provisions to the Fishery Management Act, Articles 6.a and 10, which were intended to meet these objectives. Furthermore various provisions of the FMS are intended to reach the objective. It is important that public policy is efficient and effective, but it can be questioned if economic efficiency should be the primary goal pursued, when public policy is implemented. Public policy is in its nature always social to a certain extent, and to reach its objectives economic gains sometimes have to come after social aims. Thus, public policy sometimes has to be implemented by measures that may decrease economic efficiency. Regarding the Icelandic FMS, measures that promote employment and settlement throughout Iceland may decrease economic efficiency in the fishery sector, but if these objectives are to be reached, economic efficiency may have to be positioned as a latter goal. However, it should be a political priority to pursue a marine policy which brings value to the whole nation. This objective would best be reached by promoting sustainable utilisation of marine resources at economic, environmental, and social level, i.e. by pursuing the policy in a way that equally tries to obtain the three main objectives.

It is not only the ITQ system that contributes to the effectiveness of the Icelandic FMS, the enforcement and control system also plays a part. The fact that transparency of fishery data is high, contributes without a doubt to accountability within the sector, which in turn leads to higher compliance with fishery law by the industry. Higher compliance then leads to better conservation of marine resources. The ban on discarding, also plays an important part, as the ban contributes to the overall conservation of marine resources.

After having reviewed the CFP's and the Icelandic FMS's conservation policy, it is interesting to compare the management measures that both systems use for the conservation of marine resources within their jurisdiction. A comparative approach between the systems raises interesting issues as well as questions of what general lessons can be learned from the systems, if any.

7. Comparing the Common Fishery Policy and the Icelandic Fishery Management system

After a descriptive account of the Common Fishery Policy and the Icelandic Fishery Management System, it is evident that the fishery systems rest on different foundations. Both policies aim at conserving fish stocks in a way that ensures their sustainable utilisation, but despite their common ground to conserve marine resources, the ability of the systems to meet their objectives has been quite different. The EU has not been successful in managing its resources because of problems relating to the control and enforcement of the CFP, which is illustrated by the fact that in a report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, published in July 2011, it was reported that 60% of stocks in the Union's waters were fished beyond maximum sustainable yield.[413] This is an improvement from an assessment carried out in 2007 by ICES, where it was reported that 88% EU's most important commercial fish stocks were overfished and 30% were out of safe biological limits.[414] Despite the improvement, overexploitation of fish stocks is still a serious problem within the EU. Iceland, on the other hand, has been more successful in managing its marine resources. An understanding of the conservation management of the two systems is therefore necessary to get a comprehensive account of where the main differences in the systems lie.

This chapter will review the similarities and differences between the CFP and the Icelandic Fishery System in attempting to reach their aims, with the focus placed on the problems the CFP is facing.

In Chapter 4, it was stated that the challenges the CFP is facing concern the three fundamental pillars, the conservation, control and enforcement of the system. This chapter will focus on the challenges the CFP is facing, identified in Chapter 5, and make comparative analyses between the management measures the Icelandic system and the CFP use to promote their conservation policy. Hence, the

[413] Commission report to the European Parliament the council, the European Economic and Social Committee and the Committee of the Regions. On Reporting Obligations under Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy COM(2011) 418 final, p. 2.
[414] Commission COM(2009)163 final, Green paper: Reform of the Common Fisheries Policy, 22 April 2009.

challenges the CFP is facing, will serve as a foundation for the comparative analyses between the systems. The discussion will also give an assessment of each system's managing instruments within the scope of their objectives.

The chapter begins by analysing the objectives of each system. This is done because their overall objectives give a comprehensive picture of what the management systems are trying to achieve, as well as establishing a framework for the conservation measures that have been adopted. Furthermore, by analysing the system´s objectives reasoning can be reached whether the systems are likely to reach their overall objective of sustainable fisheries.

In each section an account will be given of the management instruments currently in use within the CFP, and an assessment will be given of their nature and why some of the management tools have failed the policy. Following that, an account will be given of the management tools used in the Icelandic system, and a critical comparison will be made of their main differences to those of the CFP. After that a discussion on the 2012 reform proposed for the CFP will follow and how the proposal is intended to counter the challenges of the CFP.

7.1 Objectives of the Common Fishery Policy

The policy's objectives define the management instruments that are used to ensure the effectiveness of a particular system. In Chapter 1 it was stated that the objectives of the CFP are to be found in Article 2(1) of the Basic Regulation. The Article states that the policy shall ensure the "*exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions*". This objective is also laid down in the preamble of the regulation, where it is required that economic, environmental and social factors are taken into account by policy makers, in a balanced manner, while pursuing the objectives of the CFP.[415]

The regulation does not, however, specify how this balance between economic, environmental and social factors is to be brought about, thus leaving it to the policy makers to decide which aspect is to be prioritised when decisions are made

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

and implemented and as a consequence, contributing to imprecise policy objectives.

In 1992, Charles Tilly proposed a general framework to analyse the conflict between the three factors. He described the framework as a conflict between the three different fishery paradigms, each based on a different set of policy objectives. The paradigms being: *Conservation,* which focuses on the objective of conservation of marine resources, *Rationalization,* which focuses on economic performance, and *Social/Community*, which focuses on community welfare in the sense of equity. He then went on to organise the paradigms in a triangle, with one occupying each corner and between them a so called *pure space*, where decision makers take possession depending on the paradigm they favour. [416]

Following the CFP 2002 reform, Hegland and Raakjær used the triangular framework, introduced by Tilly, to position the gravity of decision making in the CFP in accordance with the Commission's new emphasis on the recovery of fishing stocks in the Union's waters,[417] positioning the Commission nearest to the conservation paradigm.

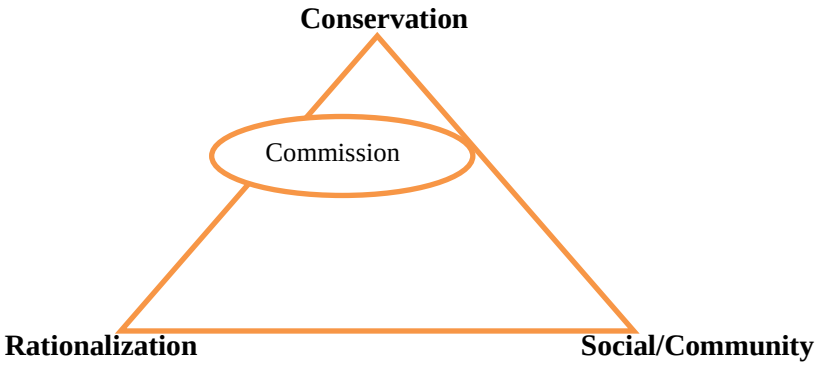

Figure 7.1 Objective of the Common Fishery Policy

Hegland and Raakjær go on to state that despite the Commission favouring conservation, now a decade later the final decision makers in the Council are "*strongly biased towards the easy, short-term political solution of pleasing the industry and the dependent communities."*[418] Therefore altering the gravity of decision making away from conservation towards the Social/Community

[416] Tilly, Charles., "Fishery Conflicts: A unified framework" p. 380-383.
[417] One of the main reasons for the reform was the decline in fish stocks from the nineteen-hundreds. Placing emphasis on recovery plans of stocks.
[418] Hegland, T., Raakjær, J., "Recovery Plans and the Balancing of fishing Capacity and Fishing Possibilities: Path dependency in the Common Fishery Policy" p. 153-155.

paradigm. This, in turn, explains the shortcomings of the recovery plans of the 2002 reform.

Healthy fish stocks and ecosystem are a premise for the economic and social viability of fishing sectors. Therefore, in the long run, there is no conflict between the economic, environmental and social objectives in fishery policies. It is only in the short-term that these objectives clash. For example, when measures have to be taken to restore or repair fish stocks, social factors such as employment can be affected. These social factors are then used to advocate decisions which are based on short-term interests, such as setting fishing opportunities higher than is recommended by scientific advice.

As was mentioned above, one of the problems of the CFP is considered to be imprecise policy objectives. The legislative proposal on a new regulation for the policy states in its Explanatory Memorandum that one of the justifications for a new Basic Regulation is the need to make "*precise the objectives of the CFP*".[419] The general objectives of the policy are in Article 2(1), which states that the policy shall "*ensure that fishing and aquaculture activities provide long-term sustainable environmental, economic and social conditions and contribute to the availability of food supplies*".[420]

There is a significant change between the general objectives stated in Article 2(1) of the Basic Regulation and Article 2(1) of the new proposal. According to the proposal, the policy's general objective is to ensure that fishing activities provide long-term economic, environmental and social sustainability. The addition of the word "*long-term*" suggests that decisions are not to be taken on a short-term basis, implying that the primary objective should be the conservation of marine resources. As discussed above, there is no conflict between economic, environmental and social factors in the long-term if fish stocks are healthy, thus reinforcing that conservation should, in the future, be the primary objective of the CFP.

[419] Commission Com(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[420] Article 2(1) Commission Com(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.

This finding is supported in the proposal's preamble, where it states that conservation of marine resources is the fundamental pillar necessary to reach the objectives of the CFP. The preamble also states that the overall objective of the CFP is to ensure that fishing activities provide for long-term sustainable environmental conditions, which are the premise to reach economic and social sustainability of the fishing industry, and which, in turn, contributes to the availability of food.[421] If we go back to the triangular framework introduced by Tilly, the general objectives in the proposal shift the gravity of the decision making towards the conservation paradigm. This is parallel to the shift that took place after the 2002 reform. The main difference, however, lies in the fact that the legislative proposal puts legal obligation on policy and decision makers to base their decisions on long-term sustainable conditions, trying to eliminate the possibility that decisions are taken in consideration of short-term interests. It remains to be seen if this change will become an adequate safeguard against short-term focus.

Hegland and Raakjær rightfully pointed out in their article that placing decision makers inside the triangle framework could easily be contested and should be taken as a mere indication of favoured paradigms.[422] In such a complex system as the CFP, many different factors can influence political positions. Different positions can also be taken at the national level.

7.2 Objectives of the Icelandic Fishery Management System

The objective of the Icelandic Fishery System is described in Article 1 of the Fisheries Management Act No. 116/2006. The Article states that the objective of the management system is to promote conservation and efficient utilisation of the Icelandic exploitable marine stocks, thereby ensuring stable employment and settlement throughout Iceland.[423] This means that the objective of the Icelandic system is to ensure the viability of Icelandic fishery communities with managing its marine resources in a sustainable manner.

[421] Commission Com(2011) 425 final. Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011, p. 6.
[422] Hegland, T., Raakjær, J., "Recovery Plans and the Balancing of Fishing Capacity and Fishing Possibilities: Path dependency in the Common Fishery Policy", p. 153 -155.
[423] Article 1 the Fishery Management Act No. 116/2006.

The Fishery Management Act No. 38/1990 is the predecessor to the current Act. In the reform the Act underwent, resulting in Act No. 116/2006, the overall objective of the system remained the same. In the comments accompanying the bill from 1990, it is stated that in order to ensure the viability of Icelandic communities, that are dependent on fisheries, marine resources must be exploited to the maximum yield from a long-term perspective.[424] Thus it is acknowledged that if decisions are based on a short-term focus, the objective of viable fishery communities would be harder to reach.

