

MODES OF REGULATION IN THE COMMON FISHERIES

POLICY: A MOVEABLE FEAST?

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Dr Ella Ritchie
Jean Monnet Chair
School of Geography, Politics and Sociology
University of Newcastle upon Tyne
ella.ritchie@ncl.ac.uk

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Introduction

It has been widely argued (Cini 2001,Wallace 2000: Zito et al 2002;) that in many sectors governance within the EU is moving towards a softer form of regulation based on less authoritative, more participatory and less interventionist instruments . This change is occurring as a result of both the failure of many of the classic modes of EU regulation and a shift in the thinking of the European Commission towards involving stakeholders in a more open, flexible and transparent form of governance (European Commission 2001). The traditional form of hierarchical control, based on a system of regulations and directives issued by the European Commission and implemented by the Member States, has been increasingly called into question as an effective way of managing diversity. Within this perspective the traditional regulatory model of the EU is shifting towards a system based on commonly accepted codes of conduct, framework agreements and mutual learning (Radaelli 2003, Mazey 2001). The Commission has advocated the use of more open, flexible and less law-bound systems of regulation in new areas of policy where detailed agreement is likely to prove difficult. In the Employment Title of the Amsterdam Treaty the EU introduced the “open method of co-ordination” which proposes that the MS should define certain policy targets in areas of common concern. The Commission would play a steering

role but co-ordination of policy would take place among the stakeholders. Post-Maastricht the EU has increasingly recognised the need to build greater consensus around policies (European Commission 2001). Hence softer forms of regulation are part of an evolving new form of governance within the EU, one in which governments voluntarily and willingly pick and choose from policies which have been adopted elsewhere. This form of policy transfer amongst specialists and policy makers can lead to the adoption of best practice across the EU and thus become the route to a new, better and more effective governance (Bomberg and Peterson 2000).

This paper examines the extent to which soft law and soft policy instruments are used within the Common Fisheries Policy (CFP) and considers whether it is useful as a concept for understanding evolving forms of regulation within the sector. The CFP is a fertile ground for the examination of the relationship between institutions, rules and actors. It is a multi-level policy with significant global, EU, national, regional and local dimensions. There has been an enduring governing crisis in the sector with, in the 1990s, major crises in nearly all EU fish stocks and wide-scale recognition of the failure of current policy instruments to deliver the desired policy outcomes of the CFP. In fisheries policy it is difficult to separate debates about forms of regulation from debates about forms of governance since for fisheries regimes to be successful the fishing industry needs to cooperate with the regime in place. Thus the focus of many debates about reform has been about the appropriate form of institutional arrangements for regulating a highly diverse, uncertain and complex natural resource (Kooiman et al 1999). According to the Food and Agriculture Organisation's (FAO) Report on the State of the World's Fisheries and Aquaculture (1998), about 60 of the main monitored commercial stocks are considered to require improved or new

management. Finally, the diversity of the fisheries sector offers many alternative models of technical measures, institutional arrangements and management systems. It is, therefore, a sector with considerable potential for policy learning, the emergence of best practice and policy transfer.

In thinking 'outside the box' about the relationship of regulation to successful policy change this paper adds to the growing literature about new modes of governance and the political and institutional conditions under which they develop. Many critics have argued that because fisheries policy is deeply embedded in social processes the key to successful reform is not the addition of new, increasingly complex and bureaucratic regulations but the construction of systems which involve stakeholders within the policy-making process (Symes 1996, Phillipson 2002, Gray 1998, Jentoft 1989, 1999). This paper suggests that in a broadly hierarchical and centralised system such as the CFP new modes of steering policy must be looked at in the context of the existing regulatory framework. Currently a command-and-control system of regulations is mediated through a variety of institutions such as national, regional or local administrations and producer organisations across the EU. Hence there is already room for variations in practice (for example in the way licences are granted or quotas are distributed) across Member States. Therefore, it is vital to understand and investigate the way in which policy transfer can take place vertically across this complex multi-level system of governance. The paper argues that while modes of regulation do have an effect on policy output this can be overstated. In the case of fisheries, an examination of the compliance issue indicates that the success of a mode of regulation is determined more by the institutional and social context within which the 'rules' are delivered than by the nature of the law. The embeddedness of practices

also makes policy transfer enormously difficult. Whilst there is some policy transfer within fisheries this tends to take place informally and attempts by the European Commission to set up best practice in management techniques immediately becomes inextricably linked to debates about interests within the sector. The paper argues that facilitating policy transfer is not easy in a sector with groups such as environmentalists, fisheries managers, processors and fishers who share little in common about the scale of the resource and the ways to utilise it. In this context the transfer of best practice becomes a bargained issue. The Commission has, however, been relatively successful in sharing best practice in monitoring and enforcement (i.e. process issues) across the Member states. Finally the paper aims to add to our understanding of the debate about hard and soft law and the usefulness of such fluid concepts in understanding policy output.

