Achieving an ecosystem approach to fisheries management in the Baltic Sea:

relevance of Member States' delegated powers under the CFP and their nature conservation duties

A report for Baltic Sea 2020

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Abbreviations

Many abbreviations are used in this report. Some are explained in the course of the report, while others are set out here:

Abbreviation	Full name
BD	Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103/1, 25.4.79), as amended
BSRAC	Baltic Sea Regional Advisory Council
CBD	1992 Convention on Biological Diversity
CBD CoP	Conference of the Parties to the Convention on Biological Diversity
CFP	EC's common fisheries policy
Commission	European Commission
Council	Council of the European Union
Court	European Court of Justice
Decision 2006/191/EC	Commission Decision of 1 March 2006 declaring operational the Regional Advisory Council for the Baltic Sea under the common fisheries policy (OJ L 66/50, 8.3.2006)
Decision 2005/101/EC	Commission Decision of 13 January 2005 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Boreal biogeographical region (OJ L 40/1, 11.2.2005)
Decision 2004/798/EC	Commission Decision of 7 December 2004 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Continental biogeographical region (OJ L 382/1, 28.12.2004)
Decision 2004/585/EC	Council Decision of 19 July 2004 establishing Regional Advisory Councils under the Common Fisheries Policy (OJ L 256/17, 3.8.2004)
EAFM	ecosystem approach to fisheries management
EC	European Community
EC Treaty	Treaty Establishing the European Community
EEZ	exclusive economic zone
EFF	European Fisheries Fund
EU	European Union
EU 10	the ten States becoming Member States of the EC in 2004 (i.e. Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia)
FAO	Food and Agriculture Organization of the United Nations

HD	Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206/7, 22.7.92), as amended
Helsinki Convention	1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area
ICES	International Council for the Exploration of the Sea
LOSC	United Nations Convention on the Law of the Sea
MPA	marine protected area
MSD	EC Marine Strategy Directive (still in draft form)
nm	nautical mile
RAC	Regional Advisory Council
Regulation 1941/2006	Council Regulation (EC) No 1941/2006 of 11 December 2006 fixing the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in the Baltic Sea for 2007 (OJ L 367/1, 22.12.2006)
Regulation 1198/2006	Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund (OJ L 223/1, 15.8.2006)
Regulation 861/2006	Council Regulation (EC) No 861/2006 of 22 May 2006 establishing Community financial measures for the implementation of the common fisheries policy and in the area of the Law of the Sea (OJ L 160/1, 14.6.2006)
Regulation 2187/2005	Council Regulation (EC) No 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending Regulation (EC) No 1434/98 and repealing Regulation (EC) No 88/98 (OJ 349/1, 31.12.2005)
Regulation 812/2004	Council Regulation (EC) No 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98 (OJ L 185/4, 24.5.2004)
Regulation 2371/2002	Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ L 358/59, 31.12.2002)
Regulation 850/98	Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures for the protection of juveniles of marine organisms (OJ L 125/1, 27.4.1998), as amended
Regulation 88/98 [now repealed]	Council Regulation (EC) No 88/98 of 18 December 1997 laying down certain technical measures for the conservation of fishery resources in the waters of the Baltic Sea, the Belts and the Sound (OJ L9/1, 15.1.98)

Regulation 3760/92 [now repealed]	Council Regulation (EEC) No 3760/92 of 20 December 1992 establishing a Community system for fisheries and aquaculture (OJ L 389/1, 31.12.1992)
Regulation 3880/91	Council Regulation (EEC) No 3880/91 of 17 December 1991 on the submission of nominal catch statistics by Member States fishing in the north-east Atlantic (OJ L 365/1, 31.12.1991), as amended
SAC	Special Area of Conservation (under HD)
SCI	site of Community importance (under HD)
SPA	Special Protection Area (under BD)
WFD	Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ L 327/1, 22.12.2000), as amended
WSSD	2002 World Summit on Sustainable Development

1. Structure of this report

This report consists of two parts. The first part, comprising sections 2-5, provides introductory material on, *inter alia*, the law of the sea, the EAFM and the CFP. The second part, comprising sections 6 and 7, addresses the relevance of the delegated powers of the Member States under the CFP, as well as their nature conservation duties under the HD, BD, WFD and Helsinki Convention, for achieving an EAFM in the Baltic Sea. Sections 6 and 7 each start with an executive summary and end with a conclusion.

2. Introduction

The purpose of this report is to consider the extent to which Member States may achieve an EAFM in the Baltic Sea by means of their delegated powers under the CFP and through implementing their nature conservation duties under the HD, BD and WFD as well as under the Helsinki Convention. Thus the focus is on the Member States: this particular report does not consider the extent to which the EC itself, in particular through the CFP, could achieve an ecosystem approach to fisheries management in the Baltic Sea.

Of course, the potential for action by the EC also merits attention, especially if there were to be a reluctance among Member States to take appropriate action to the limits of their powers. Any work on that matter could start by identifying systematically existing CFP Regulations (on a range of matters, e.g. from fisheries research through to enforcement) relevant to the Baltic Sea and considering to what extent those Regulations would need to be adapted to be consistent with an EAFM. Of course, it would also be appropriate to consider the political will within the Commission and the Council, and within the BSRAC, for action of that kind.

For the purposes of this report, the Baltic Sea is defined as ICES divisions III b, III c and III d. That definition therefore excludes the Kattegat and the Skagerrak. It is consistent with the definition of the Baltic Sea in Decision 2004/585/EC,[1] which establishes RACs including the BSRAC (see section 5.9 below), and with the definition of the Baltic Sea in Regulation 1941/2006,[2] which establishes fishing opportunities in the Baltic Sea for 2007 (see section 5.4 below). ICES divisions III b and III c are defined in Regulation 3880/91.[3]

Also for the purposes of this report, the Baltic Sea as a whole will be regarded as "the ecosystem" in question for the purpose of the "ecosystem approach to fisheries management". To achieve an EAFM in the Baltic Sea, the number of State actors

[1] Annex I.
[2] Article 3(b).
[3] Annex III.

involved will depend on whether the focus is (merely) the regulation of fishing activity or whether it also includes the regulation of other activities that can affect fisheries in the Baltic Sea ecosystem.

If the focus is the regulation of fishing activity, the principal State actors will be: (a) the coastal States of the Baltic Sea; (b) any third States whose fishing vessels are operating in the Baltic Sea; and (c) the EC. If the focus is the regulation of additional activities, the actors potentially also include, *inter alia*, any third States that contribute riverine or airborne pollutants to the Baltic Sea. This report will consider only the regulation of fishing activity.

Much has been written about the meaning of the "ecosystem approach". The term is covered in more detail in section 4 below. For now, it is important to point out that applying an EAFM is not about ensuring that nature conservation, as opposed to stock conservation, is the priority at all times. Instead, in short, the overall goal is to ensure that the health of the ecosystem is restored and maintained.

The nine coastal States in the Baltic are as follows: **Denmark**; **Estonia**; **Finland**; **Germany**; **Latvia**; **Lithuania**; **Poland**; **Russia**; and **Sweden**. All of those except Russia are EC Member States, which have transferred the power to make rules for fisheries conservation to the EC (see further section 5.1 below).

For the purposes of this report, it will be assumed that no Member State vessels other than those flagged to the eight coastal Member States currently undertake fishing activities in the Baltic. That assumption is based on: (a) the term "Member State concerned" in Decision 2004/585/EC being defined as "a Member State <u>having a fishing interest</u> in the area or fisheries covered by a Regional Advisory Council" (emphasis added)[4] and thus potentially including flag States as well as just coastal States; and, in turn, (b) the Member States concerned for the Baltic being listed by Decision 2006/191/EC as only the eight EC coastal States,[5] thus implying that no

[4] Article 1(1).
[5] Preamble, recitals (4) and (3).

other EC Member States have a “fishing interest” in the Baltic e.g. through being a flag State. (See further section 6.7 below.)

3. International law of the sea

3.1 Introduction

The Baltic Sea is comprised entirely of zones under coastal State sovereignty or jurisdiction. The following brief description of those zones will refer to relevant provisions of the LOSC, to which all Baltic Sea coastal States and the EC are parties.[6]

3.2 Internal waters

Internal waters are those waters landward of the baseline from which the breadth of the territorial sea is measured.[7] The international rules for drawing baselines, coupled with the physical geography of the coastline in the Baltic Sea, means that in some cases areas of marine waters are located landward of the baseline and are therefore categorised as internal waters. The internal waters of a coastal State are subject to the territorial sovereignty of that State.[8] That means that the internal waters are, in effect, an extension of the land territory of the State. As a general rule, ships of third States do not enjoy a right of innocent passage through internal waters. An exception arises where the establishment of straight baselines "has the effect of enclosing as internal waters areas which had not previously been considered as such".[9]

3.3 Territorial sea

The territorial sea is a band of sea extending seaward from the baseline to a maximum distance of 12 nm from the baseline.[10] In practice, some Baltic Sea states have a territorial sea of less than 12 nm in some places. The territorial sea comprises, *inter*

[6] <www.un.org/Depts/los/reference_files/status2006.pdf>.
[7] Article 8(1).
[8] Article 2(1).
[9] Article 8(2).
[10] Article 3.

alia, the seabed, subsoil and water column.[11] As with internal waters, the territorial sea of a coastal State is subject to the territorial sovereignty of that State.[12] However, in contrast to internal waters, ships of all States enjoy the right of innocent passage through the territorial sea.[13]

Innocent passage does not include, *inter alia*, "any fishing activities" or "the carrying out of research or survey activities".[14] Furthermore, coastal States "have the exclusive right to regulate, authorize and conduct marine scientific research in their territorial sea" (emphasis added).[15] The result is that, under international law, no third State may explore or exploit fisheries resources in the territorial sea of a coastal State without its permission (and the same applies to internal waters). Member States of the EC have chosen to adopt a more liberal system of fisheries access, on which see section 5.5 below.

3.4 Continental shelf

The continental shelf of a coastal State may extend from the seaward limit of the territorial sea to 200 nm from the baseline, or to the outer edge of the continental margin in some cases,[16] though no Baltic Sea coastal State has a continental shelf of even 200 nm in the Baltic because of the proximity of opposite neighbours. The continental shelf comprises the seabed and subsoil, but has no water column element.[17]

The continental shelf is a zone in which the coastal State has sovereign rights "for the purpose of exploring it and exploiting its natural resources".[18] The term "natural resources" includes, *inter alia*, "living organisms belonging to sedentary species".[19]

[11] Article 2(1) and (2).
[12] Article 2(1).
[13] Article 17.
[14] Article 19(2)(i) and (j).
[15] Article 245.
[16] Article 76(1).
[17] Article 76(1).
[18] Article 77(1).
[19] Article 77(4).

The term "sedentary species" is defined as "organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil".[20] Abalone, clams and oysters are commonly cited as examples of so-called sedentary species.[21] In contrast to the EEZ (see below), continental shelf sovereign rights do not need to be claimed: they simply exist.[22]

The sovereign rights associated with the continental shelf are exclusive rights.[23] That means that, under international law, no third State may explore or exploit sedentary species on the continental shelf of a Baltic Sea coastal State without its express consent.

3.5 Exclusive economic zone

The EEZ may extend from the seaward limit of the territorial sea to a maximum of 200 nm from the baseline,[24] though an EEZ of 200 nm in the Baltic Sea is not possible because of the proximity of opposite neighbours. The EEZ comprises the seabed, subsoil and water column,[25] though EEZ sovereign rights (see next paragraph) with respect to the seabed and subsoil are to be exercised in accordance with the LOSC's regime for the continental shelf.[26]

The EEZ is a zone in which the coastal State may enjoy certain rights and jurisdictions.[27] Those include, *inter alia*, "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living" of the EEZ.[28] The term "natural resources" includes, *inter alia*, fisheries resources. However, EEZ rights in relation to natural resources do not

[20] Article 77(4).
[21] R.R.Churchill & A.V.Lowe, *The Law of the Sea*, 3rd edition, Manchester University Press, 1999. Page 151.
[22] Article 77(3).
[23] Article 77(2).
[24] Article 57.
[25] Article 56(1)(a).
[26] Article 56(3).
[27] Article 56.
[28] Article 56(1)(a).

include rights in relation to so-called sedentary species (which are instead addressed by the continental shelf regime).[29]

EEZ rights and jurisdiction need to be claimed by the coastal State in question in order to exist. In principle, some States may chose to claim only some of the rights or jurisdictions rather than all of them. For the purposes of this report, it will be assumed that all the Baltic Sea coastal States have claimed a full EEZ (though that assumption could be confirmed, or otherwise, by checking with the ministry of foreign affairs of the individual coastal States). The precise sovereign rights claimed by each coastal State in its EEZ will depend on the wording of the national laws in question. For the purposes of this report, it is assumed that each Baltic Sea coastal State, in respect of its EEZ, has claimed, *inter alia*, sovereign rights to explore, exploit, conserve and manage the fisheries resources in that EEZ.

The sovereign rights to explore, exploit, conserve and manage fisheries resources in the EEZ are exclusive rights. That means that, under international law and subject to the assumption in the previous paragraph, no third State may explore or exploit fisheries resources in the EEZ of a Baltic Sea coastal State without its permission. As with internal waters and the territorial sea, Member States of the EC have chosen to adopt a more liberal system, on which see section 5.5 below.

[29] Article 68.

4. Ecosystem approach to fisheries management

4.1 Introduction

A large amount has been written about the meaning of the "ecosystem approach". This section does not seek to delve deeply into that literature. Instead, it focuses on some developments arising from the CBD, the so-called "Reykjavik Declaration", the WSSD and the FAO. It concludes by defining elements of the EAFM for the purposes of this report.

4.2 Convention on Biological Diversity

The CBD itself does not use or define the term "ecosystem approach". However, Decision V/6 of the Conference of the Parties to the CBD, adopted in 2000 and entitled *Ecosystem approach*, states that: "The ecosystem approach is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way".[30] It adds that an ecosystem approach "is based on the application of appropriate scientific methodologies focused on levels of biological organization, which encompass the essential structure, processes, functions and interactions among organisms and their environment".[31]

Decision V/6 acknowledges the reality that many existing management approaches already exist and that the ecosystem approach cannot simply replace them overnight. It states that: "The ecosystem approach does not preclude other management and conservation approaches, such as biosphere reserves, protected areas, and single-species conservation programmes, as well as other approaches carried out under existing national policy and legislative frameworks, but could, rather, integrate all these approaches and other methodologies to deal with complex situations".[32]

[30] Annex, section A, paragraph 1.
[31] Annex, section A, paragraph 2.
[32] Annex, section A, paragraph 5.

Decision V/6 also sets out twelve principles of the ecosystem approach, as follows:

Principle **1**	The objectives of management of land, water and living resources are a matter of societal choice.
Principle **2**	Management should be decentralized to the lowest appropriate level.
Principle **3**	Ecosystem managers should consider the effects (actual or potential) of their activities on adjacent and other ecosystems.
Principle **4**	Recognizing potential gains from management, there is usually a need to understand and manage the ecosystem in an economic context. Any such ecosystem-management programme should: (a) Reduce those market distortions that adversely affect biological diversity; (b) Align incentives to promote biodiversity conservation and sustainable use; (c) Internalize costs and benefits in the given ecosystem to the extent feasible.
Principle **5**	Conservation of ecosystem structure and functioning, in order to maintain ecosystem services, should be a priority target of the ecosystem approach.
Principle **6**	Ecosystems must be managed within the limits of their functioning.
Principle **7**	The ecosystem approach should be undertaken at the appropriate spatial and temporal scales.
Principle **8**	Recognizing the varying temporal scales and lag-effects that characterize ecosystem processes, objectives for ecosystem management should be set for the long term.
Principle **9**	Management must recognize that change is inevitable.
Principle **10**	The ecosystem approach should seek the appropriate balance between, and integration of, conservation and use of biological diversity.
Principle **11**	The ecosystem approach should consider all forms of relevant information, including scientific and indigenous and local knowledge, innovations and practices.
Principle **12**	The ecosystem approach should involve all relevant sectors of society and scientific disciplines.

Decision V/6 supplements each of those principles with a rationale, and then adds five points of operational guidance. Decision VII/11 of the Conference of the Parties to

the CBD, adopted in 2004 and again entitled *Ecosystem approach*, adds some annotations to the rationale for each of the twelve principles as well as implementation guidelines for each principle.[33] Decisions V/6 and VII/11 are clearly useful for understanding the meaning of the "ecosystem approach" in general, and can be used to develop a meaning of the EAFM (see section 4.7 below). It should be added that the EC and all Baltic Sea coastal States are parties to the CBD.[34]

4.3 World Summit on Sustainable Development

The *Plan of Implementation of the World Summit on Sustainable Development* ("**the Plan**")[35] notes that ensuring the sustainable development of the oceans requires actions at all levels to "[e]ncourage the application by 2010 of the ecosystem approach, noting the Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem and decision V/6 of the Conference of Parties to the Convention on Biological Diversity".[36] The Plan itself fails to define the "ecosystem approach", but indicates that CBD CoP Decision V/6 (see section 4.2 above) and the so-called Reykjavik Declaration (see section 4.5 below) are useful in that regard. Again, it should be added that the EC and all Baltic Sea coastal States were amongst those adopting the Plan.[37] Denmark, on behalf of the EU, submitted an interpretative statement regarding the Plan but its contents did not relate to the ecosystem approach.[38]

4.4 Reykjavik Declaration

As noted in section 4.3 above, the WSSD's Plan of Implementation notes both Decision V/6 of the CBD CoP (see section 4.2 above) and the so-called *Reykjavik*

[33] Annex I, Table 1.
[34] <www.biodiv.org/world/parties.asp>.
[35] *Report of the World Summit on Sustainable Development*, Chapter 1, Resolution 2, Plan of Implementation.
[36] Paragraph 30(d). See also paragraphs 32(c) and 44(e).
[37] *Report of the World Summit on Sustainable Development*, Chapter II, paragraph 2 and Chapter IX, paragraph 2.
[38] Ibid, Chapter IX, paragraph 9.

Declaration on Responsible Fisheries in the Marine Ecosystem ("**the Reykjavik Declaration**"). The Reykjavik Declaration is also mentioned by CBD CoP Decision VII/11.[39] It was adopted in 2001 by a conference jointly organised by the FAO and Iceland. The Conference was attended by representatives of 59 Members of FAO. The Declaration does not actually mention the term "ecosystem approach" or "ecosystem-based approach". Instead it uses the term "ecosystem considerations".

The declaration recognises that "sustainable fisheries management incorporating ecosystem considerations entails taking into account the impacts of fisheries on the marine ecosystem and the impacts of the marine ecosystem on fisheries".[40] It also confirms that "the objective of including ecosystem considerations in fisheries management is to contribute to long-term food security and to human development and to assure the effective conservation and sustainable use of the ecosystem and its resources".[41]

The declaration notes that "including ecosystem considerations in fisheries management provides a framework within which States and fisheries management organizations would enhance management performance"[42] and affirms that incorporation of ecosystem considerations: (a) "implies more effective conservation of the ecosystem and sustainable use and an increased attention to interactions, such as predator-prey relationships, among different stocks and species of living marine resources"; and (b) "entails an understanding of the impact of human activities on the ecosystem, including the possible structural distortions they can cause in the ecosystem".[43]

The declaration, *inter alia*, encourages "FAO to work with scientific and technical experts from all different regions to develop technical guidelines for best practices with regard to introducing ecosystem considerations into fisheries management", such

[39] Annex II, paragraph 22.
[40] Preamble, 10th recital.
[41] Preamble, 11th recital.
[42] Preamble, 15th recital.
[43] Preamble, 16th recital.

guidelines to be presented at the 25th session of the FAO Committee on Fisheries in 2003.

4.5 Food and Agriculture Organization

Introduction

The FAO's Code of Conduct for Responsible Fisheries does not expressly refer to the ecosystem approach. However, many of its provisions are consistent with that approach. In 2003, following the 2001 Reykjavik Declaration, FAO published two documents specifically about the ecosystem approach: (a) a volume in the series *FAO Technical Guidelines for Responsible Fisheries*, entitled *The ecosystem approach to fisheries* ("**the Guidelines**"),[44] based on a draft developed during the Expert Consultation on Ecosystem-based Fisheries Management in September 2002; and (b) an FAO Fisheries Technical Paper, again entitled *The ecosystem approach to fisheries* ("**the Technical Paper**").[45]

2003 Technical Guidelines

The Guidelines supplement the Code of Conduct, though they have no formal legal status. They are based on a draft developed during the Expert Consultation on Ecosystem-based Fisheries Management that took place in September 2002. The Guidelines state that: "Generally speaking, the purpose of an ecosystem approach to fisheries is to plan, develop and manage fisheries in a manner that addresses the multiple needs and desires of societies, without jeopardizing the options for future generations to benefit from the full range of goods and services provided by marine ecosystems".[46]

The Guidelines identify five principles that fisheries management under the ecosystem approach to fisheries ("**EAF**") should respect, as follows: (a) "fisheries

[44] *FAO Technical Guidelines for Responsible Fisheries*, Volume 4, Suppl. 2.
[45] *FAO Fisheries Technical Paper*, 443.
[46] Page 14.

should be managed to limit their impact on the ecosystem to the extent possible"; (b) "ecological relationships between harvested, dependent and associated species should be maintained"; (c) "management measures should be compatible across the entire distribution of the resource (across jurisdictions and management plans)"; (d) "the precautionary approach should be applied because the knowledge on ecosystems is incomplete"; and (e) "governance should ensure both human and ecosystem well-being and equity".[47]

The Guidelines "attempt to make EAF operational".[48] They address different categories of activity necessary for the implementation of the EAF, including: (a) fisheries data and information requirements and use; (b) management measures and approaches; (c) management processes; and (d) research.

Regarding management measures and approaches, the Guidelines acknowledge that: "The measures available to managers to adopt an EAF will, at least in the short term, be an extension of those conventionally used in [target resource-oriented management]".[49] The Guidelines go through various categories of management measures and explain how they can be used or adapted for an EAF. In some cases, specific recommendations are made. For example, "… a precautionary approach is recommended in the use of high-impact fishing methods in critical habitats".[50] Ecosystem manipulation is also discussed (e.g. habitat modification, culling).[51]

Regarding management processes, the Guidelines identify the following as examples of broad management objectives for a given fishery: (a) "keep harvested species within ecologically viable stock levels by avoiding overfishing and maintaining and optimizing long-term yields"; (b) "maintain habitats and populations of non-retained (by-catch) species within ecologically viable levels"; (c) "keep impact on the structure, processes and functions of the ecosystem at an acceptable level"; (d)

[47] Pages 14-15.
[48] Abstract.
[49] Page 29.
[50] Page 32.
[51] Section 3.2.3.

"maximize net revenues"; and (e) "support regional employment".[52] Those examples illustrate that the EAF is not exclusively about nature conservation.

Reflecting the fact that other human activities can affect fisheries, the Guidelines also point out that: "Fishery managers should be proactive … to ensure that the appropriate authorities include all those involved in fisheries as important stakeholders in management planning and decision-making" regarding activities that affect fisheries.[53]

2003 Technical Paper

The Technical Paper starts by reviewing the array of terminology in the field and some definitions, but does not offer a definition of its own. It uses the phrase "Ecosystem Approach to Fisheries (EAF)". It notes that the phrase implies "a process using specific means to achieve selected objectives" but adds that "[t]hese objectives are often not explicitly defined in conventional fisheries management and are even more difficult to define clearly in EAF".[54] It notes that further to the Reykjavik Declaration, the phrase "is recognized as a form of fisheries governance framework, taking its conceptual principles and operational instruments from conventional fisheries management on the one hand, and ecosystem management on the other hand".[55]

The Paper proceeds to deal with the problems of characterising an ecosystem and to consider how fisheries affect ecosystems. It notes that fisheries are not the only activity to have impact on ecosystems. It considers how existing instruments already address the ecosystem approach to fisheries, even though they may not use that phrase or similar ones. In that regard, it focuses in particular on the FAO's Code of Conduct for Responsible Fisheries. The Paper then sets out and reviews "a number of interrelated guiding principles or conceptual objectives" referred to by "[t]he various

[52] Page 48.
[53] Page 29.
[54] Page 3.
[55] Page 3.

forms of ecosystem management or ecosystem-based management described in the literature or adopted formally by states".[56]

The principles or objectives addressed in the Paper are as follows: "Human and Ecosystem Well-being"; "Resource Scarcity"; "Maximum Acceptable Fishing Level"; "Maximum Biological Productivity"; "Impact Reversibility"; "Impact Minimization"; "Rebuilding of Resources"; "Ecosystem Integrity"; "Species Interdependence"; "Institutional Integration"; "Uncertainty, Risk and Precaution"; "Compatibility of Management Measures"; "The Polluter Pays Principle"; "The User Pays Principle"; "The Precautionary Principle and Precautionary Approach"; "Subsidiary, Decentralization and Participation"; and "Equity".