Going back to Tilly's triangular framework, the objective of the Icelandic Fishery Management System indicates that policy and decision makers are to be positioned near the conservation paradigm. This finding is supported both by the fact that Article 1 states that the aim of the system is to promote *conservation and efficient utilisation* of fish stocks to ensure the viability of fishery communities, and the fact that in the explanatory memorandum accompanying the bill, which later became Fishery Management Act No. 38/1990, it is stated that the policy objective will only be met if decisions are taken in view of long-term interests.

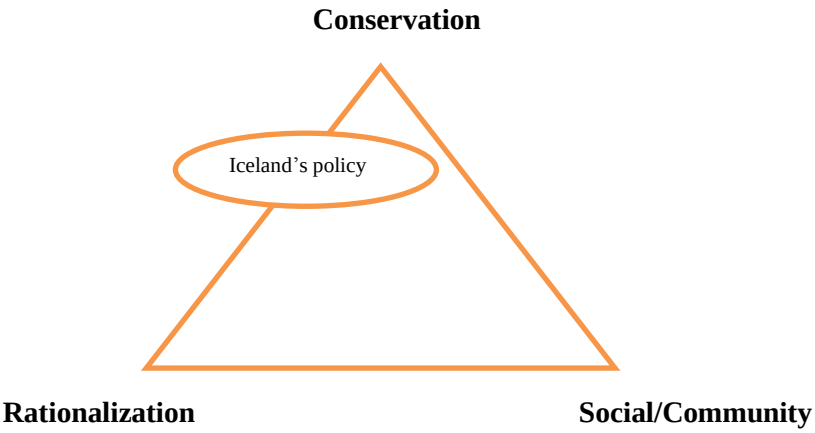

Figure 7.2 Objective of the Icelandic Fishery Management System.

When positioning Icelandic policy and decision makers within the triangular framework, they are, in addition to being positioned the closest to the *conservation* paradigm, positioned closer to the *rationalization* paradigm than the *social/community* one. That is because Article 1 of Act No. 116/2006 also states that the objective of the Act is, in addition to conservation, to ensure *efficient*

[424] 609. Legislative proposal of the Icelandic Fishery Management Act.

utilisation of fish stocks.[425] In the explanatory memorandum accompanying the bill, which became Fishery Management Act No. 38/1990, it is also stated that the aim of the bill is, among other things, to establish a framework which enables those that make decisions inside the policy to be able to do so in a manner that they consider to be the most efficient one. It is also stated that by using knowledge and experience within the fishery sector, decisions will be made that benefit society in the most efficient way.[426] Thus placing emphasis on the importance of the efficiency of the system, which in turn is supposed to lead to social gains.

7.3 Sustainable fisheries?

There are immense interests associated with fisheries. These are multiple and diverse interests that touch upon many aspects of society, and affect different interests groups. Different interests groups, in turn, seek different objectives which do not always go well together, and as a consequence conflicts arise about which goals' fishery policy should pursue. Because of the different interests associated with fisheries the question arises: what defines a successful fishery management system, or a fishery management system that obtains its objective of sustainability? In the two sections above Tilly's triangular framework was used in order to analyse the objectives of the EU's CFP and the Icelandic FMS. The triangle represented three paradigms: *Conservation, Rationalization,* and *Social/Community* paradigms, which Tilly describes as the three conflicting objectives of fishery management. These policy preferences Tilly identifies can be agreed upon. Therefore a policy that is positioned near the middle is a policy that compromises between the three objectives, and consequently, policies positioned near the corners represent an extreme policy. When analysing the objectives of the Icelandic FMS and the CFP, the conclusion was reached that the CFP positioned itself closest to the conservation paradigm, and then slightly favouring the social/community paradigm over the rationalization one. The Icelandic FMS is also positioned nearest to the conservation paradigm, but out of the two other paradigms the policy favours the rationalization or the economic paradigm over the social/community one. From analysing the policies objectives, based on the

[425] Article 1 the Fishery Management Act No. 116/2006.
[426] Explanatory Memorandum accopanying the legislative proposal for the Icelandic Fishery Management Act No. 38/1990

triangular framework, it can be gathered that both policies have the same main objective, which is the conservation of marine resources, but they differ in terms of sub-objectives or goals; the CFP's places emphasis on the social/community aspect, but Iceland the economic one. This difference between the policies has shaped the way that the systems are governed, and greatly contributed to decision making within them.

However, as has been explained, the conservation of fish stocks is a premise for the economic and social viability of fishing sectors. It has also been explained that the main objective of both the CFP and Icelandic FMS is the conservation of fish stocks at their sustainable level. At the beginning of the thesis, in Chapter 2, the concept of sustainable development was explored. There it was explained that the concept consists of environmental, social and economic pillars, and of the three the environment must be considered the strongest pillar, but the economic and social one the weaker pillars, thus it is said that the environment is the foundation while the other two are reliant on the environment. Therefore, because marine resources are exhaustible, they have to be conserved in the long run, in order for them to be able to provide for short-term benefits. The policy objectives introduced in the triangular framework, each represent one of the three pillars of sustainable development. The paradigms are mutually excluding in their purest form, and therefore if a policy's objective leans too far towards one of the paradigms it can be argued that it hinders the policy from catering to the other two objectives. Thus, a policy that favours one of the three paradigms in excess to the others does not fulfil the condition laid down by the concept of sustainable development. Hence, placing emphasis on one of the three paradigms in fishery policy is not likely to lead to sustainable fisheries. Regarding the Icelandic FMS and the EU's CFP it can, therefore be argued that neither system can be regarded as meeting their objective of sustainable fisheries; the Icelandic FMS because it favours the economic paradigm and the CFP because it places emphasis on the social/community factor. Furthermore, both policies place emphasis on the conservation paradigm, resulting in the systems obstructing the other two paradigms, which in turn lead to less emphasis on the other two paradigms. For the systems however, to reach their objective of sustainable fisheries, policy makers must take all paradigms into consideration positioning the fishery policies

objective in the middle of the triangular framework. Only when that has been done can it be concluded that the systems are sustainable, as they take equally into consideration all three pillars, and then pillars fisheries reach their fullest potential both in the short and long-term.

7.4 Countering overexploitation of fish stocks

In Chapter 4 the problems facing the CFP were categorised into problems concerning *conservation*, *control* and *enforcement*. The problems of the conservation policy were identified as *overcapacity*, *overfishing*, *discarding*, *TACs set too high, and insufficient integration of environmental concern into the system*. These challenges have amounted to the failure of the CFP conservation policy. This is shown by the fact that despite efforts to obtain the conservation of marine resources in European Waters, the Community has not been successful in preventing the continuous depletion of fish stocks. The problems of overcapacity, overfishing, discarding and TACs set too high, all reflect that the fishing capacity exceeds the availability of exhaustible natural resources; and as a consequence the exploitation of fish stocks at a sustainable level is not reached.

7.4.1 Access to fisheries

The core idea of fishery management is that because marine resources are exhaustible it is necessary to restrict fishermen's access to the resource. Decisions to restrict access are made at the political level, formulated into a public policy of fishery management, and then implemented by national administrations. Gezelius makes a distinction between these two restrictive factors. He divides them into, *resource scarcity*, which refers to the limited supply of natural resources, and *regulated scarcity*, which refers to political decisions that limit access to these resources.[427] For conservation measures to be effective, a harmonisation must exist between these two scarcity factors. Politicians rely on scientific advice which is based on the state of the natural resource, i.e. the resource scarcity. They use that advice to make decisions to promote exploitation of marine resources at a sustainable level, which results in limited access to the resources, i.e. regulated scarcity. Regulated scarcity refers to all measures that try to control fishing activity at sea, both input and output measures. As has been explained before,

[427]Gezelius, S.S., "The problem of implementing Policies for Sustainable Fishing", p. 9.

input measures are measures that regulate fishing capacity or the fishing effort of a fleet; these are measures such as vessel size and gear restrictions. Output measures are rules about what can be taken "*out*" of the natural resource, such as regulation on TACs, landings, by-catches and fish size. Both regulated scarcity and resource scarcity are of great importance if conservation measures are to be effective.

In Chapter 3 the management measures used by the CFP to promote its conservation policy were discussed. For conservation measures the CFP uses both resource scarcity and regulated scarcity, according to the terminology put forward by Gezelius. The policy's primary conservation tool is the TAC system and supplementary conservation measures to the TACs are various technical and structural measures, such as requiring a valid fishing license and the exit-entry scheme to regulate fishing capacity. TACs are a mainstream conservation tool used in fishery management today. In theory, TACs are generally considered a good way to solve the problem of distribution because their value is relatively predictable and difficult for interest groups to manipulate. Furthermore, the quantity of allowable catch is based on negotiations and compromises.[428] However, TACs do have their downside and because of that, management systems have made use of other conservation measures in addition to TACs. The main problem relating to TACs is the system's inability to implement a target for fishing mortalities.[429] For this reason the EU also makes use of structural measures for its conservation policy. Structural measures do not possess the qualities that are considered to accompany TACs. Like TACs they touch upon the issue of distribution rights but do not share TAC's characteristics of predictable value. As a consequence, the nature of structural measures makes them more difficult for interest groups to agree on and assess. Hence, it could be concluded that both conservation measures could exclude each other, i.e. if there were no implementation problems relating to catch quotas there would be no need for structural policies and vice versa. But because of the measures' inability to ensure conservation of natural resources on their own, conservation policies must rely on both systems. The main goal of the CFP structural policy is to regulate one of its

[428] Gezelius, S.S., "The problem of implementing Policies for Sustainable Fishing", p. 9.
[429] Gezelius, S.S., "The problem of implementing Policies for Sustainable Fishing", p. 8.

core problems the problem of overcapacity of the European fishing fleet. As has previously been explained, the CFP's primary instrument to meet capacity adjustments and the required reference level, as the Basic Regulation requires them to do, is with the *entry/exit regime*. In general, the entry/exit regime requires Member States to balance their fishing fleet, when new capacity enters their fleet, by withdrawing the same capacity from the fleet, both in terms of tonnage and power. Furthermore, capacity leaving the fleet with public aid cannot be replaced. Thus, Member States are not allowed to issue a new fishing license without first delisting a vessel's fishing license that has the equivalent fishing capacity. The policy touches directly upon distributional rights by trying to prevent the EU fleet from expanding and reducing it by not allowing replacement of vessels that have public aid which as a consequence excludes fishermen from the industry. However, the entry/exit regime has not been successful in overcoming the problem of overcapacity of the European fishing fleet, and fishing capacity still exceeds the available marine resources. Thus, overcapacity remains a great hindrance for the CFP in its efforts to reach its objective of fishing at a sustainable level.