Relationship between hard and soft law

The relationship between hard and soft law is complex and multi-faceted. In public policy literature soft law is generally used to denote forms of codes, guidelines and conventions which, although not binding in nature, exercise authority through persuasion, benchmarking and the setting of best practice (Cini 2001). This is contrasted to hard law which is binding in its effect and is justiciable through a system of courts. Many commentators writing on international law (Abbott & Snidal 2000, Boyle 1999, Hillgenbert 1999, Churchill 1998) emphasise the point that it is often very difficult to differentiate hard and soft law so easily. Whilst a detailed discussion of international law is outside the scope of this paper several points are germane to our discussion. Firstly there may be little distinction in practice between hard and soft

law in terms of the setting of norms and conventions. Often the reason for the choice of hard or soft law is a political one because soft law is easier to negotiate and enables states to agree detailed and precise provisions without ceding sovereignty. Secondly, there is often little difference in the level of detail incorporated in hard and soft law. In the international arena soft law is carefully negotiated and drafted and often gives very detailed directions as to policy implementation. Soft law is also used to provide detailed rules and technical standards for the implementation of treaties, especially in the environmental arena. Thirdly, policy agreed initially as soft law can be binding in its effect either because it is implemented through hard law or because states chose to adhere to soft non-binding instruments that avoid a domestic treaty ratification process and allows them to escape democratic accountability for the policy (Boyle 1999). There are many examples in international fisheries law of treaties giving binding force to soft-law instruments by incorporating them into the terms of the treaty. This is the case with the United Nations Law of the Seas (UNCLOS) 1982 which incorporated a large number of conventions and resolutions from international fisheries organisations (Boyle 1999). Finally, although soft law is not legally binding through a system of international courts, there are often well-established mechanisms to ensure 'dispute avoidance' and conciliation amongst parties over the interpretation of the law. What emerges from this brief discussion is the importance of analysing the relationship between hard and soft law and recognizing that policy instruments can be placed on a continuum between the two.

Fisheries in the EU

The CFP has been a problem area for the EU ever since its inception in 1970. The policy is now at a crisis point in that it has failed to manage dwindling fish stocks, to respond effectively to wider environmental concerns or to satisfy competing national interests. From the viewpoint of the major fishing states (the UK, the Netherlands, Spain, Denmark and Portugal) the policy is widely contested on grounds of either unfairness or its illegitimacy. For many actors in the policy process, especially in the United Kingdom, the CFP reveals many of the worst traits of the EU-over-centralisation, unnecessary bureaucracy, unevenness of policy implementation across Member States and a lack of representation of national interests. (Ritchie and Zito 1998; Phillipson 2002, Lesquesne 2001a).

Whilst many of the problems of Europe's fisheries can be laid at the door of the CFP, fisheries is, in general, an inherently difficult sector to manage. While fishing accounts for only 0.2% of employment across the EU it is often a central economic activity to the community in which fleets are located and in many fishing states the issue of preserving fishing enjoys widespread public support. In addition to the familiar disputes about how ownership of sea territories and the resources within them can be defined, fisheries managers have been faced with the problem of managing decline.

The complex relationship between territory and fishing rights underpins many of the debates about the most appropriate institutional arrangement for managing fish stocks. There are two fundamental issues here: firstly, how to define boundaries for the

exploitation of stocks and, secondly, how to regulate the exploitation of these stocks. Central to the first problem is the highly migratory nature of fish stocks. Fish such as mackerel, herring and cod migrate hundreds of miles during their life cycles. They spawn in one area, become juveniles in another and reach maturity in a third. Hence the actions of one fishing community (for example the catching of juveniles) can have quite dramatic effects on the fishing opportunities of other states. The reverse is also true- the careful management of fish stocks by one state can lead to advantages being reaped by another.