The Paper then considers how the ecosystem approach to fisheries could be rendered operational and more successful than conventional fisheries management, taking into account, *inter alia*, the principles or objectives above. The types of measure it proposes include some that are familiar from traditional fisheries management. It concludes by identifying some hurdles to implementation.

4.6 ICES

ICES has also done work on the meaning of the ecosystem approach. It is not possible here to review all the work of ICES in that regard. Instead, mention will be made of an ICES report issued in 2005 entitled *Guidance on the Application of the Ecosystem Approach to Management of Human Activities in the European Marine Environment*.[57] The report was produced as an input to the development of the EC's Marine Thematic Strategy.[58]

[56] Page 22.
[57] ICES, 2005, *Guidance on the Application of the Ecosystem Approach to Management of Human Activities in the European Marine Environment*, ICES Cooperative Research Report, No. 273, 22 pp.
[58] COM(2005) 504 final, Brussels, 24.10.2005, *Thematic Strategy on the Protection and Conservation of the Marine Environment*.

The report states that the ecosystem approach could be described as "a comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of the marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity".[59]

The report proposes six principles to "underpin the effective implementation of the Ecosystem Approach",[60] and contains an annex containing "[g]uidance on the key ecological factors that should be considered when translating these principles into ecological objectives and operational objectives".[61] It then identifies two deficiencies in the current situation. In summary, those are that "the existing policy instruments operate largely independently" and that "the concept of a 'healthy' ecosystem needs to be reconciled across sectors and policy instruments".[62]

The report contains: (a) "A review of the concept of 'ecological status'"; (b) "A description of the Ecosystem Approach"; (c) "Recommended criteria for selecting objectives, indicators, limits, and targets"; (d) "Recommendations for management methods and structures that underpin the Ecosystem Approach" (including a list of six different types of management tools); (e) "Recommendations for assessment, monitoring, and scientific research"; and (f) "Recommended methods of measuring progress towards implementation" (including ten tests for gauging whether the ecosystem approach has been "fully applied").[63]

The report also sets out a seven-step process for applying the ecosystem approach.[64] Step 1 is "Scoping the current situation". It comprises the following four components: (a) "Evaluate the ecosystem status"; (b) "Evaluate relevant ecosystem policies"; (c) "Compile inventory of human activities"; and (d) "Evaluate relevant economic and social policies".

[59] Section 4.1, 3rd paragraph.
[60] Section 2, 2nd paragraph.
[61] Section 4.1, last paragraph.
[62] Section 2.
[63] Section 2 and sections 3-7 and 9.
[64] Section 8.

Steps 2-7 are as follows: "Contrasting with the Vision" (i.e. the vision that "we and future generations can enjoy and benefit from biologically diverse and dynamic oceans and seas that are safe, clean, healthy and productive"[65]); "Identifying important ecosystem properties and threats"; "Setting ecological objectives"; "Deriving operational objectives with indicators and reference points"; "Ongoing assessment"; and "Periodic updates".

Mention should also be made in this section of the so-called Baltic Sea Regional Project, of which further details can be found on the ICES website.[66] At the 2007 ICES Annual Science Conference, due to take place in September 2007, there will be a session on "Developing the ecosystem approach to the management of human activities for the Baltic Sea".[67]

4.7 Conclusion

It is beyond the scope of this report to offer a definition of phrases such as "the ecosystem approach", "the ecosystem approach to fisheries", "the ecosystem approach to fisheries management" or "the ecosystem-based approach to fisheries management". However, sections 6 and 7 of this report relate to achieving an "ecosystem approach to fisheries management" in the Baltic Sea. It is therefore necessary to explain to some extent how that particular term will be interpreted.

First, it will be assumed that an EAFM in the Baltic Sea is more than just a procedural duty. For example, it will be assumed that it requires decision-makers to do more than simply take into account the impact of their potential decisions on the Baltic Sea ecosystem. Instead, it will be assumed that the approach additionally establishes a substantive duty on decision-makers.

Secondly, it is necessary to identify some elements of that substantive duty. Drawing on Principles 5 and 6 in CBD CoP Decision V/6, it will be assumed that conservation

[65] COM(2005) 504 final, Brussels, 24.10.2005, page 4, section 5.1.
[66] <www.ices.dk/projects/balticsea.asp>.
[67] <www.ices.dk/iceswork/asc/2007/ThemeSessions/synopses/SessionC.pdf>.

of the structure and functioning of the Baltic Sea ecosystem should be a priority target for decision-makers and that they should ensure that the Baltic Sea ecosystem is managed within the limits of its functioning.

Applying those principles to fisheries management, and reflecting and adapting the FAO Guidelines, it will be assumed that an EAFM in the Baltic Sea entails managing fisheries in a way that reflects societal choice in the Baltic Sea coastal States and the EC (e.g. food security, economic development, nature conservation), without jeopardising the full range of goods and services provided by the Baltic Sea ecosystem both currently and in the future.

Thirdly, it is necessary to identify some types of management measure to fulfil the substantive duty. This report will consider, *inter alia*, the fixing of fishing opportunities and the use of technical measures as means of helping to achieve an EAFM in the Baltic Sea. In doing so, it will consider the appropriate level for decision-making and the appropriate geographical scale for certain measures.

5. Common Fisheries Policy

5.1 Introduction

The CFP has four main areas, comprising: (a) fisheries conservation; (b) structures (e.g. the fishing fleet); (c) the common organisation of the market; and (d) external relations (e.g. participation in regional fisheries management organisations and participation in fisheries access agreements with third States).

This report focuses mainly on fisheries conservation. However, reflecting the purposes addressed in sections 6 and 7 below, it also touches on external relations (in that it deals with a new fisheries agreement between the EC and Russia) and structures (since it deals with the EFF).

Under the CFP, the Member States have transferred the power to make rules for fisheries conservation to the EC itself. That means that only the EC may make rules for fisheries conservation, except to the extent that it delegates any rule-making powers back to the Member States. The delegated powers of the Member States are introduced in section 5.6 below.

The rule-making powers of the EC regarding fisheries conservation have been extended in scope by Article 6 of the EC Treaty, which requires the Community institutions to integrate environmental protection requirements into the definition and implementation of, *inter alia*, the CFP. However, it remains unclear whether, as a result of Article 6, the EC has exclusive powers to adopt measures that restrict the activities of fishing vessels purely or primarily for the purposes of nature conservation.

The CFP is implemented mainly by means of Regulations. The procedure for the adoption of Council Regulations under the CFP is set out in Article 37 of the EC Treaty, which states that: "The Council shall, on a proposal from the Commission and after consulting the European Parliament, acting by a qualified majority, make

regulations, issue directives, or take decisions, without prejudice to any recommendations it may also make" (emphasis added).[68]

That procedure is known as the "consultation procedure", on the basis that it involves (mere) consultation with the European Parliament. Regulation 2371/2002 (see section 5.2 below) in turn states, in an article entitled *Decision-making procedure*, that: "Except where otherwise provided for in this Regulation, the Council shall act in accordance with the procedure laid down in Article 37 of the [EC] Treaty".[69] Thus the norm is for Regulations implementing the CFP to be adopted by the Council.

However, the Commission itself is sometimes also able to adopt Regulations implementing the CFP, by virtue of having powers delegated to it by the Council. Powers are delegated to the Commission by means of specific provisions in Council Regulations. For example, Article 7 of Regulation 2371/2002 delegates to the Commission the power to adopt emergency measures in certain circumstances.

5.2 Objectives

The general objectives of the CFP are set out in Article 33 of the EC Treaty. They are the same as those of the CAP, and are as follows:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
(c) to stabilise markets;
(d) to assure the availability of supplies;
(e) to ensure that supplies reach consumers at reasonable prices.

More specific objectives are found in Regulation 2371/2002. Article 1 of Regulation 2371/2002 defines the scope of the CFP. Article 1(1) states that:

[68] Article 37(2), 3rd paragraph.
[69] Article 29.

The Common Fisheries Policy shall cover conservation, management and exploitation of living aquatic resources, aquaculture, and the processing and marketing of fishery and aquaculture products where such activities are practised on the territory of Member States or in Community waters or by Community fishing vessels or, without prejudice to the primary responsibility of the flag State, nationals of Member States.

Article 1(2) adds that the CFP "shall provide for coherent measures concerning" the following: "(a) conservation, management and exploitation of living aquatic resources, (b) limitation of the environmental impact of fishing, (c) conditions of access to waters and resources, (d) structural policy and the management of the fleet capacity, (e) control and enforcement, (f) aquaculture, (g) common organisation of the markets, and (h) international relations".

Article 2 of Regulation 2371/2002 defines the objectives of the CFP. It reads as follows:

1. 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.

2. The Common Fisheries Policy shall be guided by the following principles of good governance:
(a) clear definition of responsibilities at the Community, national and local levels;
(b) a decision-making process based on sound scientific advice which delivers timely results;
(c) broad involvement of stakeholders at all stages of the policy from conception to implementation;
(d) consistence with other Community policies, in particular with environmental, social, regional, development, health and consumer protection policies.

Thus the principal specific objective of the CFP is to "ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social

conditions" or, put another way, to ensure the sustainable exploitation of living aquatic resources.

Article 2(1) states that the Council "shall aim at a progressive implementation of an eco-system-based approach to fisheries management". Article 2(2) states that the CFP shall be guided by, *inter alia*, consistence with the EC policy on the environment.

The term "ecosystem-based approach to fisheries management" is not defined in Regulation 2317/2002. However, the term "precautionary approach to fisheries management" is defined: Article 3(i) states that the term "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 dependent species and non-target species and their environment".

5.3 Ecosystem-based approach to fisheries management

Introduction

As noted in section 5.2 above, Regulation 2371/2002 states that the Council "shall aim at a progressive implementation of an eco-system-based approach to fisheries management", without defining the term "ecosystem-based approach to fisheries management". However, some other EC documents cast some light on the meaning of that term.

COM document, March 2001

A Commission COM document issued in March 2001 and entitled *Elements of a Strategy for the Integration of Environmental Protection Requirements into the*

Common Fisheries Policy[70] defines an ecosystem-based approach to fisheries management indirectly by stating that:[71]

any management action should be performed taking into account that it may have important effects on the marine ecosystem, even if their fine details are not totally understood. This is equivalent to, or will result in, adopting an ecosystem-based approach to fisheries management.

That statement implies an ecosystem-based approach to fisheries management is equivalent to, or arises from, performing all management actions while taking into account that they may have important effects on the marine ecosystem. That in turn implies that an ecosystem-based approach is merely a procedural duty, which is inconsistent with the developments set out in section 4 above.

SEC document, December 2001

In December 2001, the Commission issued a SEC document entitled *The Ecosystem-based Approach to Fisheries Management (EAFM): possibilities and priorities for international cooperation*[72] "as a contribution to the current international debate on the ecosystem-based approach …".[73] The document is indeed a contribution though it is not a rigorous treatment of the subject.

In a footnote, the document states that: "For the purpose of the present document, ecosystem based management of fisheries is defined in accordance with the definition given in Section 3.2.8, Basic Principles of Ecosystem Management, FAO Fisheries Atlas".[74] The document then reproduces an extract from that Atlas as follows:

"The overarching principles of ecosystem-based management of fisheries are an extension of the conventional principles for sustainable fisheries development to cover the ecosystem as a whole. They aim to ensure that, despite variability, uncertainty, and likely natural changes in the ecosystem, the capacity of the aquatic ecosystems to produce fish food, revenues and employment and, more

[70] COM(2001) 143 final, Brussels, 16.03.2001.
[71] Page 9.
[72] SEC(2001) 1696, Brussels, 18.12.2001.
[73] Page 2.
[74] Page 2.

generally, other essential services and livelihood, is maintained indefinitely for the benefit of present and future generations. …"

The document reports that "… the EU intends progressively to clarify the concepts associated with the [ecosystem-based approach to fisheries management] and to build up a set of principles, objectives and rules for its implementation in the context of the CFP".[75]

It advises that the ecosystem-based approach to fisheries management "aims at complementing the traditional approach to fisheries management by providing it with environmental policy principles, objectives and operational procedures as a basis for management action" (emphasis added).[76] Later it states that the approach "addresses the 'environmental' dimension of sustainable development".[77]

The document also advises that the ecosystem-based approach to fisheries management "should have the objective, in the long term, of establishing a system whereby fishing activity is conducted in a way that is compatible with the sustainable conservation of the overall balance of the marine ecosystem".[78] It considers that the approach "should not aim, particularly in the short and mid term, to replace current fisheries management, based largely on single-species stock assessment and regulation", not least because of a lack of valid alternatives at present.[79]

The document includes an annex setting out examples of "measures that in the Community's view would contribute towards the long-term objective of implementing [the ecosystem-based approach to fisheries management]".[80] The measures address management, research and international cooperation. The examples of management measures listed by the Commission are as follows:[81]

[75] Page 4.
[76] Page 5.
[77] Page 5.
[78] Page 5.
[79] Page 5.
[80] Page 6.
[81] Pages 7, 9 and 10.

Short-term	Mid-term	Long-term
Apply precautionary single-species management to most important regulated stocks, within a multi-annual framework.	Apply precautionary single-species management to all regulated stocks.	Develop and agree on precautionary ecosystem reference points to be used in application of [the ecosystem-based approach to fisheries management].
Reduce by-catches and wastage with, if appropriate, targeted measures to protect vulnerable species. Promote full use of catch.	Introduce pair-wise (and subsequently more complex) relationships for management, for target species (i.e. herring/cod) or target/non-target species (i.e. capelin/seabirds).	Restoration of degraded marine ecosystems.
Incorporate the relevant provisions of FAO International Plans of Action … into legally binding measures.	Establish precautionary reference limits for sensitive species.	
Consider measures to protect areas/sites, which have particular significance in terms of habitat or species protection, taking due account of fisheries interests.	Use integrated ecosystem health indicators in co-operation with other interest groups and stakeholders. These indicators should, as a priority, include biodiversity indicators.	
Develop operational linkages with other sectors/actors impacting upon the marine ecosystem.	Develop market-based measures.	
Ensure that the above measures and ecosystem considerations are part of all international fisheries agreements.		
Continue international efforts to identify/designate degraded fisheries in the context of Regional Fisheries Organisations …		
Improve efficiency of monitoring and control.		

Overall, those examples indicate that the Commission considers the ecosystem-based approach to fisheries management to be more than merely a procedural duty to take ecosystem impacts into account (in contrast to the extract cited above from the March 2001 COM document). However, it remains unclear how far the Commission would be prepared to go to implement the approach as defined in the FAO Fisheries Atlas (see above) or as discussed in section 4 above.

Regulation 2371/2002

Regulation 2371/2002, in addition to its direct reference to the ecosystem-based approach in Article 2(1), contains various other express or implied references to the ecosystem or, more generally, the environment beyond the target stock in question. Those include, *inter alia*, the following, all of which may be seen as elements of an ecosystem-based approach to fisheries management (emphasis added):

Article 1 Scope	**(2)** The Common Fisheries Policy shall provide for coherent measures concerning … **(b)** limitation of the <u>environmental</u> impact of fishing …
Article 2 Objectives	**(1)** The Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, <u>environmental</u> 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 <u>marine eco-systems</u>.
	(2) The Common Fisheries Policy shall be guided by the following principles of good governance: … **(d)** consistence with other Community policies, in particular with <u>environmental</u>, social, regional, development, health and consumer protection policies.

Article 3 Definitions	For the purpose of this Regulation the following definitions shall apply: … **(e)** 'sustainable exploitation' means the exploitation of a stock in such a way that the future exploitation of the stock will not be prejudiced and that it does not have a negative impact on the marine eco-systems; … **(i)** '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 dependent species and non-target species and their environment;
Article 4 Types of measures	**(1)** To achieve the objectives mentioned in Article 2(1), the Council shall establish Community measures governing access to waters and resources and the sustainable pursuit of fishing activities.
	(2) The measures referred to in paragraph 1 … may, in particular, include measures for each stock or group of stocks to limit fishing mortality and the environmental impact of fishing activities by: … **(g)** adopting technical measures, including: … (iv) specific measures to reduce the impact of fishing activities on marine eco-systems and non target species; **(h)** establishing incentives, including those of an economic nature, to promote more selective or low impact fishing; …
Article 5 Recovery plans	**(2)** … Recovery plans may include targets relating to other living aquatic resources and the maintenance or improvement of the conservation status of marine eco-systems. …
	(3) Recovery plans shall be drawn up on the basis of the precautionary approach to fisheries management and take account of limit reference points recommended by relevant scientific bodies. They shall ensure the sustainable exploitation of stocks and that the impact of fishing activities on marine eco-systems is kept at sustainable levels. They may cover either fisheries for single stocks or fisheries exploiting a mixture of stocks, and shall take due account of interactions between stocks and fisheries. …
Article 6 Management plans	**(2)** … Management plans may include targets relating to other living aquatic resources and the maintenance or improvement of the conservation status of marine eco-systems. …
	(3) Management plans shall be drawn up on the basis of the precautionary approach to fisheries management and take account of limit reference points recommended by relevant scientific bodies. They shall ensure the sustainable exploitation of stocks and that the impact of fishing activities on marine eco-systems is kept at sustainable levels.

	They may cover either fisheries for single stocks or fisheries exploiting a mixture of stocks, and shall take due account of interactions between stocks and fisheries. …
Article 7 Commission emergency measures	**(1)** If there is evidence of a serious threat to the conservation of living aquatic resources, or to the marine eco-system resulting from fishing activities and requiring immediate action, the Commission, at the substantiated request of a Member State or on its own initiative, may decide on emergency measures …
Article 8 Member State emergency measures	**(1)** If there is evidence of a serious and unforeseen threat to the conservation of living aquatic resources, or to the marine ecosystem resulting from fishing activities, in waters falling under the sovereignty or jurisdiction of a Member State where any undue delay would result in damage that would be difficult to repair, that Member State may take emergency measures …
Article 9 Member State measures within the 12 nautical mile zone	**(1)** A Member State may take non-discriminatory measures for the conservation and management of fisheries resources and to minimise the effect of fishing on the conservation of marine eco-systems within 12 nautical miles of its baselines …
Article 31 Regional Advisory Councils	**(1)** Regional Advisory Councils shall be established to contribute to the achievement of the objectives of Article 2(1) …
Article 33 Scientific, Technical and Economic Committee for Fisheries	**(1)** A Scientific, Technical and Economic Committee for Fisheries (STECF) shall be established. The STECF 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.

Regulation 2371/2002 is not the only CFP instrument calling for an ecosystem-based approach to fisheries management. For example, in the context of the Baltic, the new fisheries agreement between the EC and Russia contains reference to the ecosystem-based approach (see section 5.10 below). That agreement, once concluded by the EC, will be a component of the CFP. Furthermore, some CFP Regulations applicable to the Baltic manage fishing activities for the purposes of environmental protection and can thus be seen as contributing towards achieving an ecosystem-based approach to fisheries management. An example is Regulation 812/2004, addressing cetacean by-catch.

Commission policy documents from 2002 onwards

As a contribution to the discussion at the European Marine Strategy Stakeholder Conference in Rotterdam in November 2004, the Commission prepared a document entitled *Guidance on the application of the Ecosystem Approach to Management of human activities in the European marine environment*. The document states that:[82]

> … the Ecosystem Approach could be described as 'a comprehensive integrated management of human activities based on best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of the marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.

On fisheries specifically, the Commission has issued several policy documents from 2002 onwards that raise the ecosystem-based approach tangentially.[83] However, none of those documents appears to treat the matter in any depth. The Commission has also issued one policy document that deals exclusively with the role of technical conservation measures in environmentally-friendly fishing.[84]

Conclusion

Two documents adopted by the Commission in 2001 provide some mixed messages about the how the Commission regards the ecosystem-based approach to fisheries management. In the March 2001 COM document, the Commission seems to regard the approach as (merely) a procedural duty. In the December 2001 SEC document, the Commission appears to go further than. However, the examples given in the latter document fail to reveal any clear vision by the Commission.

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[82] Paragraph 12.

[83] See, for example: **(a)** COM(2002) 656 final, Brussels, 26.11.2002, *On a Community Action Plan to reduce discards of fish* (e.g. page 8, paragraph 1); **(b)** COM(2006) 360 final, Brussels, 4.7.2006, *Implementing sustainability in EU fisheries through maximum sustainable yield* (e.g. page 3, paragraphs 5 and 6); pages 7-8, section 3.2; page 8, section 3.3, bullet points 3 and 5); **(c)** COM(2007) 30 final, Brussels, 29.1.2007, *Review of the management of deep-sea fish stocks* (e.g. page 3, paragraphs 2 and 5; page 5, section 3.1.1, paragraph 1; page 10, bullet point 6).

[84] COM(2004) 438 final, Brussels, 21.6.2004, *Promoting more environmentally-friendly fishing methods: the role of technical conservation measures*.

The absence of a clear vision is carried through into Regulation 2371/2002, which merely requires the Council to "aim at a progressive implementation of an eco-system-based approach to fisheries management" and fails to define the term "eco-system-based approach to fisheries management". In the years since the entry into force of Regulation 2371/2002, it is possible to point to a few examples of EC measures that could be said to be contributing to an EAFM in Community waters and to a few policy documents that either raise the issue tangentially or, in one case, deal with a specific aspect of it. However, it is hard to point to clear evidence of a coherent EAFM emerging.

The Commission may have been reluctant to set out chapter and verse on the meaning of an EAFM on the grounds that, *inter alia*, the meaning of the concept is still developing in the international community and the (still new) RACs may have an important role to play in developing ideas. In practice, it is now more than four years since Regulation 2371/2002 was adopted. In the intervening period, the FAO has published two important documents on the EAFM, the profile of the issue has been increasing steadily at the international level and the forthcoming MSD will enhance the need for an ecosystem approach to be taken in Community waters. Overall, it may now be timely for the Commission, perhaps in liaison with the RACs, to issue a new policy document setting out a clear vision on how an EAFM should be implemented in, *inter alia*, Community waters (including those in the Baltic Sea).

5.4 EC measures applicable specifically to Baltic Sea

Introduction

Any EC measure applicable to Community waters generally will be applicable to, *inter alia*, the Baltic Sea (except Russian waters). For example, in that way, Regulation 2371/2002 applies to the Baltic Sea. Some EC measures exclude their application to the Baltic Sea (for example, see Article 1 of Regulation 850/98 – see section 5.6 below). Others do not apply generally to Community waters but do

include the Baltic Sea or parts of it, amongst other areas, within their scope (for example, see Regulation 812/2004).

There are also some EC measures that apply specifically to the Baltic Sea. The two principal measures in that respect are Regulation 2187/2005 (which repealed and replaced Regulation 88/98) and the annual Regulation setting out fishing opportunities and associated conditions regarding the Baltic (currently Regulation 1941/2006).