TACs are also an important conservation tool in the Icelandic FMS. In the FMS, the TACs are decided upon in a regulation by the Minister of Fisheries and Agriculture based on scientific advice from the Icelandic MRI. So, like the CFP, the Icelandic FMS also uses natural scarcity as a basis for regulated scarcity to control the exploitation of marine resources at a sustainable level. Accompanying the TACs are various other input measures that also aim at ensuring the conservation of fish stocks, these are mainly technical measures and measures that permit permanent or temporary closure of fishing grounds.

The distribution of TACs inside the Icelandic FMS is governed by the ITQ system and differs fundamentally from the allocation of TACs in the CFP. The TACs are allocated to individual vessels in accordance to the vessel's quota share. The ITQ system thus restricts access to fisheries (fisheries that are subject to TACs) and also works as a base for their distribution. In the discussion above, it was mention that it is generally considered that the qualities associated with TACs make them well suited to meet the distributional challenges in fisheries. Because of the elements of the ITQ system, fishermen have a long-term right to catch fish if they

are owners of vessels that hold quota share. The fact that the quotas are tradable enables fishermen to trade their rights to catch fish, by selling their quotas. The quota buyers can double the quota of their previous vessels, which means that the vessel that was sold is removed from the fishing fleet, if it has sold its entire quota share. Hence, the elements of the ITQ system make the system able to work as a means for downsizing the fleet. As a result the system counters the problem of *overcapacity* of the Icelandic fleet, which is one of the main problems plaguing the CFP.

The allocation of TACs to vessels that hold quota shares has made the implementation of the TAC system in Iceland more functional than in the CFP, where the catch quota system does not function as it is supposed to. This has resulted in the fishery management system in Iceland not having to rely on structural policy for the harmonisation of resource scarcity and regulated scarcity. The ITQ system has therefore enabled the TACs to function as a distributional tool, resulting in catch restrictions being the FMS's main resource management tool.

In Chapter 4 an account was given of the proposal for the 2012 reform of the CFP, which is intended to enter into force in 2013. The reform introduces some radical changes in the Community's fishery management system which is supposed to counter the problem of depleting fish stocks in the Union's water and improve the overall economic performance of the industry. The reform's main objective is to reach sustainable fisheries by the year 2015, which in light of the state of the Community's marine resources, must be considered to be an ambitious objective. In order to be able to reach its aim the reform must tackle the problems of the current conservation policy. To do so, the reform introduces significant changes in management measures directed towards the conservation of fish stocks.[430]

The proposed system of *Transferable Fishing Concessions* (TFCs), in the proposal for the future CFP is, first and foremost, supposed to counteract the problem of overcapacity. The system is to become mandatory for all vessels operating inside the European Union that exceed 12m in length and have passive

[430] Here it must be noted again that the new proposal does not abandon the principle of relative stability.

gear. However, the proposal does not abandon the structural policy of Member States' obligation to adjust their fishing fleet to fishing opportunities. Member States will still have to control the entry and exit of fishing vessels, as they have before. This is understandable as the TFC only applies to vessels that are over 12m in length, leaving a part of the fleet still having to be subject to the entry/exit regime. Furthermore, the provisions on fleet capacity must be kept in place for the period when the decommissioning of vessels with public aid is still in effect. Gezelius argues that when fishery management systems are not able to abandon prior structural policies it shows how "*structural policies tie the management system to the implementation challenges associated to the chosen management form*".[431] This is precisely why the CFP cannot abandon the exit/entry regime. The regime was aligned to counter the challenges of the implementation of the management of controlling fleet capacity, and therefore provisions were adopted that prohibited the replacement of vessels with public aid. As a consequence, the system cannot abandon the regime as vessels with public aid still remain in the fleet, making the management system tied to the prior chosen management form. Hence, according to the new proposal, both the structural policy and the TFC system are intended to control the fleet capacity.

7.4.2 Effectiveness of TACs

Previously it was mentioned that, in theory, catch quotas are considered to be a good way to solve the problem of distribution of marine resources. However, if they are not implemented properly they will not function as they are supposed to and as a consequence, management systems will need to rely on structural policy to a greater extent. This is, as has been mentioned, true for the CFP. Even though the primary conservation tool the policy relies on is catch quotas, the system also heavily relies on structural policy to solve the problem of overcapacity. This is partly because of the EU's inability to properly implement the TAC system. Going back to what was stated and explained at the beginning of this chapter: there is a need for the harmonisation of resources scarcity and regulated scarcity in order for a conservation policy to be effective. This means that if these two factors are not in line with each other it leads to an imbalance, which can result in problems such as overcapacity and overfishing or an inability to implement

[431] Gezelius, S.S., "The problem of implementing Policies for sustainable fishing", p. 10.

functional management measures. The setting of TACs for European Waters is a complex process, which was thoroughly explained in Section 3.5.1. In brief, the Council issues a regulation on TACs based on a recommendation from the Commission. The Commission's recommendations are in turn based on scientific advice from the ICES and the STECF in accordance to the Basic Regulation which states that the decision-making process shall be "*based on sound scientific advice which delivers timely results*."[432] Hence, the regulated scarcity is to be decided upon on the grounds of resource scarcity. This means that the Council regulation on TACs is supposed to be based on the scientific advice given to the Commission from the ICES and STECF. Based on the theory of TACs, and the obligation put forward in the Basic Regulation, the Council's regulation on catch should be adequate in distributing the available marine resources; however, this has not been so in practice. The Council has a reputation of setting TACs much higher than the scientific advice recommended. The following table shows the average deviation from the recommended scientific advice and the Council settings of TACs in recent years.[433]

Year	2003	2004	2005	2006	2007
Average deviation	42%	48%	57%	47%	43%

Figure 7.3 Council's average deviation in setting TACs 2003-2007.

The table shows that there is a significant difference between the scientific advice and the Council's decisions, reaching its peak in 2005 when the average deviation from the scientific advice was nearly 60%. This has increased the risk of further depletion of fish stocks. However the Council has made an effort to turn this practice around and in 2011 the deviation was down to 23% which is a big step forward.[434] The Council's decision to raise TACs above the recommended

[432] Article 2(b) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.
[433] Markus, Till: *European Fishery Law*, p. 77.
[434] Commission report to the European Parliament, the council, the European Economic and Social Committee and the Committee of the Regions. *On Reporting Obligations under Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy* COM(2011) 418 final, p. 2.

scientific advice has been politically motivated.[435] There is a general reluctance by members of the Council to announce to their voters that catch quotas have been significantly downsized, which results in decisions being based on short-term interests rather than long-term ones. And when a Member State wants an increase in its own quota, it must aim for raising the whole Community's quota. When TACs are raised high above the given scientific advice it is evident that there is no harmonisation between resource scarcity and regulated scarcity, and the use of TACs as a conservation tool becomes *ineffective*, resulting in the Conservation policy's problem of overfishing.

Discarding is another problem that is plaguing the CFP and greatly affects the conservation of marine resources. In Section 2.5.4 it was described how discarding is an unwanted side effect of the TAC system because the Basic Regulation uses the term "*catch limit*" in its legal framework for TACs, which is in turn defined as "*quantitative limits on landing…*", making it illegal to land catches that have exceeded the allowable catches.[436] Therefore it becomes mandatory for fleets to discard valuable resources if they do not have sufficient quota for the catch. This practice is in contrast with the CFP's conservation policy, as discarding affects the sustainable exploitation of marine resources. It can however be concluded that limits on landings are relatively easy measures to implement and because of the poor performance of the TAC as a conservation tool, the Community has to rely on measures such as limits on landings to try to improve the state of fish stocks in the European Waters.

[435] See for example: Commission COM(2009)163 final, Green paper: Reform of the Common Fisheries Policy, 22 April 2009, p. 9.
[436] Article 4(2)(d) and Article 3(m) Council Regulation (EC) No. 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy.

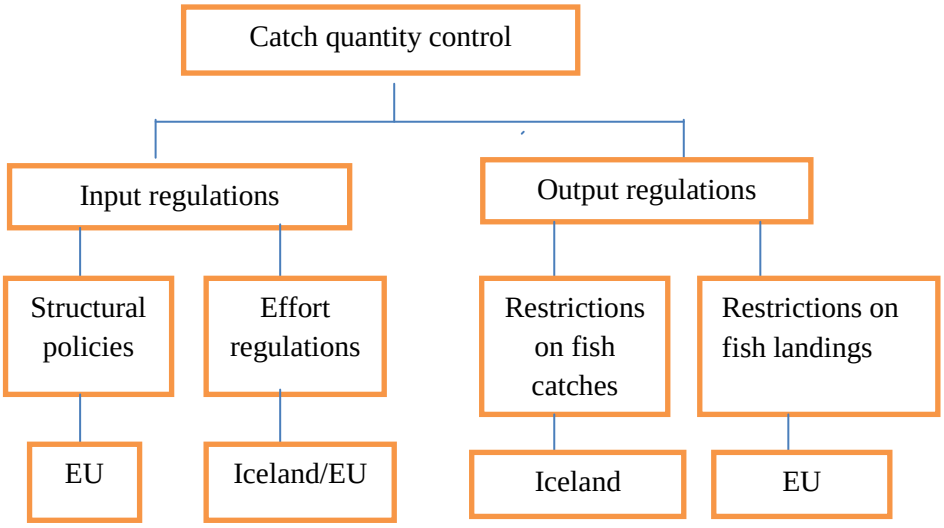

Figure 7.4 Difference between catch control in Iceland and the EU.

In Iceland the TACs have been more effective as a conservation tool. Above it was explained that overfishing in the CFP mainly resulted from the Council's practice of setting TACs high above the scientific advice given, making the TACs ineffective as a conservation tool. In Iceland the Minister of Fisheries and Agriculture has slightly raised the allowable catches from the scientific advice from the MRI. This is done by the minister primarily to support communities that are dependent on fisheries for labour and to counter the economic incentive of discarding. However, for the most important species, such as cod, there has been no difference in the minister's setting of catch quota and the scientific advice given by the MRI.[437] Gissurarson argues that one of the advantages of the ITQ system is that quota holders have an incentive for marine species to be exploited at a sustainable level because "*the value of their quotas reflects how well management is doing in ensuring healthy stocks in the future. This provides vessel owners with a strong incentive to accept a TAC set cautiously to conserve fish stocks*".[438] According to this theory the Icelandic administration is under no pressure from the fishing industry to raise TACs above scientific advice because vessel owners want to maximise their future profits, favouring long-term interests. However, it can very well be argued that those who conduct fishing activities in Iceland often complain about the setting of TAC being too low and argue that the advice given by the MRI does not agree with what they experience at sea. Despite

[437] OECD, OECD economic surveys: Iceland 2011, p. 37-38.
[438] Gissurarson, Hannes H., "Iceland's ITQ system and the problem of political acceptability", p. 176.

that, the fact that TACs are only raised slightly above the scientific advice, and in some fisheries not raised at all, contributes to both cautious fishing and the conservation of fish stocks, thus overall reducing the problem of overfishing and ensuring the effectiveness of TACs.