For many commentators (Symes 1996, Jentoft 1999) the sector is experiencing, in a marked form, the penetration of traditional social life by global forces where historic forms of collective regulation are being challenged by market competition. In spite of the internationalisation and deterritorialisation of many aspects of the fishing sector (such as ownerships of vessels, nationalities of crews) there is a strong identification amongst many fisher folk with their, often imagined, community. This sense of belonging, perpetuated through social institutions such as the *Confridas des pescadores* in Spain and the *prud'hommes* in France (Lesquesne 2001b), is reinforced when communities are under threat. The political controversy caused by the issue of quota hopping in the UK- where under EU rules 'foreign' (usually Dutch and Spanish) operators can buy UK licences- illustrates how difficult it is for the EU to impose economic rules on socially embedded practices. The challenge facing fisheries management regimes is to find new modes of regulation which can bridge this gap.

Symes (1996) identifies a number of specific crises facing the fishing sector. These are a crisis of *production* involving over fishing and the increasing constraints placed

on fishers' traditional freedom of action by the regulatory process; a crisis of *property rights* based on the redefinition and enclosure of the global commons by numerous fisheries regimes which have challenged traditional perceptions of marine resources; the crisis of *markets* resulting from globalisation processes and the marginalisation of smaller local producers; a crisis of *institutions* where traditional forms of flexible management organisation have been displaced by more top heavy, centralised forms of management ; finally, a crisis of *confidence* in the management system which threatens its ability to maintain social order and gain the respect of all those involved in fishing.

As a finite resource fishing requires a system of regulation and management which often runs against the individualism of many fishers who believe that they both have a 'right to fish' and a superior knowledge of the fishing resources available. Fisheries managers are in a no-win situation as they construct rules for managing fish stocks on the basis of uncertain and contested information but are ultimately reliant on the fishers to obey the rules. What is important in fisheries management is not so much whether policy instruments have binding force or whether they set guidelines agreed by consensus but the institutional arrangement for administering the law and the levels of trust in the system. Currently, there is a bewildering array of EU measures to regulate the conditions under which areas may be fished, by whom and with what gear. Much of this regulation is ignored, poorly enforced and poorly monitored. Ultimately the Commission is reliant on thousands of operators on the open seas adhering to cumbersome sets of guidelines which they either contest or find a bureaucratic burden. There are, however, many examples of informal practices governed by unwritten codes to which all parties agree. For example, in the English

Channel French and British fishers often negotiate local agreements for the fishing of stocks and even (illegally) dump material on the sea bed to create artificial reefs to attract shoals of fish. Inshore fisheries within the six mile limit *, and hence technically outside the jurisdiction of the EU, are usually managed by local committees (such as Sea Fisheries Committees in the UK) which govern the local commons through mutually accepted rules. Nevertheless the bulk of the sector is subject to a classic system where substantive procedures and regulations set the framework of guidelines and rules.

The International Framework to Europe's Fisheries.

There is an important international dimension to the management of the CFP. Historically most of the world's oceans were deemed to be high seas with states only owning narrow coastal strips. However, since the 1970s most states have laid claim to Exclusive Economic Zones (EEZs) of 200 nautical miles from their coastline which collectively currently yields about 90% of the world's fish catches. This was confirmed by the UNCLOS in 1982. Managing the global resources and ocean space of the high seas requires international law. Effective management of the high seas has become more critical in recent years because stock decline and increased capacity of boats has increasingly driven fishers out of the EEZs on to the high seas. International fisheries law governing the high seas impacts on the EU and the MS in two ways. Firstly, it covers the management of stocks which migrate between the exclusive zones and the high seas and secondly, it has implications for EU fleets

Footnote

*Jurisdiction for the 6-12 mile limit falls to national administrations

which operate on the high seas. International environmental law also provides a framework in which EU fisheries operate. The Law of the Sea is hard law negotiated through UN Treaties and binding on the States which sign up to it. Disputes are settled in an International tribunal for the Law of the Sea. Another important source of hard law is the UN Agreement on Straddling Stocks and Highly Migratory Species. Many of the rules of this agreement were implemented under the UNCLOS before the agreement was eventually ratified. The Straddling Stocks Agreement covers issues such as conservation and management, compatibility between the EEZs and the High Seas, access to resources, and enforcement and dispute settlement. It therefore has all the classic sanctions which one would expect from hard law.