Regulation 2187/2005

Regulation 2187/2005, in Article 1 on *Subject matter and scope*, states that: "This Regulation lays down technical conservation measures in relation to the taking and landing of fishery resources in the maritime waters under the sovereignty or jurisdiction of the Member States and situated in the geographical area specified in Annex I". Annex I in turn lists and defines subdivisions 22-32 in the Baltic Sea, which jointly comprises ICES subdivisions III b, III c and III d. The measures in Regulation 2187/2005 apply to Community vessels and, in principle, to Russian-flagged vessels when fishing in the Community waters of the Baltic. Article 26 of Regulation 2187/2005 provides some delegated powers to the Member States, on which see sections 5.6 and 6 below.

As indicated by its Article 1, the focus of Regulation 2187/2005 is "technical conservation measures". That term is not defined, but the subsequent articles include specifications about, *inter alia*, minimum mesh sizes and other factors relating to mesh, minimum percentages of target species to be retained on board, maximum lengths and maximum immersion time of certain passive gear, use of particular fishing methods, maximum proportion of fleet using driftnets, discarding, minimum landing size of fish, closed areas, retention on board of certain species, landing of unsorted catches, use of special fishing permits and engine power.

Regulation 1941/2006

Regulation 1941/2006 in Article 1 on *Subject matter*, states that: "This Regulation fixes fishing opportunities for the year 2007 for certain fish stocks and groups of fish stocks in the Baltic Sea and the associated conditions under which such fishing opportunities may be used". Thus whereas Regulation 2187/2005 deals with technical measures, Regulation 1941/2006 deals principally with fishing opportunities (i.e. catch limits and effort limits).

The catch limits set by Regulation 1941/2006 relate to only five species (i.e. herring, cod, plaice, Atlantic salmon and sprat) in specified subdivisions of the Baltic. It should be added that the Commission has issued a legislative proposal for a Council Regulation establishing a multi-annual plan for the cod stocks in the Baltic Sea and the fisheries exploiting those stocks.[85] A Regulation pursuant to that proposal has not yet been adopted by the Council. Regulation 1941/2006 contains a contingency plan in the event that no such Regulation is adopted by 30 June 2007.[86]

Though Regulation 1941/2006 deals principally with fishing opportunities, it also contains an important annex on *Transitional technical and control measures*.[87] As its title suggests, that annex contains a number of, *inter alia*, technical measures which are valid only for 2007. In that regard, the annex contains specifications about a seasonal closed area (in order to conserve cod) and about retention on board of certain flatfish species during particular periods.[88] The transitional technical measures in Regulation 1941/2006 may be contrasted with the longer-term technical measures in Regulation 2187/2005.

Article 2(1) of Regulation 1941/2006, on *Scope*, adds that: "This Regulation shall apply to Community fishing vessels (Community vessels) and fishing vessels flying the flag of, and registered in, third countries operating in the Baltic Sea". The reference to third country vessels is a reference to Russian-flagged vessels when

[85] COM(2006) 411 final, Brussels, 24.7.2006.
[86] Annex I, footnote 1 to both entries for Cod and Appendix 1 to Annex I.
[87] Article 8 and Annex III.
[88] Annex III, points 1 and 3.

fishing in Community waters in the Baltic (e.g. pursuant to the new EC-Russia fisheries agreement – see section 5.10 below).

Amendments arising from accession by EU 10

The accession instruments for the EU 10 address some aspects of fisheries. Of relevance to this report, Annex III to the Act of Accession provides for some amendments to Regulation 88/98 regarding the Gulf of Riga. Now that Regulation 88/98 has been repealed, provisions on the Gulf of Riga are to be found in Regulation 2187/2005.[89] Also, Annexes VI, VIII, IX and XII to the Act of Accession contain transitional provisions on allocation of fishing opportunities in respect of Estonia, Latvia, Lithuania and Poland respectively.

5.5 Access restriction within 12 nm of the baseline

Despite international law (see section 3 above) providing coastal States with the right to exclude third States from exploring or exploiting fisheries resources in their internal waters, territorial seas and EEZs, and on their continental shelves (in the case of sedentary species), Member States of the EC have chosen to adopt a more liberal system as between themselves. The general rule is set out by Article 17(1) of Regulation 2371/2002 which states that: "Community fishing vessels shall have equal access to waters and resources in all Community waters other than those referred to in [Article 17(2)], subject to the measures adopted under Chapter II".

As can be seen, Article 17(1) refers to Chapter II of Regulation 2371/2002. That Chapter is headed *Conservation and Sustainability*. It contains the power and duties for the Council and the Commission to adopt stock conservation and ecosystem protection measures, and as well as the delegated powers of the Member States introduced in section 5.6 below. Thus the principle of equal access is subject to EC and Member States' measures on stock conservation and ecosystem protection.

[89] Recitals (10) and (11) and Article 20.

Article 17(1) also notes that the principle of equal access applies to all Community waters except those referred to in Article 17(2). Article 17(2) states that:

> In the waters up to 12 nautical miles from baselines under their sovereignty or jurisdiction, Member States shall be authorised from 1 January 2003 to 31 December 2012 to restrict fishing to fishing vessels that traditionally fish in those waters from ports on the adjacent coast, without prejudice to the arrangements for Community fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States and the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned.
>
> By 31 December 2011 the Commission shall present to the European Parliament and the Council a report on the arrangements set out in this paragraph. The Council shall decide before 31 December 2012 on the provisions which will follow the abovementioned arrangements.

Thus Article 17(2) provides for a coastal Member State to restrict fishing access by vessels flagged to other Member States in respect of its internal waters and "waters up to 12 nautical miles from baselines". In most cases, the waters up to 12 nm from the baseline will exclusively comprise the territorial sea. However, as noted in section 3.3 above, some Baltic Sea coastal States have a territorial sea of less than 12 nm in some places. In such cases, the access restriction provided for by Article 17(2) potentially relates to waters beyond the territorial sea as well (so long as such waters are within the jurisdiction of the coastal State).

The access restriction only lasts until the end of 2012, whereupon it is subject to review. The access restriction allows a coastal State to restrict fishing to vessels "that traditionally fish in those waters from ports on the adjacent coast". However that power is without prejudice to: (a) "the arrangements for Community fishing vessels flying the flag of other Member States under existing neighbourhood relations between Member States"; and (b) "the arrangements contained in Annex I, fixing for each Member State the geographical zones within the coastal bands of other Member States where fishing activities are pursued and the species concerned".

Thus any access restriction imposed by a coastal State under Article 17(2) is not to affect the arrangements referred to in "(a)" or "(b)" in the preceding paragraph. So

long as those arrangements are not affected, the coastal State may restrict fishing to vessels "that traditionally fish in those waters from ports on the adjacent coast". It would be interesting to establish which vessels "traditionally fish … from ports on the adjacent coast" in respect of any given Baltic coastal State and whether the coastal State in question in turn exercises its right, subject to "(a)" and "(b)" above, to allow access only to those vessels.

Meanwhile, it is hard to know whether, or to what extent, Article 17(2) serves to reduce the variety of flag Member States with vessels operating in the waters of any given Member State in the Baltic within 12 nm from the baseline. What can be said, however, is that some arrangements for access to waters within 12 nm do exist. Those are set out in Annex I to Regulation 2371/2002 which, it will be recalled, contains arrangements that are not to be affected by any restrictions imposed under Article 17(2).

The arrangements set out in Annex I that are relevant to the Baltic Sea are shown below. It can be seen that some of the arrangements are reciprocal, while others are not. Of note, the accession instruments for the EU 10 do not provide for amendments to the list of access arrangements that at the time were contained in Annex I to Regulation 3760/92 (the then Basic Regulation) and are now contained in Annex I to Regulation 2371/2002.

COASTAL WATERS OF DENMARK

Geographical area	**Member State**	**Species**	**Importance or particular characteristics**
Baltic Sea (including Belts, Sound, Bornholm) 3 to 12 nautical miles	Germany	Flatfish	Unlimited
		Cod	Unlimited
		Herring	Unlimited
		Sprat	Unlimited
		Eel	Unlimited
		Salmon	Unlimited

		Whiting	Unlimited
		Mackerel	Unlimited
Baltic Sea (3 to 12 miles)	Sweden	All species	Unlimited

COASTAL WATERS OF GERMANY

Geographical area	Member State	Species	Importance or particular characteristics
Baltic coast (3 to 12 miles)	Denmark	Cod	Unlimited
		Plaice	Unlimited
		Herring	Unlimited
		Sprat	Unlimited
		Eel	Unlimited
		Whiting	Unlimited
		Mackerel	Unlimited

COASTAL WATERS OF FINLAND

Geographical area	Member State	Species	Importance or particular characteristics
Baltic Sea (4 to 12 miles) (*) (*) 3 to 12 miles around Bogskär Isles	Sweden	All species	Unlimited

COASTAL WATERS OF SWEDEN

Geographical area	Member State	Species	Importance or particular characteristics
Baltic Sea (4 to 12 miles)	Denmark	All species	Unlimited
	Finland	All species	Unlimited

5.6 Delegated powers of Member States

Introduction

As noted in section 5.1 above, the EC has exclusive powers to make rules for fisheries conservation, except to the extent that it delegates any rule-making powers back to the Member States. Delegated powers are provided by Articles 10, 9 and 8 of Regulation 2371/2002 and, in respect of the Baltic specifically, by Article 26 of Regulation 2187/2005.

It should be noted that Regulation 850/98 also provides delegated powers to Member States, in Articles 46 and 45(2) and (3). However, Article 1 of that Regulation states that:

> This Regulation, laying down technical conservation measures, shall apply to the taking and landing of fishery resources occurring in the maritime waters under the sovereignty or jurisdiction of the Member States and situated in one of the regions specified in Article 2, except as otherwise provided in Articles 26 and 33.

As can be seen, Article 1 refers to "maritime waters … situated in one of the regions specified in Article 2, except as otherwise provided in Articles 26 and 33" (emphasis added). None of the regions specified in Article 2 of Regulation 850/98 relate to ICES divisions III b, III c and III d (i.e. the Baltic Sea as defined for the purposes of this report). Of the exceptions mentioned in Article 1 of Regulation 850/98, Article 26 relates to salmon and seatrout specifically and Article 33 has been repealed.

The wording in Article 1 of Regulation 850/98 is rather unclear in that the article does not simply state: "This Regulation shall …". Instead, it states: "This Regulation, laying down technical conservation measures, shall …" (emphasis added). Thus it could be argued that the limited geographical scope described in Article 1, which excludes the Baltic, is only applicable to the extent that Regulation itself actually lays down technical measures and that otherwise the Regulation applies more generally. On that basis, the delegated powers set out in Articles 46 and 45(2) and (3) would apply to the Baltic Sea.

However, for current purposes, it will be assumed that the powers provided for in Articles 46 and 45(2) and (3) of Regulation 850/98 do not apply to the Baltic Sea. That is corroborated by the fact that, in 1998, an additional technical measures Regulation was adopted exclusively regarding the Baltic (Regulation 88/98 – now repealed). That Regulation contained delegated powers equivalent to those provided by Article 46 of Regulation 850/98 (and tailored to the Baltic), thus suggesting that those in Article 46 of Regulation 850/98 were not intended to apply to the Baltic Sea.

This section describes Articles 10, 9 and 8 of Regulation 2371/2002 and Article 26 of Regulation 2187/2005, with reference to the Baltic Sea, and ends with a table summarising their contents. Delegated powers are analysed in more detail in section 6 below.

Article 10 of Regulation 2371/2002

Under Article 10 of Regulation 2371/2002, "Member States may take measures for the conservation and management of stocks in waters under their sovereignty or jurisdiction" in respect of: (a) fishing vessels flying the flag of the Member State concerned and registered in the EC; or (b) persons established in the Member State concerned (in the case of fishing activities which are not conducted by a fishing vessel). Such measures must be compatible with the objectives set out in Article 2(1) of Regulation 2371/2002 (see section 5.2 above) and no less stringent than existing EC legislation.

The reference in Article 10 to "waters under their sovereignty or jurisdiction" is a little confusing. It clearly means that a Member State in the Baltic can use Article 10 to apply measures to its own-flag vessels when they are operating that State's marine internal waters, territorial sea or EEZ. However, it is less clear whether it means that Article 10 could also be used by a Member State to apply measures to its own-flag vessels when they are operating in the marine internal waters, territorial sea or EEZ of other EC coastal States.

Article 10 may be contrasted with Articles 8 and 9 of Regulation 2371/2002 in two important respects. First, it may not be used to adopt measures applying to fishing vessels flying the flag of other Member States. Secondly, it does not expressly provide for measures to be taken for the purposes of protection of the marine ecosystem. It would be interesting to establish whether the failure of Article 10 to expressly apply to marine ecosystems was an oversight on the part of those drafting Regulation 2371/2002 or was intentional.

The failure of Article 10 to expressly provide for measures to protect the marine ecosystem has been noted by the English Court of Appeal in a recent case.[90] The case related to the by-catch of dolphins in the pair-trawl fishery for bass. The Court of Appeal stated that Article 10:[91] "authorises Member States to take measures for the conservation and management of fish stocks but only in relation to vessels from the Member State concerned. It does not apply to measures to protect marine ecosystems, and is therefore irrelevant for present purposes". The Court of Appeal's judgment is not binding on the European Court of Justice, but it nonetheless shows how a national court has interpreted Article 10.

Article 26 of Regulation 2187/2005

Article 26(1) states that: "Member States may, for the conservation and management of stocks or to reduce the effect of fishing on the marine eco-system, take technical measures designed to limit fishing opportunities which: (a) supplement measures set out in Community fisheries Regulations; or (b) go beyond minimum requirements set out in Community fisheries Regulations".

Article 26(2) states that: "Measures referred to in paragraph 1 shall apply solely to the fishermen of the Member State concerned and shall be compatible with Community law" (emphasis added). For the purposes of this report, it will be assumed that the reference to "fishermen" is a reference to own-flag vessels (though the reference to "fishermen", rather than "fishing vessels", also raises the possibility

[90] *R (on the application of Greenpeace Ltd) v Secretary of State for the Environment, Food and Rural Affairs* [2005] EWCA Civ 1656.
[91] Judgment, Appendix, paragraph 7.

of a Member State using Article 26 to regulate the activities of its nationals even when they are operating on a fishing vessel flagged to another State).

There are some important differences between Article 26 of Regulation 2187/2005 and Article 10 of Regulation 2317/2002. First, Article 26 relates only to technical measures, whereas Article 10 applies to measures more generally. Secondly, Article 26 does not refer to any particular waters, whereas Article 10 does. Thirdly, Article 26 expressly permits measures "to reduce the effect of fishing on the marine eco-system" whereas Article 10 does not.

The fact that Article 26 does not refer to any particular waters implies that a Member State in the Baltic could use Article 26 to adopt measures applying to its own-flag vessels whether those vessels are operating in its own waters (i.e. marine internal waters, territorial sea or EEZ) or in the waters of another coastal State in the Baltic.

A further important difference between Article 10 and Article 26 is that Article 10 does not specify any procedure while Article 26 does. The procedure set out in Article 26 is relatively straightforward. First, the Member State concerned must "communicate such measures without delay to the other Member States and the Commission".[92] Secondly, Member States (unspecified) must "supply the Commission, on its request, with all information needed for the assessment of whether the measures comply with the conditions laid down in [Article 26(1)]".[93] Thirdly, "[i]f the Commission concludes that the measures do not comply with the conditions laid down in [Article 26(1)] it shall adopt a decision requiring the Member State to withdraw or modify the measures".[94]

Article 9 of Regulation 2371/2002

Under Article 9 of Regulation 2371/2002, a Member State may take "measures for the conservation and management of fisheries resources and to minimise the effect of fishing on the conservation of marine eco-systems" but only: (a) "within 12 nautical

[92] Article 26(3).
[93] Article 26(4).
[94] Article 26(5).

miles of its baselines"; (b) if the measures are non-discriminatory; (c) if the EC "has not adopted measures addressing conservation and management specifically for this area"; (d) if the measures are compatible with the objectives set out in Article 2 of Regulation 2371/2002 (see section 5.2 above); and (e) if the measures are no less stringent than existing EC legislation.[95]

The reference in Article 9 to "within 12 nautical miles of its baselines" means that a Member State in the Baltic can use Article 9 to adopt the measures in question for fisheries resources and marine ecosystems in its marine internal waters, its territorial sea and, in cases where the territorial sea is less than 12 nm in breadth, that part of its EEZ lying within 12 nm from the baseline.

Measures adopted under Article 9 may include measures "liable to affect the vessels of another Member State".[96] However, such measures may be adopted "only after the Commission, the Member State and the Regional Advisory Councils concerned have been consulted on a draft of the measures accompanied by an explanatory memorandum"[97] and are subject to the procedure laid down in Article 8(3)-(6) of Regulation 2371/2002.[98] The latter reads as follows:

3. The Member States and Regional Advisory Councils concerned may submit their written comments to the Commission within five working days of the date of notification. The Commission shall confirm, cancel or amend the measure within 15 working days of the date of notification.

4. The Commission decision shall be notified to the Member States concerned. It shall be published in the *Official Journal of the European Communities*.

5. The Member States concerned may refer the Commission decision to the Council within 10 working days of notification of the decision.

6. The Council, acting by qualified majority, may take a different decision within one month of the date of receipt of the referral.

[95] Article 9(1), 1st paragraph.
[96] Article 9(1), 2nd paragraph.
[97] Article 9(1), 2nd paragraph.
[98] Article 9(2).

As can be seen, the Commission has a power under Article 8(3) to confirm, cancel or amend the measure that has been proposed by the Member State under Article 9. In general, the Court has been keen to acknowledge that the Commission (and the Council) has a broad discretion when implementing the CFP. That broad discretion is likely to apply, *inter alia*, to the Commission's decision-making under Article 8(3) and can be illustrated by the following example, albeit not from the Baltic, regarding the UK.

In January 2005, the UK consulted the Commission pursuant to Article 8(3) regarding a proposed measure under Article 9. The proposal concerned "the extension of a domestic ban on pair trawling for bass within the 12 miles limit off the south-west coast of England to vessels of other Member States having fishing access to this area" for the purpose of reducing cetacean by-catch.[99] In its Decision, the Commission did not systematically consider whether the proposed measure was non-discriminatory, compatible with Article 2(1) of Regulation 2371/2002 and no less stringent than existing EC legislation (i.e. the conditions set out in Article 9 itself).

Instead, the Commission focused on the scientific justification for the measure. In that regard, it concluded that: "Although pursuant to Article 9 of Regulation (EC) No 2371/2002 a Member State may take measures in order to minimise the impact of fishing activities on marine ecosystems, according to the scientific information available the proposed measure is not likely to contribute to that objective".[100]

Thus the Commission considered that, on the basis of the available scientific information, the UK's proposed measure was not likely to contribute to the objective of reducing dolphin mortality. That consideration seems to have been a significant factor in the Commission's ultimate decision to reject the proposal. Viewed another way, the Commission is saying that the UK's proposal goes beyond what is necessary to achieve the objective of reducing dolphin mortality. In that sense, the Commission

[99] Commission Decision 2005/322/EC of 26 February 2005 on the request presented by the United Kingdom pursuant to Article 9 of Council Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ L 104/37, 23.4.2005), preamble, recital (1).
[100] Ibid, preamble, recital (6).

may be stating that the proposed measure breaches the general principle of proportionality (see further section 6.5 below).

Article 8 of Regulation 2371/2002

Under Article 8 of Regulation 2371/2002, a Member State may take "emergency measures": (a) "[i]f there is evidence of a serious and unforeseen threat to the conservation of living aquatic resources, or to the marine ecosystem resulting from fishing activities, in waters falling under the sovereignty or jurisdiction of [that] Member State"; and (b) "where any undue delay would result in damage that would be difficult to repair".[101] In principle, the measures may have a duration of up to three months.[102]

The reference in Article 8 to "waters falling under the sovereignty or jurisdiction" of the Member State proposing to take the measure means that a Member State in the Baltic can use Article 8 to adopt the measures in question for living aquatic resources and marine ecosystems in its marine internal waters, its territorial sea and its EEZ.

Measures under Article 8 may potentially apply to own-flagged vessels or vessels of another Member State. In both cases, the same procedure must be followed. First, "Member States intending to take emergency measures shall notify their intention to the Commission, the other Member States and the Regional Advisory Councils concerned by sending a draft of those measures, together with an explanatory memorandum, before adopting them".[103] Secondly, the procedure laid down in Article 8(3)-(6) must be followed (see above). The requirement to notify an "intention" and the reference to "sending a draft" in Article 8(1) suggest that the measure should not be allowed by the Member State to take effect until the Commission has reached its decision.

[101] Article 8(1).
[102] Article 8(1).
[103] Article 8(2).

Summary

The powers provided by Articles 10, 9 and 8 of Regulation 2371/2002 and by Article 26 of Regulation 2187/2005 can be summarised as follows:

	Zones	**Purpose of measures**	**Vessels Affected**	**Further express conditions** [cumulative unless otherwise stated]
2371/2002				
Article 10	- internal waters - territorial sea - EEZ	- stock conservation	- own-flag	**[1]** compatible with Article 2(1) of Regulation 2371/2002 **[2]** no less stringent than existing EC law
Article 9	- internal waters - territorial sea - any part of EEZ within 12 nm from baseline	- stock conservation - ecosystem protection	- own-flag - other MSs [*special procedure*]	**[1]** non-discriminatory **[2]** no existing EC conservation and management measures "specifically for this area" **[3]** compatible with Article 2 of Regulation 2371/2002 **[4]** no less stringent than existing EC law
Article 8	- internal waters - territorial sea - EEZ	- stock conservation - ecosystem protection	- own-flag [*special procedure*] - other MSs [*special procedure*]	**[1]** "evidence of a serious and unforeseen threat …" **[2]** "undue delay would result in damage that would be difficult to repair" **[3]** 3 month duration

2187/2005 [Baltic only]				
Article 26	- internal waters - territorial sea - EEZ [including, impliedly, waters of other coastal States]	- stock conservation - ecosystem protection [but **only** "technical measures designed to limit fishing opportunities"]	- own-flag [*special procedure*]	**[1]** "supplement measures set out in Community fisheries Regulations"; **or** **[2]** "go beyond minimum requirements set out in Community fisheries Regulations" **[3]** "compatible with Community law"

5.7 European Fisheries Fund

Introduction

The EFF was established by Regulation 1198/2006, which entered into force in September 2006.[104] Regulation 1198/2006 may potentially be supplemented by implementing rules adopted by the Commission.[105] Some such rules have been adopted,[106] though description of those is beyond the scope of this report. Any implementing rules are to be adopted through a new comitology committee known as the European Fisheries Fund Committee.[107] The Regulation is to be reviewed by the end of 2013 (i.e. almost seven years from now) at the latest.[108]

[104] Article 106.
[105] Article 102.
[106] See, *inter alia*: **(a)** Commission Regulation (EC) No 498/2007 of 26 March 2007 laying down detailed rules for the implementation of Council Regulation (EC) No 1198/2006 on the European Fisheries Fund, OJ L 120/1, 10.5.2007; and **(b)** Commission Decision 2007/218/EC of 28 March 2007 on amending Decision C(2006) 4332 final fixing an annual indicative allocation by Member State for the period 1 January 2007 to 31 December 2013 of the Community commitment appropriations from the European Fisheries Fund, OJ L 95/37, 5.4.2007.
[107] Articles 102 and 101.
[108] Article 105.

In short, the EFF is a fund of EC money to support "the sustainable development of the fisheries sector, fisheries areas and inland fishing".[109] It replaced the Financial Instrument for Fisheries Guidance as from 1 January 2007.[110] It is to contribute to attaining the objectives set out in Article 33 of the EC Treaty (see section 5.2 above) as well as "the objectives defined as part of the common fisheries policy".[111] The latter is presumably a reference to Article 2(1) of Regulation 2371/2002 (see section 5.2 above).