Another difference regarding the conservation policy in the system is that, according to the Icelandic Fishery Management Act, it is obligatory to land all catches.[439] Discarding of by-catches is thus an illegal practice inside the Icelandic territory. It has been explained that discarding prevents the objectives of the conservation of marine resources to be met, as it prevents stocks from recovering and wastes precious resources. The prohibition of discarding in the Icelandic fisheries therefore promotes the conservation of fish stocks. This is not to say that discarding does not take place in Icelandic fisheries. There still exists an incentive for fishers to practice *highgrading*, or throwing away lower valued fish species because quota holders want to maximise the value of their quota. Discarding, however, mainly takes place when quota for one species is exhausted but quota for other species still exist, making fishers discard the species they have exceeded their quota for. The flexibilities of the ITQ system are intended to counter this problem. They permit fishers that have exceeded their quota to obtain additional quota or the vessels are allowed to land a small percentage of the catch they do not have a sufficient quota for.[440] Here it is important to mention that according to research carried out by the MRI and the Directorate of Fisheries, discarding is an insignificant problem in Icelandic fisheries.[441]

To reach the objective of sustainable fishing and to overcome the problem of overfishing, it is essential to ensure the effectiveness of TACs. That means that within the CFP an end must be made to the practice of deviations from scientific advice by the Council when setting TACs, or that TACs have to be set at levels that balance resource scarcity and regulated scarcity. The proposal for the new Basic Regulation introduces multi-annual plans as a general management form for stocks. The plans are intended to restore and maintain all fishing stocks above levels capable of restoring sustainable fisheries by 2015. Fishing opportunities

[439] Article 6(6) The Fishery Management Act No. 116/2006.
[440] Article 11 of the Fishery Management Act No. 116/2006.
[441] Responsible fishing: http://www.fisheries.is/management/government-policy/responsible-fisheries/.

under the multi-annual plans shall then be set on the basis of predefined conservation reference points.[442] Furthermore, they shall be consistent to the general objectives of the CFP and include quantifiable targets.[443] Multi-annual plans are supposed to terminate the setting of TACs at levels that are high above the scientific advice given. Because of their nature they are intended to prevent short-term interest from being prioritised over long-term ones. As has been stated, the proposal states that the multi-annual plans are to be consistent with the CFP's general objectives. To reach those objectives the Council must set TACs with long-term interests in mind, as was explained in Section 7.1. Hence, both the nature of the multiannual plans and the objectives put forward in the proposal are to work as a framework for the Council to set TACs at levels that are in line with the scientific advice given. However, the Council still has the autonomy for the setting of TACs and it therefore remains to be seen if the changes proposed in the proposal will turn around the practice of setting ineffective TACs; it is difficult to make any conclusions as politics play a big part in the Council's decisions on TACs. The proposal does not include any provisions that prohibit fishing opportunities exceeding the scientific advice.

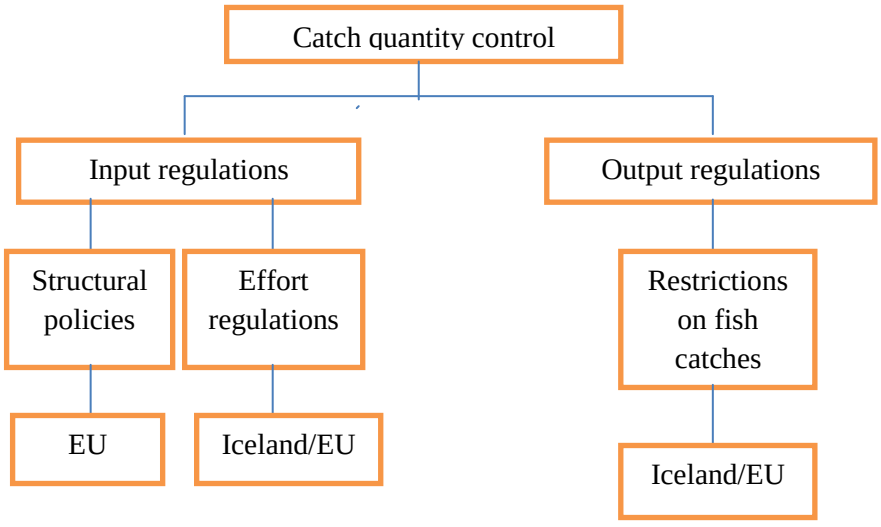

Figure 7.5 Changes in catch control with the 2012 reform.

As explained in Chapter 4 the proposal introduces a ban on discards. With discards identified as one of the problems of the conservation policy, the ban is an

[442] Article 9 Commission COM(2011) 425 final proposal for a regulation of the European Parliament and the Council on the Common Fishery Policy, 13 July 2011.
[443] Article 11(b)(c) Commission COM(2011) 425 final, Proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011. A detailed account was given of the general objectives of the proposal for a new Basic Regulation in Section 7.1.

important means to improve the state of the Community's marine resources. Fishermen will be obliged to land all catches and they are to be counted against quotas; however, the ban on discarding only applies to specific species. Previously it was explained that the practice of discarding differs between the Union's regions and therefore probably between Member States. This raises questions about the ban's impact on the principle of relative stability, if discarding differs greatly between Member States the count against quotas may affect the distribution of fishing opportunities between them. However, Member States seem to be satisfied with the implementation on the obligation to land all catches, so perhaps this will not become a problem but will instead affirm the incentive of better treatment of marine resources. In comparison, the main difference in the Icelandic ban on discarding is that there is an obligation to land all catches, thus the ban does not only apply to specific species. Also, the flexibilities of the Icelandic ITQ system make the implementation of the ban easier and more effective. This kind of flexibility seems to be missing from the new proposal, which raises concerns that the rule will be hard to implement and will only exist on paper.

7.4.3 Distribution of fishing rights and fishing opportunities

The EU has not been successful in implementing a functional TAC system, which has led to TACs being an ineffective conservation tool and the CFP having to rely heavily on structural policy to try to meet its conservation aims. The TACs do, however, not only serve the CFP as a conservation tool but also distribute fishing opportunities between Member States. The distribution of TACs between states is done in accordance to the Community's allocation principle of *relative stability*. The principle is based on a political agreement between Member States to solve the distributional challenge of state's fishing rights, and following every reform of the CFP it has been decided to continue the distribution of scarce marine resources between the Member States in accordance with the principle. Therefore, it is fair to say that the principle has become an inherent factor of the CFP management system. Long-time political agreements, like the agreement on the principle of relative stability, tend to make management systems remain unchanged even though it is apparent that amendments need to be made within the system. Paul A. David used the term "*path dependency*" to describe situations like

this, where past decisions influence the nature of present choices and it has economic disadvantages to change routes.[444] Gezelius agrees with David and argues that "*once policy-makers have chosen to manage resources through a given form of scarcity, and have established the necessary structures for distribution, it becomes politically costly to part with the chosen form of regulated scarcity*".[445] As has been stated, the principle of relative stability is based on a political agreement between the EU Member States. To abandon the allocation mechanism proceeding from the principle would be politically costly for Member States who would have to answer for changes in TAC allocation within their national state. As a result, the implementation of the CFP conservation policy relies on the distributional agreement founded in the principle of relative stability. The principle can therefore be regarded as the path dependency of the CFP's conservation policy.

As the principle of relative stability can be described as the path dependency of the CFP, the Icelandic ITQ system can also be described as the path dependency of the Icelandic FMS. The distribution of quota shares to individual vessels is not tied to any timeframe according to the Fishery Management Act; as a result, the distribution of TACs has been seen by many as a permanent allocation, which has led to legitimate expectation for those that have made a living from fisheries and spent their resources to be able to work in the profession. The long-term distribution of TACs can therefore prove very difficult to change at a later stage and can involve a significant political cost. This problem is apparent within the Icelandic Fishery Management System; now that the system is undergoing a reform, it has proven very difficult for the administration to promote any changes in the system. All changes have met strong opposition by the fishery sector; their main argument is that any changes will have negative effects on the efficiency of the system. Hence, the ITQ system has created a significant institutional inertia in the Icelandic FMS, just as the principle of relative stability has done in the CFP.

According to the proposal on a new Basic Regulation for the CFP, the Transferrable Fishing Concession (TFC) system is mainly supposed to accelerate the reduction of fleet overcapacity. It reduces access to marine resources to

[444] David, Paul A., "Clio and the Economics of QWERTY", p. 332-334.
[445] Gezelius, S.S., "The problem of implementing Policies for Sustainable Fishing", p. 10.

vessels that are holders of TFC. Member States then allocate fishing opportunities to these vessels on the basis of distribution of fishing opportunities.[446] Access to fisheries is thus confined to vessel owners that have been distributed fishing opportunities from their Member States. This proposed system introduces *right-based* fishery management, or as it is referred to in the proposal, a user-right to fish resources. The system resembles the Icelandic ITQ system, which also is a right-based system. It is the characteristics of the TFC that are intended to reduce the capacity of the European fishing fleet, primarily the characteristic that Fishing Concessions are to be leasable and transferable. As within the Icelandic ITQ system, fishermen that hold quota shares can transfer or lease their fishing concessions. In practice, that means that a vessel that leases or transfers its fishing concession to another vessel is able to exit the fishing fleet, which in turn reduces fleet capacity. A Member State can also decide to allow leasing of TFC to and from other Member States, that way fishing opportunities can be transferred to Member States that have more need of fishing opportunities because of the usage of their fleet, which is also supposed to contribute to fleet reduction. However, because the allocation of fishing opportunities is still based on the principle of relative stability, transferability of the concessions may be restricted to vessels flying the same flag. The distributional agreement founded in the principle of relative stability is therefore still a foundation for the allocation of fishing opportunities.

7.4.4 Environmental integration

The problems of overcapacity, overfishing, discarding, TAC set too high, and insufficient integration of environmental concern are all interlinked and together contribute to the failure of the conservation policy, as they all result in fishing that is not conducted at a sustainable level. To repair the state of European stocks all problems must be tackled effectively, otherwise the problem of overfishing will continue, at least to a certain extent. Overexploited fish stocks not only have an impact on marine life but also on its ecosystems. Healthy marine ecosystems, in turn, are essential for a plentiful supply of marine resources, which all fishing activities depend on. A successful conservation policy thus relies on both the

[446] Article 28 and 29 Commission COM(2011) 425 final proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.

conservation of marine life and the marine ecosystems. This leads to the last identified problem of the CFP conservation policy, the insufficient integration of environmental concern into the policy, or in other words, that the objects of fishery management are not consistent with the EU's environmental policy and its objectives.

Following the 2002 reform, increased emphasis was put on improving the protection of the marine environment. In a communication accompanying the reform, the Commission set out an Action Plan to integrate environmental protection into the CFP; the main objectives, means and targets were outlined in the Communication and were intended to meet and solve environmental challenges in an effective way.[447] The main objective of the Action Plan was to promote sustainable development by integrating the Community's main environmental principles into the CFP.[448] The reform was, however, not successful in creating the environmental conditions for the objective of sustainable fisheries to be reached.