There are many examples of soft law in the international arena shaping fisheries policy. This is not surprising as binding international treaties are difficult to negotiate and require national measures to be accepted by the participating states. For example, The Law of the Seas, signed in December 1982, was only ratified in 1994, as a result of the delay in negotiating sea bed mineral rights for participating states. In the intervening period, however, many of its guidelines and resolutions were treated as 'law'. Much of the international environmental law which covers fisheries can be said to be soft law. Some UN agreements such as the Drift Net Ban (1989) are soft law but quite firmly adhered to and can have the same impact as hard law. In other cases soft law can help to shape the agenda. For example, the 1972 Stockholm Declaration laid down a number of environmental principles and the Rio Conference on Sustainability and Development (1992) enshrined in Agenda 21 the precautionary principle which has been widely adopted as the precautionary approach in fisheries policy. The precautionary principle states that where serious harm is threatened, positive action to

the environment should not be delayed until irrefutable scientific proof of harm is available. The principle was endorsed in a number of binding conventions (the Paris Convention on the NE Atlantic, the Convention on Biodiversity, and the UN Agreement on Straddling Stocks and Highly Migratory Species) and in the Maastricht Treaty on European Union.

The FAO is influential in shaping fisheries policy. The most important of FAO declarations has been the Code of Conduct for Responsible Fisheries (1993) which has become a benchmark for fisheries reform. The aim of the code was to ensure the sustainable utilisation and development of the marine living resources, taking into consideration the total eco-system as well as the socio-economic aspects of fisheries. The Code also covers the capture, processing and trade of fish and fishery products, fishing operations, aquaculture, fisheries research and the integration of fisheries into coastal management. This Code of Conduct had voluntary guidelines although certain parts of it are based on relevant rules of international law including those of UNCLOS. In fact much of the Code is very detailed and has the effect of binding agreements. The philosophy of the Code is very much geared towards facilitating best practice in this area by establishing frameworks, guidance and research. Much of the text of the Code has been taken up by EU policy makers in the discourse about fisheries reform. It also underpins the reform of the CFP where article 6.1 declares 'states and users of resources should conserve aquatic ecosystems. The right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources'.

Article 12.5 also requires states to monitor and assess the state of their stocks and it include the impact of fishing on ecosystems . The CFP reform proposals also includes

a number of articles which indicate the ways in which stakeholders can contribute to the ecosystem approach (Articles 6.4;6.16;7.16). The reform proposals also stress the necessity of exchanging information across member states on ecosystem management.

The CFP reform also uses the discourse of the precautionary approach, outlined in Agenda 21 of Rio but also embodied in hard law agreements such as the UN Migratory and Straddling Stocks Agreement, in its recommendations urging states, regional and sub-regional fisheries management organisations to apply a precautionary approach to marine exploitation. The Council proposals stressed the importance of the precautionary approach to fisheries management and the role of stakeholders in management.

We can see here that the codes of practice embodied in soft international law can be seen to have shaped the discourse and policy frame of the 2002 CFP reform. It is important, however, not to overstate this argument. Firstly, it is over-simplistic to view international bodies as independent variables influencing the EU since Commission officials and scientists may play a role in shaping the FAO agenda. Secondly, the change in orientation may equally well be accounted for by the increasing activity and respectability of environmental groups such as the World Wide Fund for Nature (WWF) and the Royal Society for the Protection of Birds (RSPB) within the fisheries policy making at all levels (Ritchie and Todd 1998). The way in which ideas get into policy and the way in which groups facilitate this process is outside the scope of this paper but is clearly important in explaining the process of change. Finally, policy articulated in the proposed CFP reform is a long way from its implementation in harbours and on the high seas. Modelling the science for a

precautionary approach (which involves calculations and predictions of the spawning biomass) and getting it accepted by fishers is a complex and contested task but necessary if sustainable fisheries is to be achieved within the present structure of policy making. Similarly, for the precautionary approach to work strict regulations about fishing gear and protected areas need to be strictly enforced. One of the problems of the increasing plethora of soft law (in some cases in tandem with legal instruments) in fisheries is that there is a growing lack of clarity about obligations and authority for different resources (Hoel 1998). Nevertheless, a more environmentally orientated approach to fisheries management is now more firmly established at the EU level and is beginning to pervade the policy-making community. As one senior official at the UK Department of Food and Rural Affairs (DEFRA) commented” ... we all have to be constantly aware of the ecosystem approach to fisheries management now ; it’s the flavour of the month with the Commission”(Personal interview DEFRA Dec.2002).

The Common Fisheries Policy

The CFP’s origin can be found in articles 3 and 38 of the Treaty of Rome where the original members agreed that there should be a common policy for agriculture, including fisheries. The initial framing of a Common Fisheries Policy began in the early 1970s following the establishment of EEZs. It was not until 1983, however, that the CFP was established as a response both to the increasing territorialisation of the high seas and to the entry of three fish rich nations (the UK, Ireland and Denmark) to the community. The central principle of the CFP was the concept of equal access for all MS to a common Community resource although from the outset there was

protection given to some states on the grounds of their historic fishing rights .The CFP has been continually revised with the enlargements to the EU and is currently undergoing a major revision because the access derogations given to protect existing members in 1983 expire in 2003.