The fund applies to "the entire territory of the Community" (emphasis added).[112] The term "territory" is potentially limiting in the context of fisheries. In its most restrictive sense, it means the areas that are subject to the territorial sovereignty of the Member States. In the marine environment, that means (just) marine internal waters and the territorial sea (see section 3 above). With a broader interpretation, it could mean not just the areas subject to territorial sovereignty but also areas in respect of which the Member States have sovereign rights (i.e. the continental shelf and the EEZ – see section 3 above).

The phrase "the entire territory of the Community" is not usually used in the context of the CFP. Indeed it appears that Regulation 1198/2006 is the only Regulation under the CFP that uses the phrase. It is beyond the scope of this report to come to a definitive view on the geographical scope of Regulation 1198/2006. However, it will be assumed for the purposes of this report that the Regulation has the same scope as Regulation 2371/2002, and hence includes, *inter alia*, the marine internal waters, the territorial sea and the EEZs of the Member States in the Baltic.

Article 4 of Regulation 1198/2006 sets seven objectives for assistance under the EFF. Three of those can be regarded as having particular relevance to an EAFM (emphasis added): (a) "support the common fisheries policy so as to ensure exploitation of living aquatic resources … in order to provide sustainability in economic,

[109] Article 1.
[110] Article 104.
[111] Article 5.
[112] Article 2(1).

environmental and social terms";[113] (b) "promote a sustainable balance between resources and the fishing capacity of the Community fleet";[114] and (c) "foster the protection and the enhancement of the environment and natural resources where related to the fisheries sector" (emphasis added).[115]

Article 6 is entitled *Complementarity, consistency and compliance*. Of particular note, "[o]perations financed by the EFF shall not increase fishing effort".[116] Links are forged with other EC financial instruments by virtue of Article 6(4) which requires the Commission and the Member States to ensure coordination between EFF assistance and that from the European Agricultural Fund for Rural Development, the European Regional Development Fund, the European Social Fund, the Cohesion Fund and "other Community financial instruments". However, expenditure financed by the EFF "shall not receive assistance from another Community financial instrument".[117]

Two key elements of the implementation of the EFF are the production by each Member State of a "national strategic plan" ("**NSP**") and an implementing "operational plan" ("**OP**"). It would be interesting to establish whether any of the EC coastal States in the Baltic have yet submitted NSPs and OPs to the Commission.

National strategic plans

The NSP is to be the subject of a consultation at Member State level, "according to the detailed arrangements that [the Member State] considers most appropriate".[118] The NSP is to, *inter alia*, set out "the priorities, objectives, the estimated public financial resources required and deadlines for its implementation …".[119]

Article 15(2) lists eight areas to which the NSP is to have "particular regard". Excluding aquaculture, two of those can be regarded as having particular relevance to

[113] Article 4(a).
[114] Article 4(b).
[115] Article 4(e).
[116] Article 6(5).
[117] Article 54.
[118] Article 8(5).
[119] Article 15(2).

an EAFM: (a) "the management and adjustment of the Community fishing fleet and, in particular, the adjustment of fishing effort and capacity with regard to the evolution of fisheries resources, the promotion of environmentally-friendly fishing methods and a sustainable development of fishing activities";[120] and (b) "the protection and enhancement of the aquatic environment related to the fisheries sector".[121]

Operational plans

The OP is defined as "the single document drawn up by the Member State and approved by the Commission containing a coherent set of priority axes to be achieved with the aid of the EFF".[122] The OP is to "implement the policies and priorities to be co-financed by the EFF" and is to be coherent with the NSP.[123] It is to cover the period between 1 January 2007 and 31 December 2013.[124] As with the NSP, the OP is to be the subject of a consultation at Member State level.[125]

As indicated by the definition in the preceding paragraph, the OP is subject to approval by the Commission which has the power to request a Member State to adapt its plan if necessary.[126] However, the OP is not otherwise unchangeable. It may "be re-examined where a major difficulty has arisen in its implementation or if there have been significant strategic changes or for reasons of sound management …".[127] That would presumably allow revision in the light of, *inter alia*, any new Regulations implementing the CFP.[128]

Implementation of the OP by the Member State is to be "at the appropriate territorial level in accordance with the institutional arrangements of each Member State and this Regulation".[129] Article 19 sets out eleven "guiding principles" to be taken into account by each Member State in the preparation and implementation of its OP. Four

[120] Article 15(2)(a).
[121] Article 15(2)(h).
[122] Article 3(g).
[123] Article 17(1).
[124] Article 18(1).
[125] Article 17(3).
[126] See also Article 17(4)-(6).
[127] Article 18(2), 1st paragraph.
[128] See also Article 18(2), 2nd paragraph.
[129] Article 9(1).

of those can be regarded as having particular relevance to an EAFM (emphasis added):

(a)	consistency with the principles of the common fisheries policy and the national strategic plan in order to achieve, in particular, a stable and enduring balance between fishing capacity and fishing opportunities;
(b)	enhancement of a harmonious, balanced and sustainable development of economic activities, jobs and human resources, as well as protection and the improvement of the environment;
(e)	promotion of the operations contributing to the Gothenburg strategy and particularly those enhancing the environmental dimension in the fisheries sector; Operations aiming at reducing the impact of activities in the fisheries sector on the environment and promoting environmentally friendly production methods shall be encouraged;
(k)	where relevant, improvement of the institutional and administrative capacities aiming at a good governance of the common fisheries policy and an efficient implementation of the operational programme.

Priority axes

Regulation 1198/2006 sets out a menu of priority areas for inclusion in an OP. Each priority area is known as a "priority axis".[130] There a five priority axes in total. Excluding aquaculture, three of them have particular relevance to an EAFM: (a) Priority axis 1: measures for the adaptation of the Community fishing fleet;[131] (b) Priority axis 3: measures of common interest;[132] and (c) Priority axis 4: sustainable development of fisheries areas.[133]

In general terms, it can be said that priority axes 1 and 3 provide a host of relevant opportunities whereas priority axis 4 is much more limited in that regard. In no case is "the ecosystem approach" mentioned expressly, but there is clearly scope for piecing together various opportunities to help achieve that approach.

[130] Article 3(i).
[131] Articles 21-27.
[132] Articles 36-42.
[133] Articles 43-45.

Priority axis 1 is particularly relevant for the purposes of this report since it deals, *inter alia*, with public aid for owners of fishing vessels and fishers affected by certain measures adopted by Member States using their delegated powers under Articles 10, 9 and 8 of Regulation 2371/2002. However, one attraction of the EFF is that it also provides opportunities for Member States irrespective of their delegated powers. Priority axis 3 is also particularly relevant for this report because it covers, *inter alia*, pilot projects (including the use of no-fishing zones) and *Natura 2000*. Priority axes 1 and 3 are addressed further in section 6.6 below.

5.8 Regulation 861/2006

Regulation 1198/2006 is not the only financial instrument relevant to implementation of the CFP. In particular, it is complemented by Regulation 861/2006, which establishes a framework for EC financial measures for implementing, *inter alia*, the CFP in various areas.[134] Regulation 861/2006 entered into force in July 2006.[135] It may be supplemented in certain areas by implementing rules adopted by the Commission.[136] Some such rules have been adopted,[137] though description of those is beyond the scope of this report. Any implementing rules are to be adopted through a pre-existing comitology committee called the Committee for Fisheries and Aquaculture.[138] The Regulation is to apply from 1 January 2007 until the end of 2013 (i.e. the same point at which Regulation 1198/2006 is to be reviewed).[139]

Article 2 sets out the four areas to which the Regulation relates: (a) "control and enforcement of CFP rules"; (b) "conservation measures, data collection and improvement of scientific advice concerning the sustainable management of fisheries resources within the scope of the CFP"; (c) "governance of the CFP"; and (d)

[134] Article 1.
[135] Article 33, 1st paragraph.
[136] Article 31.
[137] Commission Regulation (EC) No 391/2007 of 11 April 2007 laying down detailed rules for the implementation of Council Regulation (EC) No 861/2006 as regards the expenditure incurred by Member States in implementing the monitoring and control systems applicable to the Common Fisheries Policy, OJ L 97/30, 12.4.2007.
[138] Articles 31 and 30.
[139] Article 33, 2nd paragraph.

"international relations in the area of the CFP and the Law of the Sea". Article 3 identifies seven "general objectives" that EC financial measures covered by the Regulation are to contribute towards. All of those are relevant to the ecosystem approach, but none particularly so.

Articles 4-7 then identify "specific objectives" for four categories that broadly correspond to the four areas set out in Article 2. The specific objectives for the second area include "improving the collection and management of the data and scientific advice required to assess the state of the resources, the level of fishing and the impact that fisheries have on the resources and the marine ecosystem … by providing financial support to the Member States …". Those for the third area include, *inter alia*, "involving stakeholders at all stages of the CFP …". Such objectives clearly have a role in helping to achieve an EAFM.

Articles 8-14 identify specific items for support by EC financial measures, grouped broadly into the four areas set out in Article 2. Those items relating to data collection probably have the most particular relevance to achieving an EAFM. Data collection is divided into "basic" and "additional" categories.

Regarding basic data collection,[140] EC financial measures "shall apply to the expenditure incurred by the Member States for the collection and management of the basic fisheries data for the purposes of", *inter alia*, "evaluating the impact of fishing activities on the environment".[141] Regarding additional data collection,[142] "[t]he spheres of activity which may be eligible for Community financial measures shall include", *inter alia*, "exploratory data collection projects [regarding] the relationship of fisheries … with the environment …",[143] "selectivity of fisheries …"[144] and "evaluating and managing the links between fishing activities … and aquatic ecosystems".[145]

[140] Article 9.
[141] Article 9(1)(v).
[142] Article 10.
[143] Article 10(1)(b).
[144] Article 10(1)(d).
[145] Article 10(1)(f).

The EC financial contribution to Member State expenditure on "basic" data collection is not *ad hoc*. Instead, each Member State is to draw up a national programme that reflects the corresponding Community programme.[146] Member States may then apply for financial assistance "for those parts of their national programmes that correspond to the elements of the Community programme with which they are concerned".[147] Commission Decisions on funding to Member States are to be adopted on an annual basis, by use of the Committee for Fisheries and Aquaculture, priority being given to "the actions which are most appropriate in order to improve the collection of data necessary for the CFP".[148]

5.9 Regional Advisory Councils

Introduction

Articles 31 and 32 of Regulation 2371/2002 provide for the establishment of RACs. The functions of RACs are stated in Article 31(1) to be as follows: (a) "to contribute to the achievement of the objectives of Article 2(1) [of Regulation 2371/2002]" (see section 5.2 above); and (b) "in particular to advise the Commission on matters of fisheries management in respect of certain sea areas or fishing zones". Article 31(2) and (3) address composition of, and participation in, RACs; however, those provisions are elaborated on in Decision 2004/585/EC – see below.

Article 31(4) and (5) addresses the relationship between RACs and the Commission and Member States. RACs may be consulted by the Commission "in respect of proposals for measures, such as multi-annual recovery or management plans, to be adopted on the basis of Article 37 of the [EC] Treaty that it intends to present and that relate specifically to fisheries in the area concerned" (emphasis added).[149] Thus that particular provision concerns only those proposals relating to fisheries in the area covered by the RAC in question.

[146] Articles 22 and 23(1) and (3).
[147] Article 23(4).
[148] Article 24(1) and (2).
[149] Article 31(4).

However, RACs "may also be consulted by the Commission and by the Member States in respect of other measures".[150] That provision broadens the range of matters on which the Commission may consult a RAC. But it also allows Member States to consult RACs. So, for example, there is scope for a RAC to be consulted by a Member State on measures it has in mind under Articles 10, 9 or 8 of Regulation 2371/2004 or Article 26 of Regulation 2187/2005 (though Article 9, in some circumstances, and Article 8 anyway call for consultation by Member States of RACs – see further section 6.7 below).

RACs have a broad remit to "conduct any … activities necessary to fulfil their functions".[151] Two particular activities are identified in Article 31(5) of Regulation 2371/2002. One is to "submit recommendations and suggestions … on matters relating to fisheries management to the Commission or the Member State concerned".[152] That may be done of the RAC's own accord or at the request of the Commission or Member State. The other is to "inform the Commission or the Member State concerned of problems relating to the implementation of Community rules and submit recommendations and suggestions addressing such problems to the Commission or the Member State concerned".[153]

Other provisions in Regulation 2371/2002 also refer to RACs. Article 4(2) states that measures taken by the Council to achieve the objectives set out in Article 2(1) shall be established "in the light of any advice received from Regional Advisory Councils …". RACs also have a consultative role under Article 7 (on Commission emergency measures) and under Articles 8 and 9 (on Member State delegated powers, on which see section 5.6 above and section 6.7 below). The Commission has stated that since their establishment, it has received more than 40 recommendations from RACs.[154]

[150] Article 31(4).
[151] Article 31(5)(c).
[152] Article 31(5)(a).
[153] Article 31(5)(b).
[154] COM(2006) 732 final, Brussels, 27.11.2006, Explanatory Memorandum, paragraph 2.

Decision 2004/585/EC

Article 32 of Regulation 2371/2002 requires the Council to "decide on the establishment of a Regional Advisory Council". In response, the Council adopted Decision 2004/585/EC whereby it established seven RACs including the Baltic Sea RAC.[155] The Baltic Sea RAC is stated to covers ICES areas III b, III c and III d.[156] The Decision establishes a procedure for the rendering operational of individual RACs.[157] The Baltic Sea RAC was in turn rendered operational from 13 March 2006 by means of Decision 2006/191/EC.

Articles 4, 5, 6 and 7 of Decision 2004/585/EC relate to structure, membership, participation and functioning, respectively, of RACs. The provisions on membership and participation facilitate an EAFM since membership is to comprise "representatives from the fisheries sector and other interest groups affected by the Common Fisheries Policy" (emphasis added).[158] However, the fisheries sectors enjoys a higher proportion of the seats.[159]

The Commission has the right to participate as an "active observer" at any meeting of a RAC. The "Member States concerned" may do likewise. The term "Member State concerned" is defined as "a Member State having a fishing interest in the area or fisheries covered by a Regional Advisory Council".[160] In the case of the Baltic Sea RAC, the Member States concerned are the eight EC coastal States (see section 2 above and section 6.7 below). Upon receipt in writing of a recommendation from a RAC, "the Commission and, where relevant, the Member States concerned shall reply precisely to them within a reasonable time period and, at the latest, within three months".[161]

[155] Article 2(1).
[156] Article 2(2) and Annex I.
[157] Article 3.
[158] Article 5(1).
[159] Article 5(3).
[160] Article 1(1).
[161] Article 7(3).

The implementation of Decision 2004/585/EC, and the functioning of RACs, is to be reviewed by the Commission by 30 June 2007 at the latest.[162] In November 2006, the Commission issued a legislative proposal to amend Decision 2004/585/EC.[163] That is a positive development for RACs in that the Commissions proposes that RACs should be defined as "bodies pursuing an aim of general European interest …" and hence enable them to "receive a fixed financial contribution from the Community budget".[164] A Council Decision amending Decision 2004/585/EC accordingly was adopted in June 2007.[165]

5.10 EC-Russia fisheries agreement

Introduction

Because Russia is not a EC Member State, the waters under its sovereignty or jurisdiction in the Baltic Sea are not subject to the CFP except to the extent that Russia makes any agreement in that regard with the EC. A new fisheries agreement has recently been agreed between the EC and Russia, though it has yet to enter into force.

This section will summarise the events leading up to that agreement and will summarise the provisions of the agreement itself. It will then analyse how the agreement could be relevant to implementing an EAFM in Russian waters in the Baltic.

To that end, the section will draw upon a legislative proposal issued by the Commission in December 2006 for a Council Regulation *on the conclusion of the Agreement between the European Community and the Government of the Russian Federation on co-operation in fisheries and the conservation of the living marine*

[162] Article 11.
[163] COM(2006) 732 final, Brussels, 27.11.2006, *Proposal for a Council Decision amending Decision 2004/585/EC establishing Regional Advisory Councils under the Common Fisheries Policy*.
[164] COM(2006) 732, Explanatory Memorandum, paragraphs 2, 3 and 4.
[165] Council Decision 2007/409/EC of 11 June 2007 amending Decision 2004/585/EC establishing Regional Advisory Councils under the Common Fisheries Policy, OJ L 155/68, 15.6.2007.

resources in the Baltic Sea ("**the 2006 proposal**").[166] That proposal includes an explanatory memorandum, a proposed Regulation (see below) and the text of the fisheries agreement.

Summary of events leading to agreement

In the past, an international organisation called the International Baltic Sea Fisheries Commission ("**IBSFC**") existed. Immediately prior to Estonia, Latvia, Lithuania and Poland joining the EC in 2004, the members of the IBSFC comprised those four States as well as Russia and the EC. The treaty underlying the IBSFC is the 1973 Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and the Belts ("**the Gdansk Convention**").

The 2006 proposal's explanatory memorandum notes that Estonia, Latvia, Lithuania and Poland "took the necessary steps to withdraw from [the Gdansk Convention] either at the date of their accession [to the EC Treaty] or at the earliest possible date thereafter". Withdrawal of those four States from the Gdansk Convention would have left the EC and Russia as the only remaining parties to the convention. In that regard, the explanatory memorandum notes that:

> With the Russian Federation being responsible for only about 5% of the fishery resources of the Baltic Sea in very limited areas around Kaliningrad and St Petersburg, and with all waters in the Baltic Sea now under national jurisdiction, the Community's view was that an international Convention between two Parties was an inappropriate and disproportionate mechanism for discharging the Parties' obligations to co-operate on fisheries management.

The EC's response to the situation after May 2004 was to withdraw from the Gdansk Convention.[167] The 2006 proposal's explanatory memorandum states that the EC "completed the relevant procedures by transmission of a Note Verbale from the Council to the Republic of Poland dated 20 December 2004". The explanatory

[166] COM(2006) 868 final, Brussels, 22.12.2006.
[167] See: Council Decision 2004/890/EC of 20 December 2004 on the withdrawal by the European Community from the Convention on Fishing and Conservation of the Living Resources in the Baltic Sea and Belts (OJ L 375/27, 23.12.2004).

memorandum notes that now only Poland and Russia are parties to the convention and that "Poland's membership will terminate by the end of 2006".

The subsequent response of the EC has been to negotiate a bilateral fisheries agreement with Russia. The 2006 proposal's explanatory memorandum notes that the scope of that agreement "for the time-being should be limited to the Baltic Sea" and that the agreement "should also integrate the existing bilateral Agreements between the Russian Federation and Estonia, Finland, Latvia, Lithuania, Poland and Sweden respectively …".

The explanatory memorandum states that agreement was concluded in July 2006, initialled by the EC in July 2006 and initialled by Russia in August 2006. For the EC, the next step is for the EC to approve the agreement, hence the 2006 proposal which proposes a Council Regulation to provide a legal basis for that act. The explanatory memorandum states that upon its entry into force, the agreement will supersede existing bilateral fisheries agreements that have been made between various Member States and the Russia.

Summary of agreement

The agreement, as set out in the 2006 proposal, has 20 articles. **Article 1** contains definitions. **Article 2** sets out the geographical area to which the agreement applies, which includes "all waters of the Baltic Sea and the Belts … bounded in the west by a line as from Hasenore Head to Gniben Point, from Korshage to Spodsbierg and from Gilbierg Head to the Kullen". However, the internal waters of Russia and of the EC coastal States are expressly excluded. **Article 3** clarifies the territorial application.

Article 4 is headed *Objectives*. Article 4(1) states that the objective of the agreement is "to ensure a close co-operation between the Parties on the basis of the principle of equitable and mutual benefit for the purpose of conservation, sustainable exploitation and management of any straddling, associated and dependent stocks in the Baltic Sea".

The term "straddling … stocks" is potentially confusing, since in international fisheries law it tends to be reserved for stocks that straddle from the EEZ into the high seas. There is no high seas in the Baltic. The agreement defines the term for its own purposes as "any stock of fish that migrates regularly across the delimitations of Exclusive Economic Zones of the Parties in the Baltic Sea".[168] In international fisheries management terminology, such stocks would usually be referred to as shared stocks or transboundary stocks.

The term "sustainable exploitation" is defined as "the exploitation of a stock in such a way that the future exploitation of the stock will not be prejudiced and that it does not have a negative impact on the marine eco-systems".[169]

Article 4(2) adds that the agreement "lays down the principles and procedures relating to the close co-operation between the Parties with the purpose of ensuring that the exploitation of the straddling, associated and dependent stocks in the Baltic Sea provides sustainable economic, environmental and social conditions".

Article 4(3) requires the EC and Russia to: (a) "base their co-operation on the best scientific advice available and on any other relevant data"; (b) "apply the precautionary approach"; and (c) "agree to develop an eco-system approach to fisheries management". The phrase "eco-system approach to fisheries management" is not defined. However, the definition of "precautionary approach to fisheries management" is the same as in Regulation 2371/2002 (see section 5.2 above), i.e. "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 dependent species and non-target species and their environment" (emphasis added).[170]

Article 5 is entitled *Joint management measures* and relates principally to straddling stocks. The measures referred to in Article 5 are to be addressed through the so-called

[168] Article 1(f).
[169] Article 1(e).
[170] Article 1(h).

Joint Baltic Sea Fisheries Committee.[171] That Committee is established by **Article 14** of the agreement, and is to "consider all issues pertaining to the scope and application of this Agreement and provide recommendations to the Parties".[172] It is not clear whether any recommendations adopted by the Committee regarding the measures referred to in Article 5 are to be binding on the parties.

Article 5(1) states that: "Each Party may, on the basis of the principle of mutual benefit and in compliance with its own legislation, allow fishing vessels of the other Party to fish within the Exclusive Economic Zone of this Party in the Baltic Sea". Of note, that provision relates only to the EEZ (rather than to the territorial sea, which is also included in the geographical area of the agreement). It is not clear whether that power relates only to fishing for straddling stocks. **Article 7**, on licensing, contains provisions on the licensing of fishing vessels that are granted fisheries access pursuant to Article 5(1).

Article 5(2) enables the EC and Russia to "exchange quotas in the Baltic Sea on a reciprocal basis". Again, it is not clear whether that power relates only to quotas for straddling stocks. Under Article 5(3), the parties may establish conservation measures regarding "straddling stocks in the Baltic Sea, while taking into account associated and dependent species".[173] Those conservation measures may include, *inter alia*, TACs and allocations, long-term management plans, limitation of fishing effort and technical measures.[174]

Article 6 is headed *Autonomous management measures by the Parties*. Its provisions relate to: (a) non-straddling stocks in the Baltic Sea;[175] (b) cases where the Committee has been unable to agree on management measures;[176] and (c) cases where either party considers it necessary to adopt measures additional to than those agreed on by the Committee.[177] In general, measures adopted by each party in respect of its

[171] Article 5(4) and Article 14(5).
[172] Article 14(3); see also Article 14(4).
[173] Article 5(2) and (3).
[174] Article 5(3)(a)-(d).
[175] Article 6(1).
[176] Article 6(2) and (3).
[177] Article 6(4).

territorial sea or EEZ are to be "based on objective and scientific criteria, while taking into account associated and dependent species …".[178]

Articles 8, 9 and 10 relate to compliance. **Article 11** relates to arrest or detention of vessels, including prompt release. **Article 12**, *inter alia*, requires the parties to request ICES "to provide scientific advice for straddling, associated and dependent stocks in the Baltic Sea in order to provide the basis for the adoption of joint management measures for these stocks".[179] **Article 13** relates specifically to anadromous and catadromous species and envisages the possibility of cooperation in internal waters (which are otherwise excluded from the geographical area covered by the agreement).

Article 15 is a (weak) provision on dispute resolution. **Article 16** deals with cooperation between the EC and Russia in other international organisations "on management and conservation matters of mutual interest". **Article 17** is a savings clause. **Article 18** relates to entry into force and states, *inter alia*, that the agreement is to be applied provisionally from the date of signature and is to enter into force "from the date of receiving the last written notification from all internal procedures required for its coming into force … have been fulfilled by the Parties".