Iceland's fishery management policy is to manage its marine resource by taking into consideration the impacts of fisheries on the marine environment, or by using the ecosystem approach.[449] Therefore, the MRI conducts extensive research not only on the condition of the Icelandic fish stocks but also on the ecosystem within the Icelandic territory. However, the Icelandic Fishery Management Act does not include any provisions on marine environment or on the ecosystem approach; it only states that the objective of the Act is to promote the conservation of exploitable marine resources. Thus there is no broader environmental policy integrated into the system, as is done in the CFP. The environmental integration into the policy is considered to be included in the objective of the conservation of fish stocks. As was explained above, a successful conservation policy relies both on the conservation of marine life and of the marine environment, the Icelandic policymaker seems to link the two in the objective of the conservation of marine resources.

[447] Communication from the Commission COM(2002) 186 final setting out an Action Plan to integrate environmental protection requirements into the Common Fishery Policy.
[448] Communication from the Commission COM(2002) 186 final setting out an Action Plan to integrate environmental protection requirements into the Common Fishery Policy, p. 3.
[449] Government policy; www.fisheries.is/management/goverment-policy, Accessed on 31.10.2011.

In order to solve the problem of insufficient integration of environmental concern, the proposal on the new Basic Regulation states that the CFP should contribute to the protection of the marine environment and to the "*achievement of good environmental status*" as required by the Marine Strategy Framework Directive.[450] To reach the directive's goal all of the problems which result in overfishing must be countered and the precautionary principle and ecosystem approach must be effectively applied.

7.5 Fisheries Control

In Section 5.2 there were three challenges identified that the CFP is facing concerning the control of the policy. These were problems concerning *lack of focus in objectives, lack of reliable data, and top-down micromanagement which is lacking flexibility*. The problem of lack of focus in objectives was assessed at the beginning of this chapter where the objective of the CFP and the Icelandic management system were analysed. This was done because the underlying objectives of the Icelandic Fishery Management System and the CFP determine the fundamental grounds the policies are based on. In that respect, the systems' objectives play a large part in determining what management measures are used, as well as impacting the development of the measures. Thus, the objectives of the systems affect the approaches used by authorities to exploit marine resources in a way that promotes people's welfare.

7.5.1 Transparency and data collection

It has been emphasised that reliable data is a prerequisite for reaching sustainable fisheries. Without sound data on fish stocks, there can be no knowledge of their biological state. Reliable data is therefore both highly important for scientific advice and for the implementation and control of a well-functioning fishery management system, i.e. for conservation policies to be effective.

As stated above, one of the problems the CFP has been identified as having is the lack of reliable data to assess all stocks and fleets. Section 3.6.1 contained a comprehensive account of the process of data collection within the CFP and

[450] Article 1(1) of Directive 2008/56/EC of the European Parliament and the Council of 17 of June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)

measures the Community has taken to try to make data collection more effective and reliable. As a part of making data more reliable, the European fishing fleet is obliged to make use of modern technology for the collection of data within the industry, but despite the Union's efforts to improve data collection, scientists have not been able to assess stocks accurately, as data provided by the Member States is still too incomplete. This is shown by the fact that last year 95 stocks were fished in the European Union's North-East Atlantic waters, but of those, only 34 stocks were understood well enough for scientists to be able to estimate fishing mortality that corresponded with maximum sustainable yield (MSY). Furthermore, in the Mediterranean, only the biomass of one stock could be assessed and 55% of stocks were evaluated in terms of MSY.[451] These figures show that Member States have not been efficient enough to ensure that data is collected sufficiently from the fishing industry, or in other words, there seems to be a lack of enforcement on their part regarding data collection from the fishing industry. The figures also show that collection of data within the fishing industry itself is inadequate. This implies that fishermen do not have an *incentive* to collect necessary data, according to the rules on data collection.

There are many factors that can contribute towards fishermen's non-compliance with regulations, such as regulations regarding collection of data. One of those factors is the fishermen's perception of the regulations' ability to function as a means to adequately measure the biological state of fish stocks. In a research carried out by Raakjær and Mathiesen, regarding compliance with fishery law in Denmark, they pointed out that fishers generally accept that regulations need to be based on scientific advice, but there exists a general distrust towards the work of scientists because fishers believe that their practical knowledge should be integrated into the stock assessment process and they argue that biologists "*misunderstand the fluctuations and spatial movements of the stocks because of their research methods*".[452]

Without a doubt, fishers' practical knowledge can prove to be a valuable addition to the scientific evaluation of fish stocks. Many fishers have gained their

[451] *Fisheries and Aquaculture in Europe*. No. 58 October 2011: http://ec.europa.eu/fisheries/documentation/magazine/mag53_en.pdf. Accessed on 02.11.2011.
[452] Raakjær, J., Mathiesen, C., "Important factors influencing rule compliance in fisheries lessons from Denmark", p. 412.

knowledge and experience through years of daily practice. Even though the research, commented on above, was carried out in Danish fisheries, it can be assumed that this view also applies to fishers operating in other Member States of the EU. As the wording from the research suggests, there seems to be a general mistrust by fishers of the scientific assessments of fish stocks. Such mistrust of the scientific research undermines the fishers' incentive to comply with the data collection regulation, as the regulations are regarded as lacking in legitimacy and being meaningless. This can explain why data collection from the Member States is incomplete.

As has been explained before, the most important data from the fishing industry are landing declarations, sales notes and logbooks, referred to as primary data. The primary data is then transferred to a Member States' authority that is competent to receive it, which is responsible for validating and controlling the data before it is transmitted to end users. The Commission is then responsible for ensuring that Member States have collected the primary data in accordance to their obligations under Community law. It is therefore the responsibility of Member States to ensure that data is correctly collected by the fishing industry. Insufficient information coming from the fishery sector thus entitles the competent authorities in the Member States to use enforcement measures to try to dissuade the infringement of fishery law. Fishery management is a complicated issue, and in the EU, fishery management is a complex system with rights being held at many different levels and by many different institutions. Raakjær argues that it is common in many fisheries that the institutions in question have not been able to adjust rules to the practical fishery, which in turn creates unfortunate incentives.[453] This is true for the overall compliance with fishery legislation but can also be applied to insufficient data collection. It seems that Member States' authorities that receive data from the fishing industry have not been able to adjust the rules on data collection to the practical fisheries, fuelling the fishers' incentive for non-compliance with the rules.

The importance of transparency in the fishery sector has been discussed and an account was given of the relationship between transparency in public policy and

[453] Raakjær, J., "An analytical framework for studying: compliance and legitimacy in fisheries management", p. 430.

accountability. In theory, increased transparency in public policy leads to an increase in accountability. Transparency enables authorities and the public to see if legal obligations are being met, if information reveals that obligations are not being met, individuals can be made accountable for their failings. Within the CFP, transparency of fishery data is limited. Any information that is confidential, i.e. information that, for example, concerns the protection of an individual, which is data that makes any reference to the master of a fishing vessel or his representatives that are responsible for the vessel's activity and is linked to the identification of a fishing vessel, is not accessible to the public. The information that is available to the public is output data that originates from the summarisation of primary or detailed data for specific analytical purposes, referred to as aggregated data, but not primary data from the fishing industry (because of the reasons above). Public access to fishery data is governed by Directive 2003/4/EC of the European Parliament and of the Council on public access to environmental information and Regulation (EC) No. 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies. Under the directive and the regulation, the public has the right to access environmental information that relates to the sustainability of fisheries and the marine environment. However, to be able to access data the public has to make a request to the proper authority, thus the public needs to know beforehand what information to seek and in what way it would benefit them. This procedure imposes a hindrance for the public who would require information on the state of marine resources, as few have the time and resources to fully comprehend marine impact on the environment. Therefore it can be stated that public access to information relating to fisheries in the EU is limited. This in turn affects the accountability in the sector. If the public has, for example, access to primary data form the fishing industry it would create a greater incentive for fishers to comply with the applicable regulations on data collection. Furthermore, it would also place greater pressure on authorities to make certain that adequate data is being received from the fishing industry. Hence, more transparency of data from the industry would increase accountability in the sector, therefore promoting sustainable fisheries.

As within the CFP, the most important data from the fishing industry in Iceland are landing declarations, sales notes and logbooks. However, unlike within the CFP, the fishing industry generally complies with rules on data collection.[454] In the discussion above it was mentioned that in a research carried out in Danish fisheries, fishermen acknowledged that fishery management had to be based on scientific advice but there exists a distrust of scientist's work because fishers feel that their practical, long-term knowledge is not integrated into assessment procedures; this results in a low incentive to comply with regulations. This seems not to be the case in Icelandic fisheries. Even though fishers sometimes complain about the scientific advice on TACs not being consistent with their practical experience, it seems to have no effects on the level of compliance with rules on data collection.

There is a fundamental difference between the Icelandic FMS and the CFP regarding transparency of fishery data and public access to it. As explained above, the public access to fishery data within the CFP can be described as limited. In Iceland this is not so. As was explained in Section 6.4.2, data collection within the Icelandic FMS is governed by Article 22 of the Act on the Treatment of Exploitable Marine Resources. According to the Article, all information on quota allocation, vessels' quota share, vessels' catch, and quota transfers are all public information. In addition to that, the Article also states that the Directorate of Fisheries shall regularly display information on vessels that have made catches in excess to their quota share, as well as information on sanctions because of illegal catches.[455] Public access to fishery data from the Icelandic fishing industry is therefore very open. The fact that information originating from the fishery sector is readily available to the public has a great impact of the industry's incentive to comply with the Icelandic Fishery Law. Furthermore, the fact that information on vessels that exceed their quota share, as well as information on sanctions because of illegal catches, is made public, also has an impact on the fishers' incentive to comply with the fishery law. There is another factor that promotes an incentive for the fishing industry to comply with the rules, which is that data is immediately made available on the Directorate of Fisheries' website and is updated every 6

[454] There is considered to be an overall general compliance with Icelandic Fishery Law.
[455] Article 22 of Act No. 57/1996 on the Treatment of Exploitable Marine Resources.

hours,[456] making it easily accessed by the public. Hence, there is much transparency of data within the fishing industry in Iceland, which, without a doubt, promotes accountability within the system. Following this, it is also important to emphasise that in the Icelandic FMS's data collection, no distinction is made between information for scientific purposes and information on vessels, as is done with data collected from the EU fishing fleet.

The proposal for a new Basic Regulation for the CFP proposes some changes regarding data collection to tackle the problem mentioned above of incomplete data from Member States. The proposal emphasises that scientific knowledge of marine resources within the Union needs to be improved. With sound scientific data, the objective of the new CFP on sustainable fisheries can be implemented more effectively and the knowledge base for the conservation policy improves. According to the proposal, there is not much change regarding data collection within the fishing industry. The Member States are still responsible for the collection of data that is necessary for ecosystem based fisheries, but according to the proposal Member States now also have to collect data concerning the socio-economics of their fishery sector. Another change is that data is supposed to be collected in accordance with the multi-annual plans applicable for some stocks.[457] Additionally, the proposal proposes changes on the coordination of data collection between Member States. To ensure better coordination between Member States, the Commission introduces a *regional coordination obligation on data collection*. Furthermore, the Member States shall ensure a national coordination of the collection and management of scientific data.[458] The move towards a regional coordination obligation on data collection is a decentralisation from the Commission's role of verifying data collected by Member States. Now the Member States themselves are obliged to verify and coordinate their national data with other Member States in the same region.[459] This move towards decentralisation reduces the hierarchical organisation within the CFP and may be expected to increase the industry's compliance with fishery law, as the institutions

[456] Directorate of fisheries, *General information*, 2011.
[457] Article 37(a) Commission COM(2011) 425 final proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[458] Article 37(6)(7) Commission COM(2011) 425 final proposal for a regulation of the European Parliament and the Council on the Common Fisheries Policy, 13 July 2011.
[459] The commission, though, still has the role of verifying the Member States collect adequate data.

may have greater capacity of adjusting the rules to suit the needs of practical fisheries. If data from Member States becomes more reliable for scientific purposes, it increases the aim of the conservation policy to be reached.