There are three key internal aspects to the CFP:

- Market Policy: a common organisation of the market in fisheries products. Holden (1994) describes the main objectives of this policy as being to establish marketing standards, to stabilise markets and avoid surpluses, to help support producers incomes, and to consider consumers' interests.
- Structural Policy: The original objectives of this policy were specified to “promote harmonious and balanced development, of the industry and the rational use of marine resources” (Holden 1994). Until the mid-1980s the key content of structural policy was to invest in the European fleet in order to catch more fish, however this was moderated to a policy of balancing fish catching with available stocks through a series of decommissioning programmes.
- Conservation: There are two main policies for conservation; quotas and Total Allowable Catches (TACs) and technical measures. The TAC is now used as a means of conserving stocks although it was originally introduced as a means of allocating a share of available resources to the EU's member states. TACs are based on scientific advice gathered by ICES working groups and assessed by the EU's Advisory Committee on Fisheries Management (ACFM) and the Scientific , Economic and Technical Fisheries Committee (STEC) in stock assessment . Once the Ministers have agreed the TACS for each of the stocks,

it is the responsibility of the Member States to share out the quotas among their fishers and to enforce those quotas.

A second element of the conservation policy is technical conservation. This includes measures such as minimum mesh sizes; minimum landing sizes; by-catch limits; selective gear including square mesh panels and escape hatches for undersize fish; limits of length of beam and size of drift nets (as of 1 January 2003 a ban on drift nets for tuna swordfish and other marine species has been in place to remove the negative impact on dolphins and other non-target species); tonnage/power regulations; closures of fishing grounds for part or all of the year; and various derogations for certain types of fishing.

The CFP has evolved considerably since 1983, in response to changing circumstances and, in particular, to the warnings from scientists of fish stock collapse for certain species and to the increasing pressure from the environmental lobby. As a result, the conservation policy and effort management have now taken central stage. The CFP is broadly a top-down process with a strong regulatory framework set by the European Commission. Annual rounds of policy are developed by DG Fish on the basis of scientific advice provided by international and EU scientists. This requires in the first place a careful estimation of the current state of stocks. Here the complex problem of differing sources of knowledge comes into play. Fishers traditionally derive their knowledge experientially through their relationship to the sea. On the other hand, fisheries science is dependent on highly complex biological and economic modelling. The interrelated life cycles of many fish (approximately 50% of fish are eaten by other fish or marine predators), the multi-species character of most stock and the nature of the ecosystem mean predicting stocks is fundamentally uncertain. One of the

problems of stock assessment is that it is disputed by fishers on the grounds that it is often out-of-date and too reliant on economic modelling. One constant complaint by fishers is that their logbooks are not used enough in stock assessment. The Commission sets recommended annual TAC which is then debated in the Council of Ministers and decisions taken based on QMV. Significantly, representatives of the Union's fishing industry have little direct role in the decision-making process (Symes 1995) although they often exert considerable pressure on governments. The final policy emerging from the Council of Ministers seldom reflects the scientists' advice because it is bargained through a political process (Ritchie and Zito 1998; Payne 2000; Lesquesne 2001a; Holden 1994). The political compromising and bargaining which takes place causes TACs to be revised upwards against scientific advice, thus creating 'paper quotas' (Karagiannakos 1996) for which there are no fish. There is considerable bargaining about technical measures in the Council of Ministers and the difficulties in constructing majorities frequently lead to a dilution of carefully designed measures (for example the heated debate in 2000 over sprat net sizes).

Once the policy recommendations are made they are passed on to the MS who then share out the quotas. In a majority of states in the EU this is done through the mechanism of Producers Organisations which are voluntary marketing organisations established through the EU to facilitate effective sectoral quota management. In some states, such as the UK, they display an effective management capacity working closely with fishers (Goodlad 1998). The national administration and the processors in other states, such as France, perform a more limited role. Some technical measures, such as the newly introduced days at sea (January 2003) for most cod stocks, are

directly enforced and monitored by the MS whereas others, such as licensing and permits, are largely delivered by the MS or local administrations.

The CFP as a Regulatory Regime.

Knill and Lenschow (2003) offer a useful framework of 4 different modes of regulation in the EU.