Article 19 relates to duration of the agreement. Thus the agreement is to remain in force for an initial period of six years after its entry into force, with the possibility of remaining in force for additional periods of three years thereafter. **Article 20** deals with languages (the text in 20 listed languages being equally authentic, but the English and Russian texts being determinative in case of dispute). The agreement has no annexes.

Relevance to implementing an EAFM

The new agreement provides scope for an ecosystem-based approach to fisheries management. That arises not just from Article 4(3), with refers expressly to that

[178] Article 6(5).
[179] Article 12(1).

approach, but also from: (a) various references to "associated and dependent stocks" or "associated and dependent species" (in, *inter alia*, Article 4(1), 4(2), 5(3), 6(5) and 12(1));[180] (b) the definition of the term "precautionary approach to fisheries management", which is used (only) in Article 4(3); and (c) the definition of the term "sustainable exploitation", which is used (only) in Article 4(1).

The obligation in Article 4(3) regarding an ecosystem-based approach is not as strong as it could be. Rather than being bound to implement such an approach, the parties are merely bound to "agree to develop" such an approach. That formulation implies that: (a) the duty is one removed from being directly bound "to develop" the approach; and (b) negotiations and further agreement will be needed on what constitutes such an approach.

It is also unclear whether the obligation in Article 4(3) to agree to develop an ecosystem-based approach is restricted to "straddling stocks" (and associated and dependent stocks) or is more generally applicable. If the latter, Article 4(3) is potentially a useful provision to encourage, if necessary, the development of an ecosystem-based approach in the Russian EEZ and territorial sea in the Baltic (an obligation of that kind already applying to the EC in respect of EC waters and EC vessels by virtue of Article 2(1) of Regulation 2371/2002). More research would be needed to know what proportion of stocks being fished for in the Baltic would be regarded as "straddling stocks" for the purposes of the fisheries agreement.

As indicated above, there is variation in whether the agreement uses the phrase "associated and dependent stocks" or "associated and dependent species". The former is used in, *inter alia*, Articles 4(1), 4(2) and 12(1). The latter is used in, *inter alia*, Article 5(3) and 6(5). The latter is broader in scope, since it includes species that are not necessarily stocks. It is useful that the word "species", rather than "stocks", has been in used in Article 5(3) (which requires the parties to adopt conservation and management measures) and 6(5) (which relates to autonomous measures). However, it remains to be seen whether any issue arises from the fact that Article 4(1) and (2), on objectives, used the narrower formulation of "stocks".

[180] See also: Articles 6(1), 6(2) and 14(4)(a).

6. Relevance of delegated powers under CFP

EXECUTIVE SUMMARY

Introduction

(1). The delegated powers of the Member States in the Baltic Sea, under Articles 10, 9 and 8 of Regulation 2371/2002 and under Article 26 of Regulation 2187/2005, are summarised in the table in section 5.6 above. The relevance of those delegated powers to helping to achieve an EAFM in the Baltic Sea needs to be judged not just by the wording of the articles in question, but also by taking into account, *inter alia*: (a) the objectives set out in Article 2(1) of Regulation 2371/2002; (b) the general principles of EC law; (c) the access restriction provided for by Article 17(2) of Regulation 2371/2002; (d) the EFF; (e) the BSRAC; and (f) the new EC-Russia fisheries agreement.

(2). The delegated powers provide possibilities for Member States in the Baltic Sea to adopt measures in respect of: (a) their own-flag vessels; (b) vessels within 12 nm of their baselines; and (c) vessels in emergency situations. However, they provide no possibility for a coastal Member State to unilaterally regulate foreign-flagged vessels in non-emergency situations in its waters beyond 12 nm from its baseline. That limitation is clearly problematic in the Baltic Sea, where the majority of the waters are located beyond 12 nm from the coastal States' baselines. However, cooperation among Member States provides some scope for overcoming the limitations of the delegated powers, both outside and inside the 12 nm line.

Waters beyond 12 nm from the baseline

(3). Outside the 12 nm line, Article 26 of Regulation 2187/2005 enables cooperation to have its greatest potential. It allows Member States to adopt "technical measures designed to limit fishing opportunities" for their own-flag vessels, for the purposes of either stock conservation or ecosystem protection. Significantly, its wording implies that such measures could apply irrespective of where the flag

Member State's vessels are operating in the Baltic. Simultaneous adoption of identical measures under Article 26 by all those Member States with relevant vessels in a given sea area beyond 12 nm would, in effect, establish a unified measure for such waters and would also reduce the likelihood of reverse discrimination based on nationality, which would otherwise offend against the general principle of equal treatment.

Waters within 12 nm of the baseline

(4). Inside the 12 nm line, Article 26 of Regulation 2187/2005 offers the same possibilities as it does outside the 12 nm line. Thus the scenario of joint action described in the preceding paragraph could be used to adopt a technical measure applying to waters inside 12 nm, or indeed both inside and outside the 12 nm line. In principle, assuming joint action by all eight Member States in the Baltic Sea, Article 26 could be used to adopt a unified technical measure that applied to the entire Baltic Sea (except waters under Russian sovereignty or jurisdiction or Russian-flagged vessels). However, in all cases where Article 26 is used, the measure adopted must supplement existing CFP measures or go beyond their minimum requirements. Furthermore, the Commission has express powers to intervene if the measure does not meet the basic conditions for the use of Article 26.

(5). As an alternative to Article 26, Article 9 of Regulation 2371/2002 offers significant possibilities within 12 nm. It enables a coastal Member State to adopt measures, technical or otherwise, for vessels within 12 nm of its baseline, for the purposes of either stock conservation or ecosystem protection. Those measures may apply to own-flag vessels and, in principle, to vessels of other Member States. In practice, the access restriction provided for by Article 17(2) of Regulation 2371/2002 may reduce the likelihood of an Article 9 measure needing to apply to vessels of other Member States.

(6). As with Article 26, cooperation among Member States in the Baltic could increase the efficacy of Article 9. That potential arises from the procedure involved whenever the use of Article 9 by a coastal State is liable to affect the vessels of

another Member State. Under that procedure, the flag Member States may notify the Commission of their concerns, and the Commission has the power to confirm, cancel or amend the measure. If the flag Member States in question cooperate with the coastal Member State adopting the measure, the measure should have a greater chance of survival. In turn, with reciprocation, the measure in question could be adopted by several Member States in their respective waters within 12 nm. In all cases where Article 9 is used, the measure adopted must, *inter alia*, be no less stringent than existing EC legislation and the EC must not already have adopted measures specifically for that area.

Objectives set out in Article 2(1) of Regulation 2371/2002

(7). Any use by Member States of their delegated powers under the CFP will need to be compatible with the objectives set out in Article 2(1) of Regulation 2371/2002. It is arguable that those objectives are sufficiently broad that it would be hard to show that any particular measure for stock conservation or ecosystem protection was incompatible with them, unless it was clear that there would be no conservation or protection benefit.

General principles of EC law

(8). It is strongly arguable that use of delegated powers will need to comply with the general principles of EC law. Two such general principles that may have particular relevance are proportionality and equal treatment. Equal treatment is potentially an issue where, *inter alia*, particular groups of producers or particular nationalities are treated differently. Simultaneous adoption of identical measures by all those Member States with vessel interests in a particular area of the Baltic Sea should, in principle, reduce the likelihood of reverse discrimination on grounds of nationality. Regarding proportionality, it is arguable that the assessment of whether a particular measure is proportionate will need to be carried out in the light of the objectives set out in Article 2(1) of Regulation 2371/2002.

European Fisheries Fund

(9). The EFF does not create constraints to the use by Member States of their delegated powers; instead it may provide some assistance. Priority axes 1 and 3, in particular, provide a host of relevant opportunities for helping to achieve an EAFM in the Baltic Sea. Priority axis 1, on "measures for the adaptation of the Community fishing fleet", includes six areas for EFF support – including at least three that may assist use of delegated powers. One of those is aid for fishermen affected by certain "fishing effort adjustment plans" – including plans forming part of measures adopted under Articles 10, 9 and 8 of Regulation 2371/2002. Another of the areas is aid for, *inter alia*, improvements in selectivity. In principle, such support has the potential to complement certain measures adopted by Member States using their delegated powers.

(10). Priority axis 3 addresses "measures of common interest with a broader scope than measures normally undertaken by private enterprises and which help to meet the objectives of the common fisheries policy". Such measures include, *inter alia*, "collective actions" (several of which are of particular relevance to achieving an EAFM), those for "protection and development of aquatic fauna and flora" (including measures relating to *Natura 2000*) and "pilot projects" (including tests on the establishing of no-fishing zones and tests to improve gear selectivity and environmental protection). As with priority axis 1, there may be scope for complementarity between priority axis 3 and measures adopted by Member States using their delegated powers.

Baltic Sea RAC

(11). In the Baltic Sea, the use of delegated powers needs to be considered in the light of the existence of the BSRAC. The BSRAC has the potential to influence, both in positive and negative ways, the use of delegated powers. RACs are required to be consulted by Member States wishing to exercise their delegated powers under Article 8 and, in some circumstances, under Article 9 of Regulation 2371/2002. In both cases, the RACs may submit their written comments to the Commission, which in

turn may confirm, cancel or amend the measure in question. The Commission is not bound by the opinion of the RAC, but is required to take that opinion into account. Therefore a favourable opinion by the RAC may be helpful to the Member State(s) proposing the measures, and vice versa.

EC-Russia fisheries agreement

(12). The efficacy of delegated powers regarding the Baltic Sea needs to be considered in the light of the new EC-Russia fisheries agreement. That agreement is potentially relevant to the exercise of Articles 9 and 8 of Regulation 2371/2002 and Article 26 of Regulation 2187/2005. In respect of Articles 9 and 8, that is because Russian-flagged vessels, pursuant to the EC-Russia agreement, could potentially be fishing in the waters to which those articles relate. In the case of Article 26, the relevance arises because Member State vessels to which that article relates could potentially be fishing in Russian waters.

(13). Article 9 only expressly envisages measures in respect of own-flag vessels and "the vessels of another Member State". Article 8 envisages measures in respect of own-flag vessels and, impliedly, vessels of other Member States (by its various references to "the Member States concerned"). Neither article expressly envisages measures in respect of vessels of non-EC States, such as Russia. In practice, in both cases, it would probably be for the Commission to adopt or propose any complementary measures deemed necessary for Russian-flagged vessels operating in Member States' waters.

(14). The wording of Article 26 raises the possibility of a Member State in the Baltic using the article to apply measures to its own-flag vessels even when they are operating in the Russian EEZ. That would not necessarily be a problem under the EC-Russia fisheries agreement unless measures imposed by the Member State were incompatible with those imposed by Russia. In the event of incompatibility in those circumstances, the provisions of the fisheries agreement imply that the Russian measures would prevail.

6.1 Introduction

The purpose of this section is to explain to what extent the delegated powers of the Member States in the Baltic could be used by those States to help achieve an EAFM in the Baltic Sea, taking into account the influence of the access restriction provided for by Article 17(2) of Regulation 2371/2002, the objectives set out in Article 2(1) of Regulation 2371/2002, the general principles of EC law, the EFF, the BSRAC and the EC-Russia fisheries agreement.

As noted in section 2 above, the entire Baltic Sea will be regarded as "the ecosystem" in question for the purpose of the "ecosystem approach to fisheries management". The question is to what extent the eight Member States in the Baltic, working individually or jointly by use of their delegated powers, can help to achieve an EAFM at the level of the Baltic Sea as a whole. For current purposes, the meaning of "ecosystem approach to fisheries management" as developed in section 4 above will be applied.

The range of measures available to Member States, using their delegated powers, to help achieve an EAFM is potentially broad. Article 26 of Regulation 2187/2005 places express restrictions on the type of measure that can be adopted using that provision, in that it allows only "technical measures designed to limit fishing opportunities" (see section 5.6 above); nevertheless, quite a lot can potentially be achieved with technical measures. In contrast, Articles 10, 9 and 8 of Regulation 2371/2002 refer merely to "measures" (albeit with a variety of other caveats).

MPAs are one type of measure that could potentially be implemented, at least to some extent, by a Member State using its delegated powers. For example, such powers might be applicable to help implement MPAs designated to protect habitats and species of national or international importance (e.g. Baltic Sea Protected Areas). (See section 7 below regarding SACs and SPAs.) Whether the delegated powers would on their own be sufficient to protect the site in question from fisheries impacts would depend on the legal limits to the use of the powers. Those limits are explored, though not in relation to MPAs specifically, in this section.

6.2 Waters beyond 12 nm from the baseline

Introduction

The delegated powers available to individual Member States are introduced in section 5.6 above. Any of those powers is potentially relevant to helping to achieve an EAFM. However, a brief look at those powers reveals that whilst they may provide possibilities for own-flag vessels, for vessels within 12 nm of the baseline and for vessels in emergency situations, they provide no possibility in respect of foreign-flagged vessels in non-emergency situations beyond 12 nm from the baseline. The extent to which that omission is a problem depends on whether Member States in the Baltic chose to act individually or jointly.

Member States acting individually

In the case of a Member State in the Baltic acting individually, the omission referred to above is clearly a problem: if that Member State wished to apply a measure to, *inter alia*, foreign-flagged vessels in its waters beyond 12 nm from the baseline, and if the situation were not an emergency as defined in Article 8 of Regulation 2371/2002, none of the delegated powers provided in Regulations 2371/2002 or 2187/2005 would allow it to apply measures to the foreign-flagged vessels in question.

Nonetheless, it is important to recognise that a Member State is not entirely powerless regarding its waters beyond 12 nm. It has certain powers relating to own-flag vessels under Article 10 of Regulation 2371/2002 and Article 26 of Regulation 2187/2005 and for both own-flag and foreign-flagged vessels under Article 8 of Regulation 2371/2002. However, exercise of those powers would need to be compatible with the objectives of Article 2(1) of Regulation 2371/2002 (see section 6.4 below) and with the general principles of EC law (see section 6.5 below).

Member States acting jointly

The delegated powers of Member States in respect of own-flag vessels provide scope for joint action in the Baltic Sea to overcome the failure of the delegated powers to apply to foreign-flagged vessels in non-emergency situations beyond 12 nm from the baseline. There are two sources of delegated power regarding own-flag vessels beyond 12 nm. One is Article 10 of Regulation 2371/2002; the other is Article 26 of Regulation 2187/2005.

Article 10 states that: "Member States may take measures for the conservation and management of stocks in waters under their sovereignty and jurisdiction …" (emphasis added). As noted in section 5.6 above, it not clear whether that wording allows Article 10 to be used by a Member State to apply measures to its own-flag vessels when they are operating in the marine internal waters, territorial sea or EEZ of other Member States. That uncertainty, pending clarification, limits the usefulness of Article 10 for joint action in the Baltic Sea.

In contrast, Article 26 (see section 5.6 above) does not refer to any particular waters. That implies that measures adopted under it could be applied to the Member State's own-flag vessels wherever they are operating in the Baltic Sea. Furthermore, measures adopted under Article 26 may relate to both stock conservation and ecosystem protection. However, only technical measures are permissible, rather than measures in general, and they must either supplement EC measures or go beyond the minimum requirements of EC measures.

The procedure for use of the powers in Article 26 is described in section 5.6 above. There is no reason in principle why all eight Member States in the Baltic could not apply that procedure simultaneously and propose identical technical measures for their own-flag vessels in the Baltic. The Commission would have exclusive power to accept the proposals or to require the withdrawal or modification of the measures. If the proposals were to be accepted, the result would be that all vessels fishing in the Baltic, with the exception of Russian-flagged vessels, would be subject to the same technical measures.

In practice, it may be somewhat unlikely that all eight Member States in the Baltic would agree to act jointly using their Article 26 powers. A more realistic scenario may be that neighbours or small groupings of Member States might be willing to act together. Whether joint action in respect of own-flag vessels by less than all eight Member States led to a comprehensive solution for fisheries in particular waters would depend on whether or not vessels flagged to the remaining Member States in the Baltic participated in those fisheries. With further research, it might be possible to identify particular areas in the Baltic that lent themselves to joint action by neighbours or small groupings of Member States.

Of all the delegated powers, those under Article 26 are the most promising for joint action in waters beyond 12 nm from the baseline. However, one other possibility, though far more limited in scope, would be to make the maximum use of the emergency powers under Article 8 of Regulation 2371/2002 through careful consideration of the criteria that define their use. However, those emergency powers, though they do relate to both stock conservation and ecosystem protection and are not limited to technical measures, are restricted to measures of three months' duration.

As with Member States acting individually, Member States acting jointly would need to ensure that the exercise of their delegated powers was compatible with the objectives of Article 2(1) of Regulation 2371/2002 (see section 6.4 below) and with the general principles of EC law (see section 6.5 below). However, it is strongly arguable that reverse discrimination based on nationality could not arise if all eight Member States in the Baltic were to jointly adopt identical technical measures under Article 26.

6.3 Waters within 12 nm of the baseline

Introduction

Within 12 nm of the baseline, all the delegated powers of the Member States are potentially relevant. However, those under Article 9 of Regulation 2371/2002 have

particular application because they are not confined to own-flag vessels (unlike Article 10 of Regulation 2371/2002 and Article 26 of Regulation 2187/2005) and are not confined to emergency situations (unlike Article 8 of Regulation 2371/2002). From the point of view of helping to achieve an EAFM, the powers under Article 9 are also of significance because they relate both to stock conservation and ecosystem protection.

Member States acting individually

A Member State in the Baltic could chose to apply Article 9 individually. However, if the proposed measure were liable to affect the vessels of other Member States, a particular procedure would need to be followed. That procedure is described in section 5.6 above, and also below. In summary, other Member States concerned must be consulted. Any such Member State may chose to object. The Commission has the power to confirm, cancel or amend the measure. Any objection by a Member State would need to be taken into account by the Commission, though the mere fact of an objection does not require the Commission to cancel or amend the measure.

If the proposed measure were not liable to affect the vessels of other Member States, the consultation procedure and the express power of the Commission to confirm, cancel or amend the measure would not apply. That would render Article 9 and Article 10 somewhat similar in effect. However, it is important to recall that Article 10 does not expressly relate to measures other than stock conservation measures, whereas Article 9 expressly relates to ecosystem protection measures. Therefore Article 9 remains of value even where only own-flag vessels are liable to be affected if the intention is to adopt a measure for the purposes of ecosystem protection. Article 9, when applied only to own-flag vessels, also has an advantage over Article 26 of Regulation 2187/2005 in that the latter entails a procedure involving the Commission while the former does not.

The fewer vessels of other Member States that are operating in the waters within 12 nm of the baseline, the less chance there is that a proposed measure will be liable to affect such a vessel and hence that the consultation procedures and Commission

powers under Article 9 will apply. That is where the access restriction described in section 5.5 above may therefore become helpful to a coastal Member State. It would be interesting to establish the full picture of fisheries access by vessels of one Member State to waters of another Member State in the Baltic within 12 nm of the baseline. Meanwhile, section 5.5 above does reveal at least part of the picture.

Thus, under Annex I to Regulation 2371/2002: (a) vessels flagged to Germany and Sweden are permitted by **Denmark** to fish 3-12 nm from its baseline (for eight named species in the case of Germany, and for all species in the case of Sweden); (b) vessels flagged to Denmark are permitted by **Germany** to fish 3-12 nm from its baseline (for seven named species); (c) vessels flagged to Sweden are permitted by **Finland** to fish 4-12 nm from its baseline (or 3-12 nm, around the Bogskär Isles) (for all species); and (d) vessels flagged to Denmark and Finland are permitted by **Sweden** to fish 4-12 nm from its baseline (for all species).

From the arrangements set out in Annex I to Regulation 2371/2002, it can therefore be seen that none of Denmark, Germany, Finland or Sweden has exclusive access to fisheries in its waters in the Baltic Sea between 4 and 12 nm of the baseline. Germany and Finland have arrangements relating only to one other Member State, while Denmark and Sweden have arrangements relating to two other Member States. In all four cases, the coastal Member State will therefore need to be aware that a measure proposed under Article 9 may affect vessels of one or more Member States and thus potentially trigger the consultation procedure and the powers of the Commission.

Equally, it can be seen the none of Denmark, Germany, Finland or Sweden have any arrangements under Annex I to Regulation 2371/2002 for fisheries access in waters landwards of 3 nm of the baseline. It would be interesting to establish whether access arrangements under any of the other means anticipated in Article 17(2) of Regulation 2371/2002 exist. But if no such arrangements exist, the access restriction in Article 17(2) would allow those States to restrict fisheries access in those waters to their own-flag vessels. That would in turn allow those States to adopt measures under Article 9

for those waters without triggering the consultation procedure and the powers of the Commission.

As with waters beyond 12 nm of the baseline, the exercise by a Member State of its delegated powers would need to be compatible with the objectives of Article 2(1) of Regulation 2371/2002 (see section 6.4 below) and with the general principles of EC law (see section 6.5 below). In that respect, a further advantage of the access restriction is that it would, in principle, reduce the scope for reverse discrimination based on nationality by reducing the number of foreign-flagged vessels that fish in the waters in question.

Member States acting jointly

The possibilities for joint action under Article 26 of Regulation 2187/2005 described above in respect of waters beyond 12 nm from the baseline apply similarly to waters within 12 nm. In other words, joint action under Article 26 could provide a solution that applied to waters both within and beyond 12 nm. In view of Article 26 being applicable to both stock conservation and ecosystem protection, that clearly has significant scope for helping to achieve an EAFM in the Baltic. However, as noted above, only technical measures, rather than measures in general, are permissible under Article 26.

Within 12 nm from the baseline, Article 9 of Regulation 2371/2002 also provides significant scope for joint action. If, using Article 9, all eight Member States in the Baltic (a) chose to propose identical measures for their waters within 12 nm of the baseline and (b) chose to not object to each other's proposed measures, the result could be, in effect, a measure adopted at the level of the Baltic Sea that applied to all areas of the Baltic within 12 nm, except Russian waters, and to all vessels fishing within that zone, except (probably) Russian-flagged vessels (see section 6.8 below).

Under Article 9 of Regulation 2371/2002, a Member State wishing to take a measure that is liable to effect the vessels of other Member States must follow a defined procedure. There is no reason in principle why all eight Member States in the Baltic

could not apply that procedure simultaneously. The procedure does not expressly envisage a joint application by two or more Member States, though that would be attractive since it would involve less consultation. Therefore, instead, it will be assumed that the route for applying the procedure simultaneously would be for each of the eight Member States to make a separate application at the same time.

The procedure applicable under Article 9 is described in section 5.6 above. Article 9(1), 2nd paragraph, requires that the measure may only be adopted after the Commission, the Member State(s) liable to be affected and the RACs concerned have all been consulted on a draft of the measure accompanied by an explanatory memorandum. Under the current scenario, it will be assumed that the BSRAC would be the only RAC concerned. (In practice, a measure affecting a relatively large part of the Baltic might also be relevant to the North Sea RAC.)

Each Member State, in respect of its own proposed measure, would need to consult the Commission and the BSRAC and those other Member States that the measure was liable to affect. Article 9(2) then applies Article 8(3)-(6). Under Article 8(3), the Member States and the BSRAC may submit their comments to the Commission. As noted above, it will be assumed that each of the eight Member States would chose not to object to any of the other seven Member States' proposed measures. Of course, in principle, the BSRAC might still chose to object (on which see further section 6.7 below).

The Commission is then required to confirm, cancel or amend the measures. If the Commission chose to cancel any of the eight measures, or to amend any of them to the dislike of the eight Member States, the Member States concerned could chose to refer the Commission's decision to the Council. However, that would introduce considerable uncertainty to the process since the Council is composed of an additional 19 Member States and the eight Member States in the Baltic do not have sufficient votes between them to ensure a qualified majority (although they do have just enough votes between them to block a qualified majority).

If the Commission chose to confirm all eight measures, the implications are interesting. The Commission would confirm each measure by means of a Decision addressed to the Member States concerned. Presumably, those States would be happy with the outcome having either proposed the measure or having taken the decision not to object to the proposed measure. With eight contented Member States, that would mean that none of the eight Decisions would be referred to the Council. That is because, under Article 8(5), only "the Member States concerned" may refer the Decision. The eight measures would therefore come into effect.