However, the proposal does not introduce any changes regarding transparency of the data or public access to information from the fishery sector.

7.5.2 National autonomy in fishery management

As was mentioned above, one of the problems concerning the control of the CFP has been identified as top-down micromanagement lacking flexibility. Or in other words the problem of policy being created at supranational level, and then subject to implementation at the national level. Top-down micromanagement exists within the CFP. That is due to the fact that the EU has exclusive competence regarding the conservation of marine resources. Regulations are passed at the EU level and Member States are then obliged to implement the rules into their national legislation. Because the EU has exclusive competence of the conservation of marine resources, the management of the CFP conservation policy has had very limited flexibility for Member States to adopt their own measures for the conservation of fish stocks, even though they do possess some means to do so.

Supranational public policies that are implemented at the national level are considered to lead to problems associated with non-compliance with the policy. Therefore, the structure of the EU (top-down micromanagement) can lead to less compliance with the CFP rules by the EU fishing industry. In practice that means that the objective of the conservation of marine resources does not serve as a priority within the industry, and other incentives overtake.

In research carried out by several scholars on the politics of implementation in resource conservation, their analyses suggested that implementation of policy in fishery management is highly dependent on the institutional setup of the fishery management system, in particular with regard to national autonomy. They argued that "*the higher the autonomy of the state in fishery management, the less likely it is that policy decisions will be reinterpreted or circumvented during their implementation*".[460] According to their findings, the fact that national autonomy is low within EU fishery management raises the likelihood of Member States not

[460] Gezelius, S.S., et al., "The politics of implementation in resources management", p. 213.

complying with the policy's decisions, such as policy decisions regarding the conservation of marine resources. National autonomy in fishery management refers to the ability of an individual state to make major decisions regarding its fishery management, rather than having to implement decision made at the international level. This reinforces what was stated above, that top-down micromanagement can increase the risk of a culture of non-compliance within the fishery sector. The distance between the fishery sector and the policy makers is great, and the fishery institutions have not succeeded in creating a positive incentive towards the conservation of marine resources in the fishery sector. Hence, the hierarchical organisation of the EU's fishery management system has decreased the legitimacy of the fishery regulations in the sector.

As was discussed in Chapter 2, following the 2002 reform the EU created the Regional Advisory Councils (RACs), which are cross-national stakeholder groups. The aim of the Councils was to increase stakeholder involvement in decision making within the CFP. The establishment of RACs was a way to reduce the dominant role played by Member States and the Community in the decision making process. By involving stakeholders in the decision making, the top-down management of the Community is altered, thus acting as a way to increase the fishing industry's incentive to comply with the conservation policy. However, as was pointed out in the discussion on the setting of TACs by the Council, no data exists on how often the Commission has followed the RAC's advice in their decision making other than that it has on several occasions taken it into consideration.[461] In light of the problems the CFP faces, the introduction of RACs does not seem to have diminished the fishing industry's incentive to circumvent the policy's decisions. The attempt to establish the RAC and increase the flexibility of the top-down management of the CFP has therefore not worked as it should have.

The Icelandic FMS is not characterised by top-down micromanagement; on the contrary, the national fishery management system of Iceland has high management autonomy. It can even be argued that stakeholders in the Icelandic fishing industry hold too much power in the decision making in the industry.

[461] Commission's Communication to the Council and the European Parliament. *Review of the Functioning of the Regional Advisory Councils*, p. 9.

The CFP's new proposal introduces some measures that are intended to reduce the top-down management of the system. The measures in question all have the common element of trying to increase regionalisation in the CFP. There are two measures that are specifically intended to increase the Member States' autonomy in decision making: the TFC and the decentralisation of technical measures. The TFC system enables the Member States to allocate their fishing opportunities, allocated from the Council, among regions or operators as they see fit. They can therefore decide to distribute their fishing opportunities based on social or economic means. The allocation of fishing opportunities is, in other words, decentralised towards the fishing industry.

As mentioned, the other measure of regionalisation is the decentralisation of technical measures to Member States. Member States will have the authority to adopt technical measures, from an available toolbox of measures under the CFP, necessary to achieve the objectives set out for the conservation of marine resources.

These changes introduce flexibility in the Union's legislation that has not existed before. The current Basic Regulation does not contain provisions that decentralise conservation power to Member States, in this manner.

7.6 Enforcement; compliance and complexity in the Systems

Enforcement is essential for the effectiveness of fishery law and the proper functioning of every fishery management system. Any challenges regarding enforcement in fisheries hinder the conservation of marine resources from being met. There are three challenges within the CFP that are identified as challenges regarding enforcement. These are *poor compliance in the sector, costly and complex legislation that leads to insufficient compliance* and *substantial public financial support that does not contribute to achieving the objectives of the CFP*. As can be seen from these challenges, they all relate to the poor compliance of fishers with the Union's fishery legislations. Costly and complex legislation and substantial public support are considered factors that influence fishermen's incentive to not comply with the Union's Fishery Law. It is therefore evident that the Union's enforcement measures have not been effective enough to change the

problem of non-compliance, in spite of the Community's efforts in strengthening the inspection and sanction measures of the CFP.

7.6.1 Implementation drift

In Section 3.6.2 a comprehensive account was given of the so called *culture of non-compliance* which is one of the major problems for the objectives of the CFP conservation policy to be met. It was stated that poor compliance exists not only within the Member States' fishing industries, but also in the Member States themselves. The fundamental purpose of fishery management is to monitor and control fishing mortality to ensure the conservation of marine resources. In order to achieve that task not only do enforcement measures need to be effective, but the system also needs to encourage fishermen to comply with the applicable rules thereby preventing illegal fishing. In other words, compliance does not rely on enforcement alone but also on incentives provided for, by fishery rules and institutional setup. Hence effective implementation of fishery rules is, among other things, affected by overall compliance.

In Section 3.6.2 it was also explained how fishermen have an incentive to try to catch as much fish as they can to increase their own economic gain, referred to as the problem of the *Tragedy of the Commons*, meaning that fishermen gain no economic profit, by reducing their fishing effort to promote the conservation of marine resources, which can be harvested by anyone. In the case of Member States, their reluctance to properly enforce the rules of the CFP can also be explained by their incentive to maximise their own economic gain. Their behaviour is shaped by the behaviours and opinions of other Member States that are unwilling to contribute to the conservation of shared resources, as they are afraid that their conservation measures will be exploited by others states.[462]

Inspired by S.S. Gezelius, et al, the term *implementation drift* will be used to try to further explain the incentives by the CFP's actors, to circumvent the objectives and rules of the CFP during the policy's implementation. *Implementation drift* refers to the process of redefining and pursuing alternative political goals based on one's own priorities, rather than those of the originator, during the implementation of policy, and is inspired by the *principal-agent approach*, which is helpful in

[462] This is referred to as the "prisoner's dilemma game", which is a social theory that is related to the prisoner's dilemma theory.

explaining the mechanism which inspires implementation drift.[463] In detail, the principal-agent approach explains how a *principal*, who delegates acts to other actors, can ensure that the acts are carried out in accordance to the principal's wishes.[464] In this discussion, the EU is the principal and the Member States is the agent that receives delegated tasks from the EU, and who is responsible for the implementation of the conservation and structural policy. Gezelius, et al, determine four mechanisms that can be used by the principal to control the agent to which it delegates acts.

The first one is to choose an agent that has the greatest incentive not to carry out an implementation drift.[465] According to this, the EU should only delegate TACs to Member States that have an incentive to comply with the CFP conservation policy. However, as was explained in Section 6.3.3 TACs are allocated between Member States according to the principle of relative stability. The principle is firmly rooted in the CFP and has been described as the path dependency of the system. Because of the nature of the principle, and the fact that it is based on a political agreement, the EU is not able to distribute TACs in any other way. Therefore, the Member States are stuck in the prisoner's dilemma.

The second one is the *structure* that the agents work under.[466] If the principal is able to create an incentive structure that makes it more profitable for the agent to remain loyal to the principal, it is more likely that the principal's objective will be met. The most important measure that influences the conservation policy is the allocation of fishing opportunities to Member States through TACs, however because the TACs are, as has been explained, not related to catches but are counted against landings, discarding has become a common practice within the CFP. Discarding is therefore not counted against the Member States' quota, and the states have no incentive to increase their enforcement of discarding, since to do so would only lower the quota allocated the following year. Hence, there is not enough incentive within the structure to promote compliance by the Member States, which in turn has no positive effect upon conservation actions.

[463] Gezelius, S.S., et al, "The politics of implementation in resources management", p. 213.
[464] Gezelius, S.S., et al, "The politics of implementation in resources management", p. 213.
[465] Gezelius, S.S., et al, "The politics of implementation in resources management", p. 214.
[466] Gezelius, S.S., et al, "The politics of implementation in resources management", p. 214.

The third and fourth mechanisms are *monitoring* and s*anctioning*.[467] As has been discussed, the EU has various ways to monitor implementation drift. It can do so, for example, through modern technology such as the electronic logbooks and the VMS. The monitoring should increase the agent's incentive to comply with the delegated task from the principal. The fourth mechanism is the ability of the EU to sanction Member States that do not comply with its conservation policy. If information reveals that an implementation drift has occurred the EU can impose an available sanction or the Commission can bring the Member State in violation of the fishery law before the European Court of Justice.

The other two challenges relating to the enforcement of the CFP are identified as *costly and complex legislation* that leads to insufficient compliance and substantial *public financial support* that does not contribute to achieving the objectives of the CFP. As stated above, both of them concern the overall poor compliance with the CFP. The lack of compliance related to the complex and costly legislation of the CFP is also rooted in the Member States' incentive to not comply with the conservation policy. The structure of the policy does not create an incentive for the Member States to conserve marine resources; thus the entire complex framework of the CFP does not counter the underlying incentive of fishermen and Member States to maximise their own economic gain.

The substantial public financial support that does not contribute to achieving the objectives of the CFP can also be linked to the Member States' incentive to not comply with the rules that apply.