- The classic regulatory model where substantive and procedures regulations set standards and detailed rules
- New policy instruments – a more indirect flexible style with framework regulations or economic and communicative instruments which are self-initiated or voluntary
- Self-regulatory model with private actors devising concrete regulatory standards under the agreement of the Commission
- Open Method of Co-ordination (OMC) where the EU provides the context and enabling structures for co-operation and learning amongst national policy makers. Here we find the dissemination of best practice and the provision of incentives rather than legal obligations and control

As seen by the discussion of regulatory instruments within the CFP, the fisheries sector fits most clearly with the classic regulatory mode with the European Commission setting the regulatory framework for the European level and Member States at national, regional and local level mediating these regulations often giving guidance, supplementary regulations and enabling frameworks for the interpretation of the legislation. There are, however, also variants of the other forms of regulation.

There is considerable use of new policy instruments across the sector, initiated either by fisheries managers or by stakeholders. Examples of these would be the development of indicators for improving the quality of the marine environment, improving fish hygiene in fish markets and the encouragement by fisheries managers of good practice within the legislation. We can also see examples of self regulation within the Producers Organisations and the Sea Fisheries Committees and within wider co-operative organisations such as the North Sea Fisheries Commission Partnership which brings together fishers and scientists to decide best practice. The Marine Stewardship Council (MSC) is a further example of a self-regulating organisation approved by the European Commission which sets standards in a particular area. It was created when a private actor – the multinational Unilever-joined with an environmental group, the World Wild Fund for Nature, to promote an ecological system where certification would be given to processors who restrict their purchases to fish that are being managed sustainably. The MSC was very active in the ‘Dolphin Friendly’ Tuna Campaign, and other systems of eco-labelling and has done much to raise the awareness of some sections of consumers about fish quality and provenance. It has been criticised by some commentators as representing the interests of big business and ignoring the interests of fishers (Steinberg 2001) but has nevertheless been a key actor in raising awareness not only of publics but also of governments to environmental and food quality issues within the sector. To date there are few examples of the OMC as an emerging mode of governance within the CFP. High levels of distrust and diversity and competition amongst the stakeholders in the sector means that identifying and reaching agreement about best practice is enormously difficult. There are, however, examples of the OMC amongst professionals within fisheries management as discussed below.

In the fisheries sector it is vital to analyse the implementation process in order to fully understand the problems with the current system of governance and the prognosis for reform. There are three interrelated aspects to the implementation process; compliance, enforcement and monitoring. The European Commission has identified a problem of uneven enforcement and monitoring of the CFP across the MS. This is due to different state traditions and organisation, cultural differences and varying levels of resourcing. The unevenness of enforcement tends to exacerbate problems of compliance (with fishers in states with relatively good compliance records, such as Denmark and the UK, arguing that they are being penalised) and legitimacy. Poor records in compliance across many MS is also a major problem for policy makers who have tended to respond with the introduction of more complex controls rather than a search for explanations for non-compliance. We will now turn to a discussion of some of these issues.

Compliance and Enforcement issues

This brief discussion of the regulatory framework of the CFP has elaborated some of conservation and technical measures to which fisherman are required to conform. These range from the amount of stock allowed to be fished (regulated through TACs and quotas, also days at sea regulations, tonnage restrictions, mesh sizes and gear restrictions), to the permitted size of stock controlled through minimum landing sizes. One of the key difficulties in the CFP is in ensuring across the Union that fishers comply with these rules. There are a number of reasons for non-compliance within the CFP. Firstly, some operators ignore the regulations because adherence may be too

costly (especially when profit margins are small), they may be too complex to work out, too bureaucratic to comply with or quite simply too difficult to implement in small craft. Secondly, many technical regulations have internal inconsistencies. Finally, many rules are simply ignored or flouted.

There are about as many ways of flouting the rules in the CFP as there are rules to keep. Three key problems are the landing of illegal or black fish, discarding fish back into the sea and the misreporting of information. Black fish are landed illegally and are not reported as landings at the designated port or are landed at other ports in the EU or outside the EU where no record is taken. Landing illegal fish not only depletes the stocks but also undermines the accuracy of stock and TAC predictions which is a particular problem when stocks are in decline. A second problem is the discarding of fish that are not of the right size or species. This is a major problem within the CFP, with some estimates suggesting that it is 50 per cent of some catches. Discarded fish are a waste and also a major pollutant of the marine environment. Again discarding is to some extent caused by the rigidity of some of the rules of the CFP such as fishing single species stock in one region. The final key group of problems are misrecording or the misreporting of stocks or misdeclared species in stocks that are landed in other respects. The temptation to misrecord happens throughout the year but increases as quotas are nearly reached. All this creates havoc with the science upon which the decisions on quota allocations are mainly based.