Of course, the Decisions referred to in the preceding paragraph are not completely immune from challenge. In principle, a non-Baltic Member State might try to raise the issue in the Council in an ad hoc way. (It would be interesting to research further into how that would be done and what the result might be.) Furthermore, it would be open to any Member State to challenge the lawfulness of any of the Commission's Decisions by resort to judicial review. However, to be successful, it would be necessary to show some breach of Community law by the Commission in adopting the Decision in question.

As with waters beyond 12 nm from the baseline, it may be somewhat unlikely that all eight Member States in the Baltic would agree to act jointly using their Article 26 or Article 9 powers. Again, further research might enable the identification of particular areas in the Baltic that lent themselves to joint action by neighbours or small groupings of Member States. Just as with action by individual Member States, the access restriction would potentially be important for reducing the number of remaining flag Member States involved.

It can be seen that Article 9 of Regulation 2371/2002 provides an important means for the Member States in the Baltic to take joint action to help achieve an EAFM, if only in relation to waters landward of 12 nm from the baseline. The procedure is more complex than under Article 26 of Regulation 2187/2005, but the benefit of using Article 9 is that it is not restricted just to technical measures.

As with waters beyond 12 nm from the baseline, Member States acting jointly would need to ensure that the exercise of their delegated powers was compatible with the objectives of Article 2(1) of Regulation 2371/2002 (see section 6.4 below) and with the general principles of EC law (see section 6.5 below). However, it is strongly arguable that reverse discrimination based on nationality could not arise if all eight Member States in the Baltic were to jointly adopt identical measures under Article 26 or Article 9.

6.4 Objectives set out in Article 2(1) of Regulation 2371/2002

The objectives set out in Article 2(1) of Regulation 2371/2002 are reproduced in section 5.2 above. Principally, the CFP is to "ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions".[181] For that purpose, the EC is to do three things: (a) "apply the precautionary approach …"; (b) "aim at a progressive implementation of an eco-system-based approach to fisheries management"; and (c) "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".[182]

An express requirement for compatibility with the Article 2(1) objectives is included in Articles 9 and 10 of Regulation 2371/2002 (though Article 9 refers to the objectives "set out in Article 2" whereas Article 10 refers more specifically to those in Article 2(1)).[183] In contrast, Article 8 of Regulation 2371/2002 makes no reference to Article 2. However, all measures proposed under Article 8 are subject to the power of the Commission to confirm, cancel or amend them and it is likely that the Commission would consider compatibility with the Article 2(1) objectives in its decision-making about any given measure. Article 26 of Regulation 2187/2005 does not refer to

[181] Article 2(1), 1st paragraph.
[182] Article 2(1), 2nd paragraph.
[183] Article 9(1), 1st paragraph; Article 10(b).

Article 2 but does require that the measures are to be "compatible with Community law",[184] which implies, *inter alia*, compatibility with the Article 2(1) objectives.

It is arguable that the objectives set out in Article 2(1) of Regulation 2371/2002, including the principal objective of sustainable exploitation, are sufficiently broad that it would be hard to show that any particular measure for stock conservation or ecosystem protection was incompatible with them (unless it was clear that there would be no conservation or protection benefit). On that basis, it is arguable that a requirement, whether express or implied, for use of delegated powers to be compatible with the Article 2(1) objectives is actually a requirement that measures adopted using those powers are to adhere to the general principle of proportionality (see section 6.5 below) interpreted in the light of those objectives.

6.5 General principles of EC law

Introduction

It is strongly arguable that a Member State, when implementing its delegated powers, should ensure that its actions are compatible with the so-called "general principles" of EC law. The general principles of EC law have arisen from the case law of the Court. They include, *inter alia*, legal certainty, proportionality, equal treatment and respect for fundamental rights. Some general principles are reflected to at least some extent in the EC Treaty (see below). Two general principles that may have particular relevance in relation to measures adopted by Member States using their delegated powers are proportionality and equal treatment.

Proportionality

The Court has consistently held that "in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the

[184] Article 26(2).

desired objective and whether they do not go beyond what is necessary to achieve it".[185] The principle of proportionality, regarding the EC, is now enshrined in Article 5 of the EC Treaty which states that: "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty".[186]

Breach of the principle of proportionality is sometimes alleged in fisheries cases before the Court. In some cases, it may be an action brought by a Member State or private entity directly in the Court, challenging the validity of a Community measure adopted under the CFP.[187] In other cases, it may be a case that has been referred to the Court from a national court for a preliminary ruling on the validity of a Community measure.[188]

As noted above, it is strongly arguable that the principle of proportionality needs to be complied with not just by the Community institutions but also by a Member State when exercising its delegated powers under the CFP. That is corroborated by the case of *Marshall* (see below), in which the Court ruled on whether a national measure adopted by a Member State using its delegated powers under the CFP was compatible with the principle of proportionality.[189] In that particular case, the Court held that the measure was "not disproportionate to the objectives pursued".[190]

As noted in section 5.6 above, the principle of proportionality may have been a factor in the Commission's decision-making regarding the UK's request under Article 9 of Regulation 2371/2002 to expand an existing domestic ban on pair-trawling to vessels of other Member States. The Commission considered that, on the basis of the available scientific information, the UK's proposed measure was not likely to contribute to the objective of reducing dolphin mortality. That can be viewed as a

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[185] See, for example, Case C-4/96 *Northern Ireland Fish Producers' Organisation Ltd (NIFPO) and Northern Ireland Fishermens' Federation v Department of Agriculture for Northern Ireland* [1998] ECR I-681: Judgment, paragraph 57.
[186] Article 5, 3rd paragraph.
[187] See, for example, Case T-192/03, *Atlantean Ltd v Commission*, Judgment of 13 June 2006.
[188] See, for example, Case C-4/96 *Northern Ireland Fish Producers' Organisation Ltd (NIFPO) and Northern Ireland Fishermens' Federation v Department of Agriculture for Northern Ireland* [1998] ECR I-681.
[189] Case C-370/88 *Procurator Fiscal v Andrew Marshall* [1990] ECR I-4071: Judgment, paragraphs 19 and 26.
[190] Judgment, paragraph 26.

statement that the UK's proposal goes beyond what is necessary to achieve the objective of reducing dolphin mortality, hence breaching the principle of proportionality.

In practice, the question of whether or not a particular Member State measure breaches the principle of proportionality will need to be addressed on the basis of the particular circumstances of the case. As argued in section 6.4 above, the assessment will need to be carried out in the light of the objectives set out in Article 2(1) of Regulation 2371/2002.

Equal treatment

The Court has consistently stated that: "Compliance with the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified".[191] Thus, if a difference in treatment were being challenged, the requirements for showing a breach of the principle of equal treatment are that: (a) the situations are comparable; and (b) if they are comparable, that the difference in treatment is not objectively justified.

One formulation of the principle of equal treatment is Article 12 of the EC Treaty, whereby "… any discrimination on grounds of nationality shall be prohibited". Another is Article 34(2) of the EC Treaty, which states that: "The common organisation [of agricultural markets] … shall exclude any discrimination between producers or consumers within the Community". In both cases, if a difference in treatment is being challenged, the requirements for showing a breach of the article in question are those set out in the preceding paragraph. Breach of both Article 12 and Article 34(2) has been alleged in fisheries cases before the Court.[192]

[191] See, for example, Case C-87/03 *Spain v Council* [2006] ECR I-2915: Judgment, paragraph 48.
[192] For an example of a case invoking breach of both articles, see Case C-44/94 *The Queen v Minister of Agriculture, Fisheries and Food, ex parte National Federation of Fishermen's Organisations and others and Federation of Highlands and Islands Fishermen and others* [1995] ECR I-3115: Judgment, paragraphs 44-50.

A recent example of a case where breach of the principle of equal treatment was invoked is *Spain v Council*.[193] In that case, Spain argued that the failure of the Council to allocate fishing quotas to it in the North Sea and Baltic Sea gave rise to discrimination against Spanish fishermen.[194] The Court worked through the question of whether Spain's situation was comparable to that of the Member States that had been allocated quotas in the areas in question, and concluded that it was not comparable.[195] Therefore it found no breach of the principle of equal treatment, without having to proceed to the question of whether the difference was objectively justified.

The principle of equal treatment is potentially relevant to the use by Member States of their delegated powers under the CFP. For example, let us consider a situation where a Member State, acting individually, wished to adopt a measure applicable to its own-flag vessels (e.g. under Article 10 of Regulation 2371/2002 or under Article 26 of Regulation 2187/2005) in an area of sea where vessels flagged to other Member States were also fishing. Owners of the own-flag vessels affected by the measure might argue breach of the principle of equal treatment, either in general terms or by invoking Articles 12 or 34(2) of the EC Treaty.

Cases of that kind are sometimes called "reverse discrimination" because the Member State, in adopting the measure in question, is disadvantaging its own nationals or producers in comparison with those of other Member States. In principle, the Court will only be interested in reverse discrimination where it falls within the scope of Community law. For example, in *Mathot* the Court stated that:[196]

> … it should be remembered that, according to the case-law of the court, treatment which works to the detriment of national products as compared with imported products and which is put into effect by a Member State in a sector which is not subject to Community rules or in relation to which there has been no harmonization of national laws does not come within the scope of Community law …

[193] Case C-87/03 *Spain v Council* [2006] ECR I-2915: Judgment, paragraphs 48-58.
[194] Judgment, paragraph 43.
[195] Judgment, paragraphs 49-58.
[196] Case 98/86 *Criminal proceedings against Arthur Mathot* [1987] ECR 809: Judgment, paragraph 9. See also, for example, Case C-64/96, *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen* [1997] ECR I-3171: Judgment, paragraph 23.

However, the CFP, and the exercise by Member States of delegated powers under it, is clearly an area that is subject to Community rules and that does come within the scope of Community law. Reverse discrimination is therefore a potential issue in the context of the CFP.

That is demonstrated by the case of *Marshall* which came before the Court on a reference for a preliminary ruling.[197] It concerned a measure adopted by the UK using delegated powers under Article 19 of Regulation 171/83 (a predecessor of current delegated powers). The measure in question was one that "applies only to British fishermen, [and] prohibits them from carrying monofilament gill nets when they are sailing in waters adjacent to the coast of Scotland within a limit of six miles".[198]

The aggrieved fisherman in *Marshall* had contended in the national court that the measure was unlawful because, *inter alia*: (a) it discriminated on grounds of nationality, because "it discriminated against British fishermen and, in particular, Scottish fishermen in comparison with other Community fishermen"; and (b) it discriminated between producers, because it "affected more particularly British fishermen operating from Scottish ports" because they "were not in a position to use monofilament gill nets where their use was authorized, since they were not permitted to carry them across the waters surrounding their home ports".[199]

Regarding the alleged discrimination on grounds of nationality, the Court stated that:[200]

> … the contested measure cannot be regarded as being contrary to [prohibition of discrimination on grounds of nationality] on the ground that it puts fishermen operating from Scottish ports in a less advantageous situation than fishermen from other Member States. Those categories of fishermen are not in comparable situations in view of the requirements of salmon conservation.

[197] Case C-370/88 *Procurator Fiscal v Andrew Marshall* [1990] ECR I-4071.
[198] Judgment, paragraph 5.
[199] Judgment, paragraph 8.
[200] Judgment, paragraph 21.

Regarding the alleged discrimination between producers, the Court reiterated some of its earlier case law that the Member States "must comply with the principle of equality when they are adopting measures, concerning only their nationals, pursuant to Community regulation relating to the organization of the agricultural markets".[201]

The Court acknowledged that the measure "affects fishermen operating from Scottish ports more than other British fishermen" because "the former are precluded even from using monofilament gill nets where their use is authorised, since they may not carry them in the waters surrounding their home port".[202] However, the Court also recognised that such a difference in treatment "is capable of constituting discrimination [between producers] only if it is arbitrary, that is to say, lacking sufficient justification and not based on objective criteria".[203]

In turn the Court examined whether or not the measure was arbitrary. First, it noted that: "it must be observed that salmon have to cross the area of the sea to which the Order relates in order to reach the rivers in which they spawn. It is therefore essential for the conservation of the species for a certain proportion of salmon to reach their spawning grounds".[204] It then concluded that the measure was not arbitrary, by the following reasoning:[205]

> This means that the use of monofilament gill nets must be prohibited in view of their particular efficiency. In order to ensure the effectiveness of that measure it was objectively justified to prohibit the carriage of that type of net in the area in question. Checks are particularly difficult to carry out in the area of the sea in question in view of the length of the coastline. It therefore does not appear arbitrary that the national authorities opted to prohibit the carriage of such nets rather than to step up checks in order to show that the nets have been used for illegal purposes. …

The Court's approach in *Marshall* indicates that reverse discrimination might have been an issue if fishermen operating from Scottish ports and fishermen from other Member States had been in comparable situations or if the difference in treatment between fishermen operating from Scottish ports and other British fishermen had been

[201] Judgment, paragraph 22.
[202] Judgment, paragraph 23.
[203] Judgment, paragraph 24.
[204] Judgment, paragraph 25.
[205] Judgment, paragraph 26.

arbitrary. That, coupled with the fact that *Marshall* is anyway a case about the use by a Member State of its delegated powers, illustrates that Member States exercising their delegated powers do need to be aware of the possibility of reverse discrimination.

However, at the same time, it should be recalled that the mere fact of stricter treatment of nationals or producers within the Member State that is proposing the measure compared to those within other Member States is not necessarily sufficient to demonstrate discrimination. It remains open to the proposing Member State to demonstrate that, say, its fishermen and those of other Member States are not in comparable situations or that, even if they are, the difference in treatment is objectively justified. Any potential measure therefore needs to be assessed on the basis of the particular circumstances of the case.

The issue of reverse discrimination can be considered in the light of the wording of Articles 10, 9 and 8 of Regulation 2371/2002 and Article 26 of Regulation 2187/2005. Of those articles, only Article 9 of Regulation 2371/2002 expressly refers to discrimination, stating that: "A Member State may take non-discriminatory measures …".[206] The failure of the other three articles to prohibit discrimination should not be regarded as implied permission to discriminate. It is strongly arguable that the general principle of equality, and the provisions of Articles 12 and 34(2) of the EC Treaty, applies equally to all four of the articles in question.

It is also relevant to consider the practice of the Member States to date using their delegated powers. One example of practice is that under consideration in the *Marshall* case (see above). Another example that has received some attention is the proposal in 2002 by the Swedish government to adopt a unilateral moratorium for cod fishing by own-flagged vessels both within and beyond Swedish waters. That proposal was rejected by the Commission. However, the reasons adopted by the Commission do not appear to be in the public domain.

[206] Article 9(1), 1st paragraph. See also recital (11).

A further example is an action taken by the UK. In 2004, the UK adopted regulations to prohibit pair trawling by own-flag vessels in waters within 12 nm of the baseline adjacent to the south-west of England.[207] The purpose of the measure was to reduce cetacean by-catch by vessels pair-trawling for sea bass. The UK adopted the measure using its delegated powers under Article 9 of Regulation 2371/2002.

The Explanatory Memorandum to the regulations noted that, in addition to UK-flagged vessels, vessels flagged to France have the potential to participate in the same fishery in the 6-12 nm part of the waters adjacent to south-west England.[208] In addition, the Commission noted the possibility for vessels flagged to Belgium to participate in the fishery.[209] In that the prohibition related only to UK-flagged vessels, the measure therefore had the potential to treat UK-flagged vessels less favourably than those flagged to France or Belgium. The Explanatory Memorandum raised the possibility of reverse discrimination in that it stated:[210]

> Many stakeholders are concerned that these measures are discriminatory as French and offshore fishery will continue where most cetacean bycatch is seen. The prohibition on the use of pelagic pair trawl nets for bass is part of a stepwise process. Once the [regulations are] in place the Government shall approach the Commission for the measure to be applied to all Member States who are permitted to fish within the 12 miles of the English coast in ICES area VIIe. A licensing scheme for the offshore bass pair trawl fishery shall also be introduced.

Thus the UK government sought to address the possibility of reverse discrimination by explaining that it would next approach the Commission with a proposal to extend the prohibition to vessels flagged to France. The UK did indeed approach the Commission with a proposal to expand the prohibition, but the Commission rejected that proposal (see section 5.6 above). The regulations originally established in 2004, with the ban for UK-flagged vessels, remain in place. There seems to have been no subsequent discussion, at least in the public domain, about whether or not the UK's continuing ban in respect of own-flag vessels now represents reverse discrimination.

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[207] The South-west Territorial Waters (Prohibition of Pair Trawling) Order 2004, SI 2004/3397.
[208] See, *inter alia*, paragraphs 16-18.
[209] Decision 2005/322/EC, preamble, recital (2).
[210] Paragraph 29, 6th indent.

It is beyond the scope of this report to consider whether or not reverse discrimination is now occurring in the case of example above. However, the example raises the possibility that a domestic fishing industry may be willing to tolerate a measure that prohibits a particular fishing activity in respect of the home industry but does not do likewise in respect vessels flagged to other Member States. The Commission, in its Decision rejecting the UK's proposal to expand the measure to French-flagged vessels, did not raise the question of reverse discrimination. However, it would be speculative to consider reasons why the Commission chose not to raise that question.

It is also relevant to consider the issue of reverse discrimination in relation to the scenario of joint action described in sections 6.2 and 6.3 above. It is strongly arguable that reverse discrimination based on nationality could not arise if all eight Member States in the Baltic were to jointly and simultaneously exercise their delegated powers under Article 26 of Regulation 2187/2005 or under Article 9 of Regulation 2371/2002 as described in sections 6.2 and 6.3 above. That is because, when viewed collectively, the measures would mean that the fishermen of the Member State proposing any one of the eight measures would be treated no differently to the fishermen of any other Member State in the Baltic.

6.6 European Fisheries Fund

Introduction

The EFF has already been introduced in section 5.7 above. The purpose of this section is to consider the influence of the EFF on the exercise by Member States of their delegated powers. In short, it can be said that the EFF does not create constraints to the use of the delegated powers, but it may provide some assistance. This section will consider some parts of Regulation 1198/2006 in more detail, notably those parts relating to priority axes 1 and 3.

Priority axis 1

Priority axis 1, entitled *measures for the adaptation of the Community fishing fleet*, is dealt with in Chapter I of Title IV of Regulation 1198/2006. Chapter I comprises Articles 21-27. Article 21, on the scope of priority axis 1, identifies six areas for support from the EFF:

(a)	"public aid for owners of fishing vessels and fishers affected by fishing effort adjustment plans" where such plans form part of certain initiatives
(b)	"public aid for temporary cessation of fishing activities in accordance with Article 24(1)(vii)" [i.e. "in the event of a natural disaster, closures of fisheries decided by Member States for reasons of public health or other exceptional occurrence which is not the result of resource conservation measures"]
(c)	"investments on board fishing vessels and selectivity in accordance with Article 25"
(d)	"public aid for small-scale coastal fishing in accordance with Article 26"
(e)	"socio-economic compensation for the management of the Community fishing fleet in accordance with Article 27"
(f)	"public aid in the framework of rescue and restructuring plans in accordance with the Community Guidelines on State aid for rescuing and restructuring firms in difficulty"

The use of delegated powers may be assisted by categories "(a)", "(c)" and "(d)" above. (Category "(b)" may also be relevant if the term "resource" were to be interpreted to mean just fisheries resources, in which case closures to protect the wider environment might then be covered by "(b)".) This section will focus on categories "(a)", "(c)" and "(d)".

Category "(a)" relates to so-called "fishing effort adjustment plans". That term is clearly important in the context of the EFF and yet Regulation 1198/2006 fails to define it. Instead, it implies that such plans are, *inter alia*, a response to the duty under Article 11(1) of Regulation 2371/2002 on adjustment of fishing capacity[211] and then adds that: "Fishing effort adjustments plans may include all the relevant measures provided in this Chapter".[212]

[211] Article 22(1).
[212] Article 22(2).

The reference to "this Chapter" is a reference to Chapter I of Title IV of Regulation 1198/2006 which, as noted above, is the chapter on priority axis 1. The reference to "all the relevant measures" creates doubt as to what measures are being referred to. But for the purposes of this report, it will be assumed that the reference is to Articles 23 and 24 which deal with permanent and temporary cessation of fishing activities, respectively (rather than, say, Article 25 which addresses, *inter alia*, investments for selectivity – see below).

Category "(a)" does not address all fishing effort management plans; instead it addresses just those plans which form part of certain initiatives. The initiatives in question are those listed below:[213]

(i)	"recovery plans as referred to in Article 5 of Regulation (EC) No 2371/2002"
(ii)	"emergency measures as referred to in Articles 7 and 8 of Regulation (EC) No 2371/2002"
(iii)	"the non-renewal of a fisheries agreement between the Community and a third country or a substantial cut in fishing opportunities under an international agreement or other arrangement"
(iv)	"management plans as referred to in Article 6 of Regulation (EC) No 2371/2002"
(v)	"measures as referred to in Articles 9 and 10 of Regulation (EC) No 2371/2002"
(vi)	"national decommissioning schemes as part of the obligations laid down in Articles 11 to 16 of Regulation (EC) No 2371/2002 on the adjustment of fishing capacity of the Community fishing fleet"

The list in the table above shows that the fishing effort management plans that may receive support from the EFF are not just those produced in response to the duty in Article 11 of Regulation 2371/2002 (see above). Instead, support is available for plans originating from a number of initiatives. Of particular relevance to this report, EFF support is available for plans forming parts of measures adopted under Articles 8, 9 and 10 of Regulation 2371/2002 (see categories "(ii)" and "(v)" in the table above).

As noted above, it will be assumed that fishing effort adjustment plans are plans for permanent or temporary cessation of fishing activities, as envisaged in Articles 23 and

[213] Article 22(1)(a).

24 of Regulation 1198/2006. Thus, in principle, measures adopted under Articles 8, 9 or 10 of Regulation 2371/2002 could provide for permanent or temporary cessation of fishing activities; that is consistent with the broad reference to "measures" in those articles (though probably only temporary cessation is relevant under Article 8, which provides only for emergency measures of short duration). The EFF creates support for any such cessation, to the extent that the cessation is construed as part of a fishing effort adjustment plan.

Article 23 deals with permanent cessation of fishing activities of fishing vessels. Article 23(1) confirms that the EFF will contribute to financing such cessation only if it forms part of a fishing effort adjustment plan under any of the categories "(i)" to "(vi)" above. It clarifies that "permanent" means scrapping, or reassignment to activities outside fishing or reassignment for use as an artificial reef. However, Article 23(2) states that permanent cessation must be "programmed in the form of national decommissioning schemes …". That presumably means that any permanent cessation required under Articles 9 or 10 of Regulation 2371/2002 for which EFF support is sought would need to be compatible with a national decommissioning scheme.

Article 24 addresses temporary cessation of fishing activities, though it notes that: "A recurrent seasonal suspension of fishing shall not be taken into account for the grant of allowances or payments under this Regulation".[214] The article sets out the maximum durations for which EFF funding would be available during the period 2007 to 2013, depending on the particular initiative that is the source of the fishing effort adjustment plan. In the case of fishing effort adjustment plans adopted under Article 8 of Regulation 2371/2002, the maximum duration of aid is three months[215] which is anyway the maximum duration of measures that may be adopted under that provision.

Of note, Article 24 does not specify any maximum duration of aid availability in the case of fishing effort adjustment plans adopted under Articles 9 or 10 of Regulation

[214] Article 24(3).
[215] Article 24(1)(ii).

2371/2002. The reason for that is not clear. Either of those articles could potentially be used to adopt a one-off measure of a limited duration involving cessation of fishing activity. It may be that Article 24 does not envisage the use of those articles for that kind of purpose. Alternatively, it may be that the failure to specify any maximum period for temporary cessation under Articles 9 or 10 simply means that there is no particular limit to duration of funding in such cases. That is a point that could usefully be clarified by the Commission.