As has previously been mentioned, the Icelandic FMS does not share the CFP's problem of non-compliance, and compliance with Icelandic Fishery Law is quite high. Some argue that the reason behind that is the fact that the ITQ system has created an incentive for quota holders to think long-term and adopt conservation measures in order to maximise their future benefits. Here it should also be noted that because Icelandic fishers know how much quota they will be allocated each year, in accordance to their quota share, the problem of the *tragedy of the commons* does not exist. They are able to better plan for the future. Figure 7.6,

[467] Gezelius, S.S., et al, "The politics of implementation in resource management", p. 215 -16.

compares the factors that are likely to influence the systems´ conservation policy. The x indicated an existing factor, but the – a lack of a factor.

Conservation of marine resources	Iceland	EU
TACs	x	x
Quotas	x	x
Right based management regime	x	-
Equal access	-	x
Decisions on fishery management taken at the international level	-	x
Decision in fishery management taken at the national level	x	-
Stakeholders involvement/influence in decision making	x	-
Compliance with fishery legislation	x	-
Transparency in the fishery sector	x	-
Accuracy of data	x	-

Figure 7.6 Factors that influence the CFP´s and the Icelandic FMS´s conservation policy.

As has been stated before, the new proposal for the CFP's Basic Regulation introduces measures that are intended to increase Member States' compliance with the CFP; specifically, measures that increase regionalisation in the system, i.e. Transferrable Fishing Concessions (TFCs) and Member States' authority to decide which technical measures to adopt for the conservation of fish stocks.

7.7 Conclusion

Previously it has been mentioned that a comparative analysis between the CFP and the Icelandic FMS provides an insight into issues that might otherwise have gone unnoticed. Furthermore the comparative approach also raises questions of where changes can be made and what general lessons can be learned. This chapter began by analysing the objectives of the two management systems, by analysing their objectives' legal framework, it became apparent that both systems' overall objective is the conservation of marine resources within their waters, but their objectives differ in relation to the policies' sub-goals. The Icelandic FMS places emphasis on efficient fishing, while the CFP puts more emphasis on welfare, or the social factors of their fishery policy. This difference between the policies' objectives, and their sub-objectives, has had a great impact on their development and decision making within the sectors. The emphasis on social objectives within the CFP has resulted in decisions being taken with short-term interests at heart, which in turn has undermined the conservation of fishery resources being the dominant goal pursued. While in Iceland, the emphasis on the efficiency of fishing has undermined social factors, and in turn created scepticism towards the policy as a whole, but has been able to conserve marine resources more effectively. To find a balance between economic, social and environmental (conservation) factors in fisheries is not an easy task for policy makers. The paradigms mentioned above in their purest forms, are mutually exclusive. It is only when a balance between all three of them exists, that is can assumed that fishery management systems are sustainable, and therefore reaching their fullest potential now and for coming generations. Analysing the CFP's and the Icelandic FMS' objectives, and observing where the main difference in their objectives lies, helps to understand the different approaches taken within the management systems.

The comparison between the two systems was based on factors that challenge the current CFP and hinder it from adequately conserving the Union's marine resources, and were divided into challenges concerning conservation, control and enforcement. It can be stated that the challenges that concern the conservation of marine resources in Europe are interlinked and together contribute to overfishing,

leading to depleting fish stocks and ineffective conservation policy. As explained TACs are the main conservation tool used by the CFP, and also serve as a distributional mechanism of fishing opportunities between Member States, based on the principle of relative stability. Because of the multi-year practice of the Council, setting TACs high above the scientific advice given, the TACs have become ineffective as a conservation tool, resulting in the policy having to adopt and heavily rely on additional management measures to try and ensure the conservation of fish stocks. However the TACs do function as a distributional tool of fishing opportunities between Member States, which are distributed in accordance to the Community's principle of relative stability. It can be argued that the principle of relative stability, as a distributional tool of TACs, has affected TACs from being distributed between Member States in a more efficient manner, i.e. in accordance to Member States' fishing capacity, which could contribute to more effective conservation of fish stocks. The primary conservation tool in Iceland is also TACs, but because of the structure of the Icelandic FMS, their functioning has been quite different from the functioning of TACs in the CFP. TACs in the Icelandic Fishery Management System function effectively as a conservation tool. That is primarily due to the fact that the Icelandic Minister of Fisheries and Agriculture sets TACs in correlation to the scientific advice given by the MRI. This practice has undoubtedly contributed to cautious and conservative fishing, therefore hindering the problem of overfishing. Of course the ITQ system also plays a part; many argue that the system creates an incentive for fishermen to promote the conservation of marine resources. However, it is the Minister of Fisheries and Agriculture that has autonomy regarding the setting of TACs and the final decisions are his to make, even though pressure from the fishing industry in raising TACs can be less. Discarding is another factor that negatively affects the conservation of marine resources. In the EU, discarding is a fairly common practice, while in Iceland discarding is prohibited by law, and research suggests that it is not a problem within the Icelandic FMS.

There is a fundamental difference between the two management systems regarding the transparency of data from the fishing industry. The main data stemming from the fishing sectors is the same, but the data processing is quite different. Within the CFP a distinction is made between the data collected for

scientific purposes and data that is related to vessels. No such distinction is made on data collected in the Icelandic fishing sector. Data that is available to the public from the European fishing industry is data collected for scientific purposes only; the transparency of data in the CFP can thus be described as limited. The transparency of data in the Icelandic fishing industry is, however, not limited, and data stemming from the fishery sector can be easily accessed by the public. The transparency of data from the Icelandic fishing industry contributes to accountability within the sector and more transparency of data from the CFP could contribute to increased accountability and legitimacy in the sector.

The chapter discussed the enforcement challenges that the CFP is facing. The problems of enforcement can to a great extent be narrowed down to the culture of non-compliance with fishery law within the EU fishing industry. The Icelandic fishing industry does not face the challenge of such compliance problems. The chapter outlined the main factors that can contribute to the implementation problems the CFP faces and identified them as problems related to the transfer of politics from the international, EU level, to the national, Member States level. Thus, the fact that national autonomy in the EU's fishery management is low and decisions are taken at the EU level contributes to the fact that EU Fishery Law faces practical implementation problems.

The chapter also gives an account of the legislative proposal for a new Basic Regulation. As has been mentioned before, the main change regarding conservation measures introduced by the proposal is the mandatory system of TFCs, which is intended to make market forces take care of overcapacity in the EU fishing fleet, and therefore counter the problem of overfishing. The chapter also explains other measures the proposal introduces that are directed towards the challenges that the CFP is facing. However, it remains to be seen if the proposal will be adopted by the Council and the European Parliament in its current form, and if not so, what changes it may possibly undergo before being accepted, and as a consequence what impact it may have on the challenges the CFP currently faces.

8. Final Conclusions

It is evident that the European Union's Common Fishery Policy (CFP) and the Icelandic Fishery Management System (FMS) are complex management regimes that incorporate multiple factors and a diverse range of actors. Accompanying them are manifold interests that do not necessarily go well together. For these reasons legislators have created a legal framework intended to enable marine resource utilisation to reach its utmost potential in order to bring value to societies. This thesis' predominant goal was to examine the effectiveness of the European Union CFP's and the Icelandic FMS's conservation of marine resources. It is evident that the systems' ability to promote fisheries at a sustainable level has been different. The European Union battles the problem of depleting fish stocks within its waters, while Iceland has been able to manage its marine resources in a manner that has better ensured their conservation. The main research question explored was whether the European Union could adapt management instruments from the Icelandic FMS in order to increase the effectiveness of their conservation policy. To adequately answer this question other topics also had to be explored. These topics were: What challenges is the European Union's CFP facing? What management measures does the CFP use to attempt to counter these challenges? What management measures does the Icelandic FMS use to counter the challenges the CFP is facing? Where do the main differences in the systems' management instruments lie and what do they have in common? Do the systems' implementation measures affect their effectiveness? And lastly, are the underlying objectives of the fishery management systems the same? The main research question therefore required an extensive investigation into both systems in order for a comparative analysis between them to take place. The thesis, therefore, together with a descriptive account of the systems' management instruments, a summary of their historical background describing the main political and structural developments that have contributed to their overall inertia.

At the beginning of the thesis the author acknowledged that there is a fundamental difference between the systems. The Icelandic FMS is governed by an Individual Transferable Quota System, while the EU's CFP is governed by the principle of equal access to marine resources, and fishing opportunities are distributed

between Member States based on the principle of relative stability. This thesis' main finding is that this fundamental difference between the systems has deeply shaped their overall performance and greatly affected how they handle the challenges they face. However, regarding the main research question it can be concluded that the EU can adopt some management measures from the Icelandic FMS in order to improve the implementation of their conservation policy. Both systems share the main objective of conserving their marine resources in a manner that secures their exploitation at a sustainable level. However the systems differ in terms of secondary goals. The EU has lacked precise objectives on how to reach its aim of environmental, social or economic sustainable exploitation of European marine resources. This has led to the prioritisation of short-term interests, with social aims as a main concern, over long-term interests, harming the sustainable utilisation of the Union's marine resources. However because marine resources are exhaustible, they have to be conserved in the long run, in order for them to be able to provide short-time benefits. Therefore short-term benefits for the industry require that it survives in the long-term. Iceland, on the other hand, has well defined secondary goals, which are to ensure the economic efficiency of Icelandic fisheries, and to promote employment and settlement throughout the country. Therefore it can be argued that the systems' secondary goals have influenced their development, and as a result affected the way that the exploitation of marine resources is carried out in each system, and in turn shaped their overall conservation performance. Clear objectives and goals establish a tighter framework for actors within each industry regarding admissible management measures; narrowing policy maker's ability to take decisions that do not follow legally binding objectives. It should thus be a priority for the EU to establish clear secondary goals within their marine conservation policy to prevent decision makers from pursuing objectives that do not promote the sustainable utilisation of marine resources. Furthermore, if it were to be defined further how economic, environmental and social sustainability of European marine resources were to be achieved, the term *sustainability* would receive a clearer legal basis, resulting in greater legal accountability for the overall EU governance.

The exploitation of marine resources for the long-run depends on the level of available fish. Thus to reach the aim of sustainable fisheries, fish stocks must be

conserved and cannot continuously be exploited beyond their sustainable levels. Within the EU the Council has practiced setting TACs high above the scientific advice given resulting in the continual exploitation beyond their sustainable level, which by definition affects their conservation. This practice has resulted in TACs becoming ineffective as a conservation tool, an unfortunate fact in light of the fact that TACs are the Union's primary tool to conserve marine resources. In contrast, the Minister of Fisheries and Agriculture in Iceland has without a doubt contributed to the conservation of Icelandic marine resources by settings TACs at a level that is compatible with the scientific advice given. This practice has promoted cautious fishing, and therefore TACs are effective as a conservation tool. As an attempt to promote better conservation of marine resources the Council should set TACs in accordance to the scientific advice given. Such measures would contribute to the better conservation of fish. From a legal standpoint, this practice should be relatively straightforward for the Council to turn around. However, from a political perspective it might prove to be more difficult. Regardless, the Council's decisions have a significant impact on the setting of TACs. The Council's decisions on fisheries are based on qualified majority voting. A ban on discarding, already enforced in Iceland, is another measure that should be relatively straightforward for the EU to implement. Because the Basic Regulation restricts quantities of landings, discarding takes place in the form of unwanted by-catches. Restrictions on landings therefore do not function properly as a conservation measure. Instead they promote a practice that hinders the policy from meeting its objective of sustainable fisheries. A ban on discarding requires increased control of fisheries. Nevertheless, judging by the obligatory control measures that currently exist in the EU, especially when compared to the Icelandic measures, it should not be too difficult for the Community to enforce a ban on discarding. These three factors described above; well defined and clear secondary goal policy objectives, the setting of TACs in accordance with the scientific advice given, and the ban on discarding, all have a great impact on the sustainability of marine resources, and hence the effective implementation of sustainable fisheries. Under the CFP, these measures should be relatively straightforward to change.