A study carried out on UK landings in 2002 (CEMARE 2003) found that there was a culture of rule breaking amongst fishers.* There was a high reliance on illegal landings. Fishers were violating the output controls (set up by the EU and enforced by a number of local agencies) largely because of economic necessity. More than half of the fishers interviewed disagreed with the statement that quota requirements should be complied with because 'they were the law' or 'because they were a way of giving people their fair share'. A high percentage of the sample felt that breaking the rules was in order because the system was flawed and inefficient and where they did conform with the rules it was because of sanctions and fines rather than an endorsement of the policy and its objectives. There was strong evidence that fishers who feel that they were directly involved in the process (through for example producer organisations) are more likely to comply with quota regulations. This does lend some weight to the argument that greater involvement of fishers in local management or co-management systems is likely to lead to higher levels of compliance.

To some extent the Commission has recognised this in its much-heralded 2002 CFP reform proposals which include the establishment of Regional Advisory Councils (RACs) to improve the participation of fishers and other stakeholders in the CFP. The Councils will be made up of fishers, scientists and representatives of other interests such as the fisheries and aquaculture sector and environmental and consumer groups who have an interest in the sea area or fishing zone concerned. National and regional

*Footnote

It should be noted that evidence of UK non-compliance is more readily known because of the good enforcement record of UK fisheries inspectors

authorities from any MS may also participate and the Commission may be present. The RACs in the first instance will have to evolve on commonly agreed good practice as they will have no regulatory powers. The RACs as proposed only have an advisory role and can submit recommendations to the Commission on issues such as implementation and compliance. The RACs have been much criticised because they are seen to be toothless and, since they have no rule-making power do not really involve fishers in a truly co-management system. They are a start, however, in recognizing that real change will only come about in the CFP under new institutional structures.

Member States are obliged by EU treaties to enforce and give full effect to Community law. MS enjoy exclusive competence to do this. The European Court of Justice (ECJ) has laid down a system whereby a harmonised penalty system (based on proportionality, effectiveness and dissuasiveness could emerge over time. There is still room, however, for manoeuvre and a key point is that enforcement agencies across the EU are more or less avid in their enforcement of the law. Another problem is that within the EU fisheries zone different regulations have been established for different parts of the fisheries zone. The rules vary between particular administrative authorities and within particular boxes for different types of fish. While the EU framework is precise there are in addition rules imposed by the national and, in some cases, local authorities as well. Inspectors are thus faced with controlling particular species of fish under bans or regulated activity, controlling access to the boxes and the particularly difficult issue of controlling fishing vessels fishing across borders between two waters in which different mesh sizes apply. Finally, many coastlines within the EU are notoriously difficult to police. Scotland, for example, has a rugged

and indented coastline of 3,700 kilometres and has in its waters some 790 islands. Although the EU is trying to establish a more coherent policy of designated ports for the landing of fish, it is incredibly difficult for inspectorates to ensure enforcement both of EU regulations and sanctions against the landing of 'illegal' fish across this type of area.

The EU has waged a long campaign to improve effectiveness and evenness of enforcement across the MS in order to improve both the effectiveness and legitimacy of the policy. It is widely acknowledged that different procedures and cultures for monitoring the implementation of technical measure across the EU can give rise to discrepancies across states. For example, in France, Belgium, Ireland the Netherlands and the UK breaches of fisheries law are dealt with through the criminal law and in Germany Spain and Portugal through the administrative courts. The European Commission has been rather slow in adopting a more flexible approach to dealing with the problems of poor enforcement but in the last ten years it has introduced a number of measures both to achieve greater co-ordination of policy but also to ensure best practice in enforcement measures both amongst MS and between MS and the Commission. Following the ECJ ruling in the case of Spain v. Council (1990) the notion of joint responsibility was first officially introduced. This was followed in 1993 by the introduction of a Control Regulation by the Commission to harmonise the way in which penalties were executed across the EU. The spirit of the Control Regulation was to foster a sense of mutual assistance and trust. It states that "MS shall place sufficient means at the disposal of their competent authorities to enable them to perform their enforcement tasks." The Control regulation set out the principle underlying penalties for infringement of EU (such as fines or the removal of licences)

and also tried to set up process to ensure harmonisation across the EU. There was a recognition by the Commission that in order for the Control regulation to be effective it was necessary to set in place mechanisms to set good practice by means of increasing co-operation between enforcement inspectors where information could be exchanged about fisheries management and infringement. Paradoxically co-operation and mutual sharing of information has been set up as a legal imperative although it only refers to areas which are outside the exclusive competence of the Community. The Commission also developed an EU Inspectorate and at the same time developed a system of training for national inspectors encouraging the exchange of officials engaged in monitoring and inspecting (COM (98) 93 FINAL).