Article 24 also specifies a maximum limit on the amount of EFF aid available per Member State over the period 2007 to 2013 in respect of certain types of fishing effort adjustment plans. That limit, exceedable in some circumstances, is "EUR 1 million or 6% of the Community financial assistance allocated to the sector in the Member State concerned".[216] The limit covers support for fishing effort adjustments plans adopted in response to various initiatives, including those forming part of emergency measures adopted under Article 8 of Regulation 2371/2002. Of note, the limit does not cover aid for adjustment plans adopted under Articles 9 or 10 of Regulation 2371/2002.

Category "(c)" in the table above relates to "investments on board fishing vessels and selectivity in accordance with Article 25". Article 25(1) states that: "The EFF may contribute to the financing of equipment and the modernisation of fishing vessels of five years of age or more only under the conditions of this Article and in accordance with the provisions of Chapter III of Regulation (EC) 2371/2002" (emphasis added). It is not clear whether that means that all the provisions of Article 25 relate only to "fishing vessels of five years of age or more" or whether that is just the criterion for support under paragraph 1 of Article 25. That is a point that could usefully be clarified by the Commission.

In any event, under Article 25(1), the EFF may contribute to investments to improve, *inter alia*, selectivity, providing that the improvements do not "increase the ability of the vessels to catch fish".[217] Improvements to selectivity of equipment are clearly relevant to helping to achieve an EAFM. Article 25 also enables various other

[216] Article 24(2).
[217] Article 25(2).

investments relevant to achieving an EAFM to receive support under the EFF, as summarised below.

Under Article 25(6), the EFF "may contribute to the financing of equipment and modernisation works" of certain types. The types are as follows, of which it can be seen that the fourth and fifth categories are particularly relevant to achieving an EAFM: (a) "making it possible for catches the discarding of which is no longer authorised to be kept on board"; (b) "as part of projects covering the preparation or trial of new technical measures for a limited period to be set by the Council or the Commission"; (c) "for reducing the impact of fishing on non-commercial species"; (d) "for reducing the impact of fishing on ecosystems and the sea bottom"; and (e) "for the protection of catches and gear from wild predators …".

Under Article 25(7), the EFF "may contribute to the financing of investments to achieve the selectivity of fishing gear, including up to two replacements of fishing gear over the entire period 2007 to 2013, provided that", *inter alia*, "the new gear is more selective and meets recognised environmental criteria and practices which go beyond existing regulatory obligations under Community law".[218] Under Article 25(8), the EFF "may contribute to the funding of the first replacement of fishing gear", *inter alia*, "for reducing the impact of fishing on non-commercial species".[219]

In principle, the support available from the EFF under Article 25(1), (6), (7) and (8) has the potential to complement measures adopted by Member States using their delegated powers. That is because if a Member State were to use its delegated powers to adopt a measure that aimed at achieving one or more of the results referred to in Article 25(1), (6), (7) or (8), support for alterations to equipment to enable compliance with that measure might then be forthcoming from the EFF pursuant to Article 25. Of course, there is no requirement for fishermen to actually make use of the opportunity provided by the EFF under Article 25, but its existence does enable the Member State proposing the measure to point out that financial support is available.

[218] Article 25(7)(b).
[219] Article 25(8)(b).

Category "(d)" in the table above relates to "public aid for small-scale coastal fishing in accordance with Article 26". The term "small-scale coastal fishing" is defined as "fishing carried out by fishing vessels of an overall length of less than 12 metres and not using towed gear as listed in Table 3 in Annex I of [Regulation 26/2004]".[220] Under Article 26, the EFF "may contribute to the payment of premiums for fishers and owners of fishing vessels involved in small-scale coastal fishing in order to", *inter alia*, "improve management and control of access conditions to certain fishing areas"[221] and "encourage the use of technological innovations …".[222] Again, there may be scope for complementarity between the EFF and measures adopted by Member States using their delegated powers.

Priority axis 3

Priority axis 3, entitled *measures of common interest*, is dealt with in Chapter III of Title IV of Regulation 1198/2006. Chapter III comprises Articles 36-42. The scope of priority axis 3 is summarised as "measures of common interest with a broader scope than measures normally undertaken by private enterprises and which help to meet the objectives of the common fisheries policy".[223] The measures falling with priority axis 3 include, *inter alia*, "collective actions", "protection and development of aquatic fauna and flora" and "pilot projects".[224]

Article 37 deals with the so-called "collective actions". Collective actions are measures "which are implemented with the active support of operators themselves or by organisations acting on behalf of producers or other organisations recognised by the Member States". Article 37 provides a non-exhaustive lists of the aims of such measures.

Those of particular relevance to achieving an EAFM include: (a) to "contribute sustainably to better management or conservation of resources";[225] (b) to "promote

[220] Article 26(1).
[221] Article 26(4)(a).
[222] Article 26(4)(d).
[223] Article 36(1).
[224] Article 36(2).
[225] Article 37(a).

selective fishing methods or gears and reduction of by-catches";[226] (c) to "remove lost fishing gear from the sea bed in order to combat ghost fishing";[227] (d) to "contribute to the objectives laid down for small-scale coastal fishing in Article 26(4)";[228] and (e) to "improve management and control of access conditions to fishing areas, in particular through the drawing up of local management plans approved by the competent national authorities".[229]

Article 38 addresses the protection and development of aquatic fauna and flora. The measures being supported "must be implemented by public or semi-public bodies, recognised trade organisations or other bodies appointed for that purpose by the Member State".[230] The measures must be "intended to protect and develop aquatic fauna and flora while enhancing the aquatic environment".[231] They are to relate to, *inter alia*, "the construction and installation of static or movable facilities intended to protect and develop aquatic fauna and flora"[232] and "the protection and enhancement of the environment in the framework of NATURA 2000 where its areas directly concern fishing activities, excluding operational costs" (see section 7 below).[233]

Article 41 deals with so-called "pilot projects". The pilot projects to be supported must be "carried out by an economic operator, a recognised trade association or any other competent body designated for that purpose by the Member State, in partnership with a scientific or technical body".[234] They must be "aimed at acquiring and disseminating new technical knowledge" and may involve "the experimental use of more selective fishing techniques".[235] The categories of pilot projects to be supported are those which:[236]

[226] Article 37(b).
[227] Article 37(c).
[228] Article 37(l).
[229] Article 37(m).
[230] Article 38(3).
[231] Article 38(1).
[232] Article 38(2)(a).
[233] Article 38(2)(c).
[234] Article 41(1).
[235] Article 41(1).
[236] Article 41(2).

(a)	"test, under near-actual conditions in the production sector, the technical or economic viability of an innovative technology with the aim of acquiring and disseminating technical or economic knowledge of the technology tested"
(b)	"enable tests to be carried out on management plans and fishing effort allocation plans, including, if necessary, the establishment of no-fishing zones, in order to evaluate the biological and financial consequences, and experimental restocking"
(c)	"develop and test methods to improve gear selectivity, reduce by-catches, discards or the impact on the environment, in particular on the sea bottom"
(d)	"test alternative types of fishing management techniques"

As with priority axis 1, there may be scope for complementarity between the EFF's priority axis 3 and measures adopted by Member States using their delegated powers. In the case of Article 37, the scope for complementarity is similar to that in respect of Articles 25 or 26 in priority axis 1 (see above). In respect of Article 38, complementarity could potentially arise if Member States were proposing to use their delegated powers to help protect marine *Natura 2000* sites. In the case of Article 41, complementarity arises because the EFF funding may, through pilot projects, inform measures (including, *inter alia*, no-fishing zones) that Member States could then potentially adopt using their delegated powers.

6.7 Baltic Sea RAC

Introduction

The EC legislation concerning RACs in general has already been introduced in section 5.9 above. The purpose of this section is to consider the influence of the BSRAC on the exercise by Member States of their delegated powers. Put briefly, it can be said that the BSRAC does have the potential to influence, both in positive and negative ways, the use of delegated powers.

As noted in section 5.9 above, the BSRAC has been operational since 13 March 2006 and its area of coverage comprises ICES areas III b, III c and III d (i.e. the Baltic Sea as defined for the purposes of this report).

Member States concerned

Decision 2006/191/EC, declaring the BSRAC operational, states that: "In accordance with Article 3(1) of Decision 2004/585/EC, representatives of the fisheries sector and other interests groups submitted a request concerning the operation of that Regional Advisory Council to Denmark, Germany, Estonia, Latvia, Lithuania, Poland, Finland and Sweden" (emphasis added).[237]

It adds that: "As required by Article 3(2) of Decision 2004/585/EC, the Member States concerned determined whether the application concerning the Regional Advisory Council for the Baltic Sea was in conformity with the provisions laid down in that Decision. On 13 December 2005, the Member States concerned transmitted a recommendation on that Regional Advisory Council to the Commission" (emphasis added).[238]

Thus Decision 2006/191/EC implies that "the Member States concerned", for the purposes of Article 3(1) and (2) of Decision 2004/585/EC, comprise Denmark, Germany, Estonia, Latvia, Lithuania, Poland, Finland and Sweden – i.e. the eight EC coastal States in the Baltic. Decision 2004/585/EC defines the term "Member State concerned" as "a Member State having a fishing interest in the area or fisheries covered by a Regional Advisory Council".[239] Thus, overall, the implication is that no Member States other than the eight coastal States have a fishing interest in the area or fisheries covered by the BSRAC.

[237] Preamble, recital (3).
[238] Preamble, recital (4).
[239] Article 1(1).

Structure and practice to date

Information on the structure and practice of the BSRAC is available at <www.bsrac.org>. That website carries the "Statutes" of the BSRAC. Paragraph 3 of the statutes states that the BSRAC "shall contribute to the achievement of the objectives of Article 2(1) in EC Regulation 2371/2002 concerning the EU Common Fisheries Policy" and then lists, *inter alia*, the objective to "aim at a progressive implementation of an ecosystem-based approach to fisheries management". That is entirely consistent with Regulation 2371/2002,[240] which states that RACs are to contribute to the achievement of the Article 2(1) objectives (see section 5.9 above).

The BSRAC's website indicates that the RAC has established three advisory working groups to date, dealing with demersal fisheries, pelagic fisheries and fisheries for salmon and sea trout. With that structure, there is clearly scope for each of the those working groups to consider, for example, the implementation of an EAFM and issues arising from the exercise by Member States of their delegated powers in the Baltic Sea.

The section of the website dealing with "Statements and recommendations" contains statements or recommendations from the BSRAC regarding: (a) a multi-annual plan for cod in the Baltic (May 2007); (b) measures for the recovery of the stock of European eel (April 2007); (c) the management of salmon (March 2007); (d) draft terms of reference for an impact assessment on the multi-annual plan for cod in the Baltic (9 October 2006); (e) the management of demersal fisheries (September 2006); (f) TACs for pelagic species in 2007; and (g) the management of the Baltic salmon fishery (September 2006).

Though none of those statements or recommendations addresses an EAFM expressly, there are some tangential references to it. For example, the recommendations on TACs for pelagic species note that "the RAC is concerned about the negative effect which a very big sprat stock could have on the cod stocks due to predation of the cod

[240] Article 31(1).

eggs". The current focus of the BSRAC's work seems to be enforcement of existing rules.

Links with Member States' exercise of delegated powers

As noted above, RACs are to be consulted by Member States wishing to exercise their delegated powers under Article 8 and, in some circumstances, under Article 9 of Regulation 2371/2002. Under Article 8, "the Regional Advisory Councils concerned" are to be provided with a draft of the Member State's proposed measures and an explanatory memorandum.[241] Under Article 9, the same applies only where the proposed measures are liable to affect the vessels of another Member State.[242]

In both cases, the RACs may submit their written comments to the Commission within five working days of the date of notification.[243] The Commission is then to confirm, cancel or amend the measures in question.[244] The Commission is not bound by the opinion of the RAC. But it is required to take the RAC's opinion into account. Therefore, and with a risk of stating the obvious, a favourable opinion by the RAC may be helpful to the Member State(s) proposing the measures and an unfavourable opinion may be unhelpful.

Furthermore, as noted in section 5.9 above, Member States may voluntarily chose to consult RACs. Therefore, though Article 26 of Regulation 2187/2005 and Article 10 of Regulation 2371/2002, as well as Article 9 of Recommendation 2371/2002 in cases where vessels of another Member State are not liable to be affected, do not require consultation with RACs, the Member State(s) considering measures under those articles may chose to consult the relevant RACs nonetheless.

An example of when Member State(s) in the Baltic might voluntarily chose to consult the BSRAC would be the scenario put forward in section 6.2 above of all eight Member States in the Baltic proposing identical measures under Article 26 of

[241] Article 8(2).
[242] Article 9(1), 2nd paragraph.
[243] Article 8(3).
[244] Article 8(3).

Regulation 2187/2005. In the case of that scenario, the combined effect of the measures would clearly be relevant to the membership of the BSRAC. It might therefore be in the Member States' interest to consult the BSRAC in order to, *inter alia*, gauge the level of support within the industry.

6.8 EC-Russia fisheries agreement

Introduction

The EC-Russia fisheries agreement has already been introduced in section 5.10 above. The agreement, in Article 5, provides for "[e]ach Party … [to] … allow fishing vessels of the other Party to fish within the Exclusive Economic Zone of this Party in the Baltic Sea".[245] The implementation of that provision is to be dealt with in the Joint Baltic Sea Fisheries Committee.[246] However, the agreement itself contains various articles that are relevant to the vessels of one party fishing in the EEZ of the other party, notably Article 7 on licensing and Articles 8-11 on compliance.

The purpose of this section is to consider the extent to which Member States in the Baltic, when exercising their delegated powers, can affect fishing by Russian-flagged fishing vessels in the EEZs of Member States in the Baltic or fishing by vessels flagged to Member States in the Russian EEZ, in the light of the new EC-Russia fisheries agreement.

Article 10 of Regulation 2371/2002

As noted in section 5.6 above, Article 10 of Regulation 2371/2002 provides a power for a Member State to take stock conservation measures for own-flag vessels in waters under its sovereignty or jurisdiction. Could that power in any way be applied to Russian-flagged vessels fishing in that Member State's EEZ or to own-flag vessels fishing in the Russian EEZ? The answer is "no", because it only applies to own-flag

[245] Article 5(1).
[246] Article 5(4).

vessels (and hence not to Russian-flagged vessels) and it only applies to the waters of Member States (and hence not to Russian waters).

Article 9 of Regulation 2371/2002

Article 9 of Regulation 2371/2002 gives a Member State the power to take measures for stock conservation and ecosystem protection within 12 nm of its baseline in certain circumstances. Article 5 of the EC-Russia fisheries agreement only provides for vessels of one party to fish in the EEZ of the other party. However, as already noted, parts of the EEZ of some Member States in the Baltic fall within 12 nm of the baseline. Therefore, it is conceivable that Russian-flagged vessels could legitimately be fishing in waters of Member States that are within 12 nm of the baseline.

Article 9 only expresses envisages measures in respect of own-flag vessels and "the vessels of another Member State". In other words, it does not expressly envisage measures in respect of vessels of States, such as Russia, that are not Member States. If a Member State wished to use its powers under Article 9 to adopt measures for vessels of other Member States, it would anyway need to apply to the Commission. In that application, it would be open to the Member State to point out that Russian-flagged vessels were also operating in the waters concerned.

In order to achieve uniformity between Member States' vessels and Russian vessels, the Commission might consider adopting an appropriate Regulation itself (if it had the necessary delegated powers to do so) or propose that the Council should adopt a Regulation. It would be interesting to establish whether Russian-flagged vessels are anyway likely to be given access to parts of the EEZ of Member States that are within 12 nm of the baseline.

Article 8 of Regulation 2371/2002

Article 8 of Regulation 2371/2002 enables a Member State to adopt emergency measures for stock conservation and ecosystem protection within any waters under its sovereignty or jurisdiction in certain circumstances. It is conceivable that Russian-

flagged vessels could legitimately be fishing in the waters in question, pursuant to the EC-Russia fisheries agreement.

Article 8 envisages measures in respect of own-flag vessels and, impliedly, vessels of other Member States (by its various references to "the Member States concerned"). As with Article 9, it does not expressly envisage measures in respect of vessels of third States, such as Russia. For any measure that a Member State has in mind under Article 8, whether in relation to own-flag vessels or vessels of other Member States, it must make an application to the Commission. As a result, the same points as made above regarding Article 9 will apply in respect of Article 8.

Article 26 of Regulation 2187/2005

Article 26 of Regulation 2187/2005 provides a power for a Member State to take stock conservation and ecosystem protection measures for own-flag vessels. That power could not be applied to Russian-flagged vessels because it relates only to own-flag vessels. The fact that Article 26 does not refer to any specific waters implies that measures under Article 26 could apply to own-flag vessels in the waters of other coastal States in the Baltic. That raises the possibility of a Member State in the Baltic using Article 26 to apply measures to its own-flag vessels even when they were operating in the Russian EEZ.

That would not necessarily be a problem under the EC-Russia fisheries agreement unless measures imposed by the Member State were incompatible with those imposed by Russia. In the event of incompatibility in those circumstances, the provisions of the fisheries agreement imply that the Russian measures would prevail. That is because, under Article 8(1) of the fisheries agreement, each party is to "take the necessary steps to ensure the observance by their fishing vessels of rules and regulations established in law by the other Party". Furthermore, Article 5(1) states that fishing by one party in the EEZ of the other party is to be in compliance with the latter's legislation.

6.9 Conclusion

Member States' delegated powers under Articles 10, 9 and 8 of Regulation 2371/2002 and under Article 26 of Regulation 2187/2005 are clearly relevant to helping to achieve an EAFM in the Baltic Sea. However, those powers are limited in several ways. Important constraints arise from the wording of the powers themselves. In particular, the powers provide no possibility for a coastal Member State to unilaterally regulate foreign-flagged vessels in non-emergency situations in its waters beyond 12 nm from its baseline. However, in the Baltic, cooperative action by some or all of the Member States using their delegated powers (e.g. those provided by Article 26) may assist in side-stepping such intrinsic limitations, both inside and beyond the 12 nm line.

Further important limitations arise from the general principles of EC law (in particular proportionality and equal treatment), since it is strongly arguable that those principles apply to the exercise by the Member States of their delegated powers. For example, the principle of equal treatment, by means of so-called "reverse discrimination", may stand in the way of a measure that, without objective justification, affects only own-flag vessels and leaves unaffected the comparable activities of other Member States' vessels in the same area of sea. Cooperative action by flag Member States should, in principle, reduce the likelihood of reverse discrimination based on nationality. Close to shore, the access restriction under Article 17(2) of Regulation 2173/2002 may help to reduce the number of situations in which vessels other than those of the coastal Member State are operating.

Additional limitations may arise from the objectives set out in Article 2(1) of Regulation 2371/2002, the existence of Russian waters and Russian-flagged fishing vessels in the Baltic Sea and the influence of the BSRAC. However, those factors are probably less significant overall than the intrinsic limitations of the delegated powers and the influence of the general principles of EC law. The EFF is a tool that can assist Member States' in using their delegated powers to achieve an EAFM in the Baltic Sea, by providing support that complements relevant measures adopted by the Member States.

Overall, it is clear that the role of Member States' delegated powers under the CFP in helping to achieve an EAFM in the Baltic Sea should not be ignored. Political considerations may limit the extent to which cooperative action among Member States, notably for the purpose of overcoming intrinsic limitations in the delegated powers or reducing the likelihood of reverse discrimination on grounds of nationality, will occur in practice. However, depending on the circumstances, it may well be possible for even one Member State acting on its own to achieve something of benefit and there may be locations or fisheries in the Baltic where cooperation by only a few Member States could achieve the desired results.

7. Relevance of nature conservation duties

EXECUTIVE SUMMARY

Introduction

(1). The duties of the Member States in the Baltic under the BD, HD and WFD, as well as under the 1992 Helsinki Convention, are relevant to helping to achieve an EAFM in the Baltic Sea. To the extent that Member States rely on their delegated powers under the CFP to implement those duties, the limitations of those delegated powers as discussed in section 6 above are clearly relevant. The EFF has an explicit link to the HD and BD, since priority axis 3 provides support for certain measures of "common interest" relating to *Natura 2000*.

Habitats Directive and Birds Directive

(2). Both the HD and BD are relevant to fisheries management, because they each provide for protection of various species and habitats that could be affected by fishing activities. The need to protect species and habitats from the impacts of fishing activities can be seen as a component of an EAFM. Therefore, both the HD and BD can be regarded as one means for helping to achieve an EAFM, including in the Baltic Sea. It is important to recall that site protection is not the only duty under the HD and BD; both Directives also include the need to protect certain species, including marine species, both inside and outside sites.

(3). The HD, in respect of its site protection provisions, works on the basis of so-called "biogeographical regions". The biogeographical regions covering the Baltic Sea region are the "Boreal" region and the northern part of the "Continental" region. To date, the Commission has adopted only an initial list of SCIs for each of those two regions. The Commission's Decisions containing those lists, adopted in 2004 and 2005, indicate that more work is to be done in identifying SCIs in the Baltic Sea.

(4). The delegated powers of the Member States under the CFP may be of use to Member States in meeting their duties under the HD or the BD where restrictions on the activities of fishing vessels are necessary. The scenarios of joint action discussed in section 6 above could be relevant, to the extent that two or more Member States in the Baltic opt to coordinate the use of their delegated powers to implement the Directives. However, the delegated powers have their limitations and cooperation among Member States is not guaranteed and so, clearly, additional means will be needed to adopt the requisite measures.

(5). In that regard, the Commission has made it known that it is ready to act on behalf of Member States, under the CFP, to help implement their duties under the HD or BD. As the number of cases of Member States seeking to implement the Directives in the marine environment increases, the extent to which the EC is willing in practice to adopt the necessary measures should become clearer. Meanwhile, it is also relevant to ask whether Member States are entitled to act unilaterally, outside their delegated powers, to implement their duties under the HD and BD on the basis that such duties relate solely or primarily to nature conservation rather than fisheries conservation.

(6). In any event, the implementation of the HD and BD through the Baltic Sea (other than in Russian waters) will not comprehensively deliver an EAFM. That is because, *inter alia*: (a) an EAFM is not just about nature conservation – it is also about stock conservation; (b) the HD and BD do not address all relevant aspects of nature conservation (e.g. species or habitat types not covered by the Directives); and (c) full implementation of the HD and BD in the Baltic Sea has the potential to cause displacement of fishing effort, which is a factor that would also need to be addressed.

(7). Member States' attempts to implement the HD and the BD in the Baltic Sea will potentially be uncoordinated. Neither the HD nor the BD expressly calls for coordination in relation to particular regions (in contrast to, say, the draft MSD), though coordination could help to achieve an EAFM in the Baltic Sea. That raises the question of whether groupings of Member States might be willing to coordinate their activities in implementing the HD and BD in the Baltic Sea, e.g. in relation to

protection of transboundary species and establishment and protection of transboundary SACs and SPAs.

Water Framework Directive

(8). Of the four categories of waters referred to in Article 1 of the WFD, those which are liable to be affected by the activities of fishing vessels in the marine environment are "coastal waters" and "transitional waters". Translated into the language of the law of the sea, those waters comprise marine internal waters and the 0-1 nm band of the territorial sea and potentially waters further offshore to the extent that such waters are "transitional waters".

(9). For coastal waters, the so-called "quality elements for the classification of ecological status" do not include "composition and abundance of fish fauna". Therefore, impacts on fish fauna do not directly affect the ecological status of coastal waters. That limits the usefulness of the WFD as a driver for controlling the activities of fishing vessels in coastal waters. For transitional waters, "composition and abundance of fish fauna" is included as one of the quality elements. However, the definitions of high, good and moderate status do not refer to effects caused directly by extraction of fish. Therefore the inclusion of fish fauna as a quality element for transitional waters is only of limited use for restricting the activities of fishing vessels.