It is often said that political decision making requires political solutions. The thesis discussed how TACs not only serve as a conservation tool, but also as a distributional tool which distributes fishing opportunities between Member States founded on the principle of relative stability. It was also described how the principle of relative stability has hindered the normal progress of the conservation of marine resources, especially with regard to the harmonisation of fishing opportunity and capacity. As the principle has its roots in a political agreement between the Member States it can be assumed that in order for changes to take place a political agreement would have to be reached between them. This, however, could prove to be a long process as the principle has contributed to the system's institutional inertia making the legal and political progress slow. In the same way that the principle of relative stability has affected the institutional inertia of the CFP the ITQ system has also contributed to institutional inertia in the Icelandic system, preventing changes from being made that are in line with the system's social objectives, and promoting instead economic efficiency. In this case, Iceland is faced with the same problem as the EU, legal and political changes in the ITQ system will be slow.

The lack of well-defined policy objectives, TACs exceeding scientific advice, and the limits on landings are not the only factors that the EU has to change to make the implementation of their conservation policy effective. Administration measures also play their part. In the thesis it was described how the system's institutional design can affect its effectiveness and the incentive for actors in the fishery sector to promote the conservation of marine resources. The institutional set up in the EU has not been able to promote such an incentive. The top-down management that characterises the EU has been identified as one of the reasons for this, as the distance between the fishery sector and decision making bodies and policy makers is large. National autonomy in decision making is therefore low, and in turn stakeholder influence and decision making is also low. This has created a further incentive for fishermen not to comply with the EU Fishery Law, but as with the conservation of marine resources this also applies to the Member States to a certain extent. This is evident from important factors such as data collection. According to Community law, Member States are under an obligation to collect certain data from the fishing industry and monitor that the fishing

industry applies to rules regarding data collection. However data collection in the fishing industry has large shortcomings and is not collected in accordance with community obligations, reflecting that both the fishing industry and the Member States do not comply with legal obligations on data collection. In contrast, the Icelandic FMS has high national autonomy in decision making. This fact can have an effect on incentives to comply with the national fishery law, and therefore resulting in the high compliance with Icelandic fishery rules. The fact that stakeholders have a large influence on decision making in the Icelandic system, as well as an overall influence in the sector, is another factor that differs between the systems. Here, the nature of the ITQ system must be kept in mind, and the argument that the system promotes the conservation of marine resources through ownership of quota shares. In order to increase the incentive to adhere to Community fishery rules, the EU could, for example, delegate more powers to the Member States. In addition, the Community could delegate more powers to stakeholders or increase their influence in policy and decision making. This has already been done to a certain extent, but it seems that those measures have not proven adequate in turning around the culture of non-compliance. The most straightforward way to see if the further delegation of power would prove to increase compliance would be to give stakeholders more powers in decision making, instead of merely having an advisory role.

The transparency of data from the fishing industry is another important factor that differs between the systems. The transparency of data from the European fishing industry can be described as limited, and the data that is made accessible to the public requires time and specific knowledge on fisheries. In contrast, transparency of data from the Icelandic FMS is high, and is easily accessible by the public. The transparency of data is interlinked to accountability, and promotes good governance. If transparency of data from the European fishing industry is increased, accountability in the sector would simultaneously increase, reducing some of the challenges that the CFP faces, and therefore help to promote sustainable fisheries. However, it might prove challenging to make changes in this respect, as fishery data is, at least to a certain extent, governed by Community rules on confidentiality.

The thesis has also discussed that both the CFP and the Icelandic FMS are intended to undergo changes in the near future, and gave a comprehensive account of the legislative proposal for a new Basic Regulation for the CFP. In can be argued that some of the changes that the proposal introduces are in line with the management measures that are in force in the Icelandic FMS, this is in particular true for the ban on discarding, efforts to reduce the Council's ability to set TAC's above scientific advice, and better defined policy objective. Which are precisely the elements mentioned above as measures that could improve the effectiveness of the CFP's conservation of marine resources. However, it must be kept in mind that it is always difficult to assess legislative proposals, as their fate is not determined and no experience exists on how they will be interpreted and applied in practice. The political uncertainty surrounding the reform of the Icelandic FMS is much greater than the one of the CFP.[468]

Lastly, after analysing the system's objectives and positioning them within the triangular framework, it was concluded that neither system is in fact sustainable. Therefore, it is of importance to emphasise that in order for the fishery sectors to continue to contribute to the welfare of EU's nations and the Icelandic one, both at present and in the future, the significance of sustainable fisheries be recognised.

[468] See appendix

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Appendix 1

Reform of the Icelandic Fishery Management Act No. 116/2006

Previously it was mentioned that a reform is anticipated on the Icelandic Fishery management system, and furthermore that a proposal for a new Fishery Management Act, is intended to go before the Icelandic Parliament early 2012.[469] However the proposed act has met great opposition, in particular from stakeholders in the fishing industry and other entities that hold interests in the sector. Following this a great political uncertainty has also emerged, raising questions regarding the fate of the proposal and the nature of the overall reform.

Because of lack political and public acceptability of the Icelandic Fishery Management Act No. 116/2001, the current government of Iceland reached an agreement in 2010 to reform the Act. The government proposed a reform of based on the objectives of making fisheries in Icelandic territory: efficient, sustainable, that it created employment opportunities and other related value, and furthermore, to "*provide the industry with the best possible operational environment to ensure its viability for the future, and additionally to reach a national agreement regarding fishery management, and to …ensure employment rights, in addition to equality of quota distribution and the nation's access to the common resource*".[470] In light of the principles of equality and proportionality, in relation to the freedom of employment and stakeholders rights to adapt to new changes in the system, it was considered necessary to repeal the current Fishery Management Act, with a complete overhaul of the legislation. It was decided to that Icelandic fisheries should be governed in accordance, with general principles of resource management and the idea of a *contractual approach* or a *negotiation way*, with owners of quota by changing their rights into contractual quota rights.

[469] Legislative proposal for a new Fishery Managment Act: http://www.althingi.is/altext/139/s/1475.html. Accessed on 29.11.2011

[470] Comments accompanying the proposal for a new fishery management act, Þskj. 1475 — 827. mál

Corresponding to the government's objective and the view mentioned above, the legislative proposal therefore introduces some fundamental changes to the Fishery Management Act No. 116/2006, in particular to the current ITQ system.

The main change of the proposal regards the distribution of TACs. The changes lie in the so called *contractual approach*. According to this approach contracts will be made between the State and the entity in question, about the latter's right to exploit and access marine resources for commercial fishing. This way the legislator envisions that quota will only be distributed from the State, affirming that marine resources are a common property of the Icelandic nation and that fishing can only be conducted against a payable fishing fee. The TACs are to be distributed into "*pots*", which contain quota, and fishing compensations and concessions. The pots are intended to ensure rightful distribution of fishing opportunities to those who wish to pursue commercial fishing. The proposal therefore prohibits the transfer of quota shares, both by selling it and renting. The contracts are to be in force for 15 years, and the end of the 15 year period the entity in question can wish for a prolonged contract, up to eight years, but does not possess any right for such prolonging. Furthermore the proposal prohibits hypothecation of quota, and any other rights that are to be found in the contracts.

According to the current Fishery Management Act the Minister of Fisheries and Agriculture decides in a regulation on the TACs after a scientific advice from the MRI. In addition to that the new proposal provides the minister with the authority, also to adopt structural measures to control catches and promote sustainable fisheries. According to the proposal TACs are to be distributed into two "*pots*", section 1 and 2. Section 1 will contain the user contracts or fishing contracts, and section 2 will contain so called "*parts*", the parts are then intended to be four and are divided into *coastal fishing part*, *community fishing part*, *line concessions part* and lastly a *supplementary part*. The proposal then offers a detailed account of the way that fisheries are to be divided between the two pots, and then the parts in section 2.

In light of the government's objectives, explained above, and the challenges the Icelandic fishing industry has been facing through the years; the lack of public and political acceptability and the debate that exists over the nature of quota

shares, the legislative proposal offers ways to counter those challenges. The contractual way, aims to ensure a fair way to enable allocation of fishing opportunities, to new entities that wish to pursue commercial fishing and the Act is also intended to make clear that quota shares are not the private property of quota holders, but are the common property of the Icelandic nation, mainly by making the contracts temporary. According to the proposal the contracts between the State and those that pursue fishing activities are protected by Article 72 of the Icelandic Constitution, but do not resemble full property rights as the Act prohibits hypothecation of the resources.

The legislative proposal does not change the objective of the current Fishery Management Act; the objective is still to ensure sustainable and efficient fisheries. However one of the main criticisms towards the proposal is that this new system will significantly decrease efficiency in the sector, and therefore not sufficiently reach the objective.

Above it was explained how the opposition towards the proposal has created political uncertainty, and raised questions about the nature of the government's reform proposal. At the end of November 2011, a new working paper was introduced, intended to be a foundation for changes to the current Fishery Management Act, and to supersede the prior proposal intended to repeal the Fishery Management Act.[471] This new working paper or proposal (hereafter called a draft) introduces some fundamental changes from the previous legislative proposal (discussed above), but does not abandon the contractual way, introduced in the prior proposal. First, the new draft imposes that contracts, made between the state and an entity wishing to conduct commercial fishing, shall be valid for 20 years, but not 15. Secondly, the draft proposes that six years prior, and at least five years prior to the end of the 20 year period, the quota holder has a *right* to a review of his contract, in order for getting the contract extended for another 15 years.

Another fundamental change from the previous proposal is that the draft does not prohibit transferability of quota shares; it only imposes restrictions to it.[472] It is the

[471] Draft for a legislative proposal on a new fishery management act for Iceland: http://www.sjavarutvegsraduneyti.is/media/frettir/frv_-til-vinnslu_END).pdf
[472] See for details Article 5 of the draft.

Directorate of Fisheries that decides if transferability of quota shall be authorised and in special circumstances the Minister of Fisheries and Agriculture has the autonomy to decide if transfer shall be permitted.

As can be seen from this discussion it is far too early to predict what the final outcome of the proposal will be, and also if the reform of the Fishery Management Act will be delayed or will be taken before the Icelandic Parliament early 2012. It can be assumed that the changes the draft proposes from the previous proposal are mainly measures that are intended to ensure the efficiency of the sector, corresponding to economic theories. But as has been stated before, all this uncertainty makes it very difficult to make any assumptions.