The EU also seeks to raise standards in the effectiveness of national systems of monitoring through the publication of Annual Reports on Monitoring the CFP. These reports are the main public mechanism that the Commission uses to report on the level of conformity of MS with their fishery enforcement obligations. There are a number of technical problems associated with the Monitoring reports as a mechanism for gathering an accurate picture of what is happening. They are, however, a useful mechanism for moving some way towards a synergy in enforcement matters. These league tables help to identify shortcomings within some MS and help to ensure transparency in the system.

Enforcement issues have continued to be high on the EU's agenda and the 1998 amendment to the Control Regulation formalised and supported the exchange of inspectors across the EU and the encouragement of the initiation of joint programmes.

Research carried out by the author on the Inspectorate indicates that there is an increasing sharing of information across the sector (both bilaterally and multilaterally) and the Commission has indeed been instrumental in facilitating this. Paradoxically, in the area of enforcement it does seem that the use of codes of practice, standards and guidelines may be a useful way of achieving better co-ordination and hence greater harmonisation and assimilation of alternative practices. However it is important to remember that in reality co-ordination and the mutual evolution of best practice is still hindered by the different levels of municipal authorities involved in enforcement and the absence of a communautaire system of criminal or administrative justice to operate in parallel with the community fishery enforcement schemes (Long and Curran 1998). It is also worth noting that the EU spends a growing percentage of the fisheries budget on increasingly sophisticated monitoring techniques such as aerial surveillance and satellite monitoring (Greenwich Forum 1998).

Conclusions: Lessons from the CFP

What then can we learn from this discussion of the CFP? Firstly, the analysis of the international dimensions of the CFP demonstrated that the relationship between hard and soft law is not a straightforward one. Legislation derived from treaties may not be very detailed whereas codes of conduct can often be highly prescriptive – or indeed may be partly embodied in legislation. Within the EU directives and regulations are legally binding but unevenly enforced. So-called hard policy instruments may be diluted because of high levels of non-compliance. FAO codes and guidelines, on the other hand, whilst not having the force of law, can help to shape the discourse and

framing of a policy as with the ideas of the precautionary principle and ecosystem management which have become part of the language of reform used by the Commission. There are also examples of benchmarking in the CFP – especially in the area of monitoring and enforcement.

Important caveats, however, need to be added to this initial broad survey. Firstly, in the case of the CFP, soft policy instruments are much more likely to change the behaviour of policy makers within peer groups (for example) within the fishing inspectorate or informally across groups of fishers, than they are to change the way actors behave vertically right through the system. As our discussion of non-compliance demonstrated, change within the system will only occur if competing groups of stakeholders ‘sign up’ to policy change. This is difficult across the sector because of often diametrically opposed ‘world views’ and little convergence about policy aims. There are many barriers to policy transfer within fisheries as a result of the variety of different practices which are embedded in wider social models and the economic uncertainties of the sector. If soft law is to affect this process we need to examine how different actors use policy instruments to achieve their goals. This discussion inevitably brings us back to a more fundamental examination of the power relationships within the sector and the institutional setting. Secondly, it may be easy to overstate the significance of soft policy instruments and a shift to a new mode of governance. It is true that while the current reform proposals of the CFP use the language of a more open and flexible method of governance there is also a considerable emphasis placed on technical measures (such as days-at-sea, cutting quotas and strengthening the inspectorate) to effect change.

In the CFP the diversity of implementation undermines the effectiveness of the policy. From a normative perspective it would be helpful if policy makers could devise a system of co-ordination which could accommodate this diversity and ensure that the goals of the EU policy are still being delivered. This is obviously not easy in the case of the CFP. Devising regulatory systems for common pool resources is always difficult and this is compounded in the case of fisheries by declining resources which have now reached a crisis point. Softer modes of regulation may be one way to achieve change and may help to tease out and offer solutions to the inter-jurisdictional character of many fisheries problems. The challenge for the Commission and national actors is to use these instruments alongside the existing regulatory framework. This involves engaging stakeholders and environmental groups in the process of reform and the RACs can provide a framework for this process. This will be a difficult process, however, in a sector where policy communities are not readily established and where there is cognitive divergence amongst the key competing groups of fishers, scientists and environmentalists.

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