(10). Despite those limitations, some scope may exist to use the WFD as a driver to control fishing activities in coastal waters and transitional waters by virtue of other quality elements. One candidate is "composition and abundance of benthic invertebrate fauna", which is a quality element for both coastal waters and transitional waters. The composition and abundance of benthic invertebrates could potentially be affected by fisheries for such species and also by, *inter alia*, bottom trawling targetting fish fauna. The attribution of such effects is not ruled out by the definitions of high, good or moderate status for benthic invertebrate fauna in both transitional and coastal waters.

(11.) In conclusion, some possibilities may exist to use the WFD as a driver to control fishing activities in coastal waters and transitional waters of Member States, including in the Baltic Sea. However, those possibilities relate to very limited areas of sea and, other than for benthic invertebrates fisheries, are indirect. Overall, it is clear that the requirements under the WFD offer only very limited possibilities for helping to achieve an EAFM in the Baltic Sea. To the extent that the WFD does justify control of fishing vessel activities, it is relevant to ask where the power lies to adopt such controls. In principle, the potential sources of implementing powers discussed for the HD and BD are equally applicable to the WFD.

Helsinki Convention

(12). The Helsinki Convention has a strong focus on pollution. Despite that, it does contain some articles that are broader in scope. Principal amongst those is Article 15, on *Nature conservation and biodiversity*. In principle, the duty in Article 15 to "take all appropriate measures … to conserve natural habitats and biological diversity and to protect ecological processes … [and] … to ensure the sustainable use of natural resources …" includes, *inter alia*, measures to restrict the activities of fishing vessels for the purposes of nature conservation and fisheries conservation. As such, Article 15 is relevant to helping to achieve an EAFM in the Baltic Sea.

(13). The EC and the eight Baltic Member States (as well as Russia) are parties to the Helsinki Convention. The Convention contains rules on how the relationship between the EC and the Member States parties is to be taken into account. That is relevant for fisheries conservation, which is a matter falling within the exclusive competence of the EC. It is arguable that the duty in Article 15, to the extent that it relates to fisheries conservation, falls exclusively on the EC; alternatively, it is arguable that it falls primarily on the EC but secondarily on the Member State parties to the extent that they have delegated powers. However, it is beyond the scope of this report to provide a definitive view either way.

(14). In principle, the duty in Article 15 of the Helsinki Convention covers not just measures in relation to fisheries conservation but also restrictions on fishing vessels

regarding nature conservation. In respect of the latter, it is relevant to ask whether the Member States parties are entitled to act unilaterally, outside their delegated powers under the CFP, to adopt such restrictions on the basis that they relate to nature conservation rather than fisheries conservation.

(15). The new EC-Russia fisheries agreement can, to some extent, be seen as a response to the duty in Article 15 of the Helsinki Convention. However, it is important not to regard it as the only response necessary to implement Article 15 regarding fisheries. To assist with implementation of Article 15, it is arguable that the BSRAC should be able to invite Russia to participate at relevant meetings or, alternatively or additionally, for there to be liaison between the BSRAC and the new Joint Baltic Sea Fisheries Committee.

7.1 Introduction

The purpose of this section is to explain to what extent the duties of the Member States in the Baltic under the BD, HD and WFD, as well as under the 1992 Helsinki Convention, could be relevant to helping to achieve an EAFM in the Baltic Sea, taking into account the influence of the access restriction provided for by Article 17(2) of Regulation 2371/2002, the objectives set out in Article 2(1) of Regulation 2371/2002, the general principles of EC law, the EFF, the BSRAC and the EC-Russia fisheries agreement. As with section 6 above, the entire Baltic Sea will be regarded as "the ecosystem" in question for the purpose of the "ecosystem approach to fisheries management".

7.2 Habitats Directive and Birds Directive

Introduction

It has recently been accepted by the Court that the HD applies to the EEZs of the Member States.[247] It is strongly arguable that the same should be the case for the BD. On that basis, the HD and BD both apply to marine internal waters, the territorial sea and the EEZ of Member States in the Baltic.

Both the HD and BD are relevant to fisheries management. That is because they provide for protection of various species and habitats that could be affected by fishing activities. The need to protect species and habitats from the impacts of fishing activities can be seen as a component of an EAFM. Therefore, both the HD and BD can potentially be regarded as one means for helping to achieve an EAFM.

This section starts by summarising the species protection and site protection provisions of the HD and BD. After consideration of relevant lists of SCIs adopted by the Commission, it then considers the scope for using the HD and BD as a means for restricting the activities of fishing vessels and for helping to achieve an EAFM in the Baltic Sea.

Species protection

The species protection provisions of the HD are set out in Articles 12-16. In particular, under Article 12(1), Member States "shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting: (a) all forms of deliberate capture or killing of specimens of these species in the wild; (b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration; (c) deliberate destruction or taking of eggs from the wild; (d) deterioration or destruction of breeding sites or resting places".

[247] Case C-6/04 *Commission v United Kingdom* [2005] ECR I-9017: Judgment, paragraph 117.

The species protection provisions of the BD are set out in, *inter alia*, Articles 5-9. In particular, under Article 5, Member States "shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular: (a) deliberate killing or capture by any method; (b) deliberate destruction of, or damage to, their nests and eggs or removal of their nests; (c) taking their eggs in the wild and keeping these eggs even if empty; (d) deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive; (e) keeping birds of species the hunting and capture of which is prohibited".

Site protection

The site protection provisions of the HD involve the establishment of a network of SACs (under the HD) and SPAs (under the BD) called *Natura 2000*.[248] SACs are to comprise the natural habitat types listed in Annex I to the HD and the habitats of species listed in Annex II to the HD.[249] As Annexes I and II to the HD currently stand, the representation of marine habitats and species is poor.

Examples of marine habitats listed in Annex I are "Sandbanks which are slightly covered by sea water all the time", "Estuaries", "Mudflats and sandflats not covered by seawater at low tide", "Coastal lagoons", "Large shallow inlets and bays", "Reefs" and "Submarine structures made by leaking gases". Examples of marine species listed in Annex II are the grey seal (*Halichoerus grypus*), common seal (*Phoca vitulina*), Baltic ringed seal (*Phoca hispida bottnica*), bottlenose dolphin (*Tursiops truncatus*) and harbour porpoise (*Phocoena phocoena*).

SPAs are sites hosting bird species listed in Annex I to the BD as well as regularly occurring migratory species not listed in Annex I.[250] In practice, marine birds species are rather well covered by the BD because a large proportion of those not listed in Annex I may instead be regarded as regularly occurring migratory species.

[248] HD, Article 3(1).
[249] HD, Article 3(1), 1st paragraph.
[250] BD, Article 4(1) and (2).

The procedure for inclusion of SACs and SPAs in *Natura 2000* is different. An SPA, once classified by a Member State, automatically becomes included into *Natura 2000* and the process of classification of a site as an SPA by the Member State does not involve any interaction with the Commission.

In contrast, the process of identifying SACs for inclusion in *Natura 2000* involves a significant amount of interaction with the Commission.[251] A key stage in that process is the adoption by the Commission, for each so-called "biogeographical region", of a list of SCIs. The list of SCIs adopted for each biogeographical region is based on proposed sites submitted to the Commission by the Member States. The sites on the adopted list are then to be designated as SACs by the Member States.

The biogeographical regions covering the Baltic Sea region are the "Boreal" region and the northern part of the "Continental" region. The initial lists adopted by the Commission to date for those two regions are discussed further below.

Designated SACs are subject to a protection regime set out in Article 6 of the HD. Classified SPAs, and SCIs adopted by the Commission, are subject to the regime in Article 6(2), (3) and (4) of the HD. In the *Basses Corbieres* case,[252] the Court held that sites that should have been classified as SPAs, but which have not yet been so classified, are subject to the protection regime set out in the first sentence of Article 4(4) of the BD.[253]

SCI lists for Boreal and Continental Regions

The Boreal region comprises "parts of the territory of Finland, Sweden and Lithuania and the territory of Estonia and Latvia …".[254] The marine parts of the Boreal region within the waters of the Member States include not just the Baltic Sea (i.e. ICES divisions III b, c and d) but also part of the ICES division III a. The Continental region comprises "the territory of Luxembourg, parts of the territory of Austria,

[251] HD, Article 4.
[252] Case C-374/98 *Commission v France* [2000] ECR I-10799.
[253] Judgment, paragraph 47.
[254] Decision 2005/101/EC, preamble, recital (1).

Belgium, the Czech Republic, Denmark, France, Germany, Italy, Lithuania, Poland, Slovenia and Sweden …" (emphasis added).[255] Its marine components include a part of the Baltic, a part of ICES division III a and a part of the Mediterranean.

To date, the Commission has adopted only an initial list of SCIs for each of the Boreal and Continental regions. Those lists are contained in Decisions 2005/101/EC and 2004/798/EC respectively. In both cases, the SCIs are listed in Annex 1 to the Decision. It is not possible to tell from those lists which of the SCIs, if any, relate to marine habitat types or marine species. However, some other provisions of the Decisions indicate that their list of SCIs cannot be regarded as definitive for marine habitat types and species in the Boreal and Continental regions.

First, both Decisions make it clear that some Member States are not covered. Thus Decision 2005/101/EC, dealing with the Boreal region, makes clear that it does not cover Estonia, Latvia or Lithuania.[256] Likewise, Decision 2004/798/EC, addressing the Continental region, does not cover, *inter alia*, Lithuania or Poland.[257] For those States, data on SCIs "will be subject to a future Commission decision, when all the pertinent information will have been collected and when an in-depth scientific evaluation of the site proposals from these Member States will have been made".[258]

Secondly, both Decisions note that "some Member States have not proposed sufficient sites to meet the requirements in [the HD] for certain habitat types and species" and "[i]t can therefore not be concluded for these species and habitat types listed in Annex 2 to this Decision that the network is complete".[259] Annex 2 to Decision 2005/101/EC in turn lists, *inter alia*, "Estuaries" in respect of Sweden. In the case of Decision 2004/798/EC, Annex 2 lists Denmark in respect of, *inter alia*, "Estuaries", "Mudflats and sandflats not covered by seawater at low tide", "Coastal lagoons" and "Large shallow inlets and bays". It not clear whether the listed omissions relate to the

[255] Decision 2004/798/EC, preamble, recital (1).
[256] Preamble, recital (2).
[257] Preamble, recital (2).
[258] Decision 2005/101/EC, preamble, recital (2); Decision 2004/798/EC, preamble, recital (2).
[259] Decision 2005/101/EC, preamble, recital (10); Decision 2004/798/EC, preamble, recital (10).

Baltic Sea or to other parts of the Boreal or Continental regions (i.e. to ICES division III a, in the case of Sweden and Denmark) or both.

Thirdly, regarding the marine environment specifically, both Decisions state that:[260]

> Given that knowledge on the existence and distribution of the natural habitat types of Annex I and species of Annex II to [the HD] that occur in both marine territorial waters and as well as marine waters under national jurisdiction beyond territorial waters remains incomplete, it cannot be concluded that the network is either complete or incomplete for them. The relevant species and habitat types are listed in Annex 3 to this decision. Consequently, the Commission considers that the initial list will be revised, if necessary, for the different habitat types and species listed in Annex 3 to this Decision in accordance with the provisions of Article 4 of [the HD].

Annex 3 to Decision 2005/101/EC in turns lists: "Sandbanks which are slightly covered by sea water all the time"; "Reefs"; *Phocoena phocoena* (harbour porpoise); *Halichoerus grypus* (grey seal); *Phoca vitulina* (common seal); and *Phoca hispida bottnica* (Baltic ringed seal). In the case of Decision 2004/798/EC, Annex 3 lists the same habitats and the same species as Decision 2005/101/EC (except the Baltic ringed seal), as well as: "Submarine structures made by leaking gases"; "Submerged or partially submerged sea caves"; *Caretta caretta* (loggerhead turtle); and *Tursiops truncatus* (bottlenose dolphin). As for Annex 2, it is not clear whether the listed habitats and species relate to the Baltic Sea or to other parts of the Boreal or Continental regions or both (e.g. part of the Continental region includes a part of the Mediterranean).

Restrictions on activities of fishing vessels

In some cases, a restriction on the activities of fishing vessels will be necessary in order for a Member State to fulfil its site and species protection duties under the HD and BD. Sometimes, a Member State may be in a position to adopt the necessary restriction using its delegated powers under the CFP. However, as noted in section 6 above, those delegated powers have their limitations e.g. where measures restricting own-flag vessels create reverse discrimination (see section 6.5 above) or where a non-

[260] Decision 2005/101/EC, preamble, recital (11); Decision 2004/798/EC, preamble, recital (11).

emergency problem is caused by foreign-flagged vessels in waters beyond 12 nm from the baseline (see section 6.2 above).

In view of the limitations of the delegated powers, and the duties faced under the HD and BD, it is relevant to ask whether alternative means exist to adopt the necessary measures. Can such measures only be imposed under the CFP? If so, is it exclusively a matter for the EC (subject to Member States' delegated powers) or is the power shared between the EC and the Member States? Alternatively, may the necessary restrictions be adopted outside the CFP? If so, may they be adopted unilaterally by Member States?

Those questions are considered in detail in a report published by IEEP in 2004, entitled *Interaction Between the EU Common Fisheries Policy and the Habitats and Birds Directives*.[261] The answers are not clear. To avoid repetition, the arguments will not be re-considered in this report. However, it is important to add that the debate about the source of powers to adopt restrictions on the activities of fishing vessels for the purposes of the HD and BD in principle applies equally to restrictions necessary to achieve nature conservation at the national level or at the international level (e.g. for the purpose of protecting Baltic Sea Protected Areas).

The Commission has made it known that it is ready to act on behalf of Member States to help implement their duties under the HD or BD. For example, in its Communication on *Elements of a Strategy for the Integration of Environmental Protection Requirements into the Common Fisheries Policy*,[262] issued in 2001, the Commission notes that whenever the requirements of the HD and BD "imply the regulation of fishing activities, then it is for the Community, on the basis of Article 37 of the Treaty, to adopt the necessary measures".[263] The Commission's reference to Article 37 of the EC Treaty is a reference to the legal basis for CFP measures.

[261] D.Owen, *Interaction between the EU Common Fisheries Policy and the Habitats and Birds Directives*, IEEP Policy Briefing, Institute for European Environmental Policy, London, 2004. Available at <www.ieep.eu>.
[262] COM(2001) 143 final, Brussels, 16.03.2001.
[263] Page 7.

Two contrasting examples illustrate different approaches by the EC. The first example concerns the so-called "Darwin Mounds" site in the north-east Atlantic. That site, important for "reefs" as listed in Annex I to the HD, falls within waters under the jurisdiction of the UK. The reefs are threatened by bottom trawling activities. The site has not been formally proposed to the Commission as a potential SAC, but the UK did express its intention to designate the site. In response, the Commission adopted an emergency Regulation in 2003 (extended in 2004) to protect the site and then the Council followed up with longer term measures in 2004.[264]

The second example concerns cetaceans. In 2004, the UK adopted a domestic ban on pair trawling for bass within 12 nm of the baseline off the south-west coast of England for the purpose of reducing cetacean by-catch (see sections 5.6 and 6.5 above), using its delegated powers under the CFP. The Explanatory Memorandum to the measure implies that the ban was in part a response to the UK's species protection duties under the HD.[265] In January 2005, the UK consulted the Commission because it wished to extend the ban to vessels of other Member States having fishing access to the area in question. The Commission rejected the UK's proposal to extend the ban, in part because it considered that the proposed measure was not likely to contribute to the objective of reducing dolphin mortality (see section 5.6 above).

In practice, the number of measures adopted by the EC under the CFP to help Member States implement their duties under the HD or BD is so far very small. However that low level of response may be more attributable to Member States' poor record of seeking to implement the HD or BD in the marine environment rather than to any failure by the EC to respond. As the number of cases of Member States seeking to implement the Directives' site or species protection provisions in the

[264] **(a)** Commission Regulation (EC) No 1475/2003 of 20 August 2003 on the protection of deep-water coral reefs from the effects of trawling in an area north west of Scotland (OJ L 211/14, 21.8.2003); **(b)** Commission Regulation (EC) No 263/2004 of 16 February 2004 extending for six months the application of Regulation (EC) No 1475/2003 on the protection of deep-water coral reefs from the effects of trawling in an area north-west of Scotland (OJ L 46/11, 17.2.2004); and **(c)** Council Regulation (EC) No 602/2004 of 22 March 2004 amending Regulation (EC) No 850/98 as regards the protection of deepwater coral reefs from the effects of trawling in an area north west of Scotland (OJ L 97/30, 1.4.2004).
[265] Paragraph 14.

marine environment increases, the extent to which the EC is willing in practice to adopt the necessary measures should become clearer.

An example of a Member State that is implementing the HD and BD beyond 12 nm from the baseline in the Baltic Sea is Germany. Implementation beyond 12 nm is significant because the delegated powers of Member States in the Baltic in such waters are restricted to own-flag fishing vessels or to emergency situations (see section 6.2 above). If foreign-flagged fishing vessels need to be regulated, and the situation is not an emergency, the delegated powers will not be sufficient.

Further details of Germany's implementation of the HD and BD in the marine environment can be found at <www.habitatmare.de>. The website focuses on the establishment of several *Natura 2000* sites beyond 12 nm (in the Baltic Sea, the North Sea and the connecting waters), and provides detailed maps showing the location and characteristics of those sites. An ICES project, focusing on the fisheries aspects of the *Natura 2000* sites in Germany's EEZ, is also underway and produced its first report in 2006.[266]

It would be interesting to research the extent to which the other seven Member States in the Baltic have sought to implement the HD and BD in the Baltic Sea or the extent to which Germany has sought to implement the Directives' species protection provisions (in contrast to the site protection provisions). Such research could help reveal how fishing activities in the Baltic might need to be curtailed in response to the HD or the BD, whether by Member States or by the EC acting on their behalf.

In principle, the implementation of the HD and BD throughout the Baltic Sea (excepting Russian waters) should help to deliver an EAFM. Inevitably, however, it will not comprehensively deliver an EAFM. That is because, *inter alia*: (a) an EAFM is not just about nature conservation – it is also about stock conservation (see section 4 above); (b) the HD and BD do not address all relevant aspects of nature conservation (e.g. species or habitat types not covered by the Directives); and (c) full

[266] <www.ices.dk/marineworld/protectedAreas.asp> and <www.ices.dk/iceswork/wgdetail.asp?wg=WKFMMPA>.

implementation of the HD and BD in the Baltic Sea has the potential to cause displacement of fishing effort, which is a factor that would also need to be addressed.

A further point is that the Member States' attempts to implement the HD and the BD in the Baltic Sea will potentially be uncoordinated. Neither the HD nor the BD expressly call for coordination in relation to particular regions (in contrast to, say, the draft MSD), though coordination could help to achieve an EAFM in the Baltic Sea. That raises the question of whether groupings of Member States might be willing to coordinate their activities in implementation the HD and BD in the Baltic Sea, e.g. in relation to protection of transboundary species and establishment and protection of transboundary SACs and SPAs.

Additional factors

As already noted, the purpose of this section is to also consider the influence of the access restriction provided for by Article 17(2) of Regulation 2371/2002, the objectives set out in Article 2(1) of Regulation 2371/2002, the general principles of EC law, the EFF, the BSRAC and the EC-Russia fisheries agreement to be taken into account where relevant.

The discussion in section 6 above about those factors would be equally relevant to the implementation of the HD and BD if a coastal Member State were to use its delegated powers under the CFP to adopt any restrictions on fishing vessels for that purpose. In some cases, the scenarios for joint action discussed in sections 6.2 and 6.3 above could also be relevant, to the extent that two or more Member States in the Baltic opted to coordinate their actions to implement the HD and BD.

If, alternatively, and more contentiously, a coastal Member State were to decide to adopt measures unilaterally outside the CFP in order to implement the HD and BD, it is arguable that the Article 2(1) objectives would no longer be relevant. The BSRAC would not have to be consulted on any such measures, though a Member State might chose to do so. It is strongly arguable that the general principles of EC law would

apply to the same extent as for measures adopted using the delegated powers under the CFP.

The EFF has an explicit link to the HD and BD. Thus Article 38 of Regulation 1198/2006, which is in the part of the Regulation dealing with priority axis 3 (i.e. "measures of common interest"), states that the EFF "may support measures of common interest intended to protect and develop aquatic fauna and flora while enhancing the aquatic environment" and in turn states that such measures may relate to, *inter alia*, "the protection and enhancement of the environment in the framework of NATURA 2000 where its areas directly concern fishing activities, excluding operational costs".

In other words, it appears that the EFF may support the protection of *Natura 2000* sites where there is a direct connection between such sites and fishing activities. It is not entirely clear what kinds of support may be provided, though "operational costs" are expressly excluded. That is a point that could usefully be clarified by the Commission. The EFF also contains some other links to *Natura 2000*, but the provisions in question all relate to priority axis 2 (i.e. "aquaculture, inland fishing, processing and marketing of fishery and aquaculture products").[267]

7.3 Water Framework Directive

Introduction

The purpose of this section is to consider the scope for using the WFD as a driver to control the activities of fishing vessels and hence to help achieve an EAFM in the Baltic Sea. Article 1 of the WFD states that: "The purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater …" (emphasis added).

[267] Articles 30(2)(d), 30(4)(d) and 30(5)(c).

Marine geographical scope

The marine geographical scope of the WFD can be understood in part from ascertaining the geographical extent of the four categories of waters referred to in Article 1 (see above).

The term "inland surface waters" is not defined in the WFD. However, the Directive does define the terms "inland water" and "surface water". The term "surface water" has two components: (a) "inland waters, except groundwater"; and (b) "transitional waters and coastal waters, except in respect of chemical status for which it shall also include territorial waters".[268] The term "inland water" means "all standing or flowing water on the surface of the land, and all groundwater on the landward side of the baseline from which the breadth of territorial waters is measured".[269] Therefore, the term "inland surface waters" presumably means "all standing or flowing water on the surface of the land".

The term "groundwater" in turn means "all water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil".[270] However, the definition of the term "inland water" (see above) implies that groundwater includes, *inter alia*, that below the seabed of marine internal waters.

The term "transitional waters" means "bodies of surface water in the vicinity of river mouths which are partly saline in character as a result of their proximity to coastal waters but which are substantially influenced by freshwater flows".[271] The term "coastal water" is defined as "surface water on the landward side of a line, every point of which is at a distance of one nautical mile on the seaward side from the nearest point of the baseline from which the breadth of territorial waters is measured, extending where appropriate up to the outer limit of transitional waters".[272] Both

[268] Article 2(1).
[269] Article 2(3).
[270] Article 2(2).
[271] Article 2(6).
[272] Article 2(7).

"transitional waters" and "coastal waters" are included within the term "surface water" (see above).

Thus, of the four categories of waters referred to in Article 1 of the WFD, those which are liable to be affected by the activities of fishing vessels in the marine environment are "coastal waters" and "transitional waters". Translated into the language of the law of the sea (see section 3 above), those waters comprise marine internal waters and the 0-1 nm band of the territorial sea and potentially waters further offshore to the extent that such waters are "transitional waters".

The marine geographical scope of the WFM is rendered more complicated by the definition of the term "surface water", which includes, *inter alia*, "transitional waters and coastal waters, except in respect of chemical status for which it shall also include territorial waters" (see above; emphasis added). Thus in the case of the "chemical status", the marine geographical scope of the Directive is extended to the seaward limit of the territorial sea. However, that extension will not be addressed further here on the basis that "chemical status" is unlikely to be affected by the activities of fishing vessels.

Restrictions on activities of fishing vessels

Having considered the marine geographical scope of the Directive, the next step is to consider whether any possibilities exist to use the WFD to restrict the activities of fishing vessels in coastal waters and transitional waters. The Directive aims to establish a protection framework which, *inter alia*, "prevents further deterioration and protects and enhances the status of aquatic ecosystems …"[273] and "aims at enhanced protection and improvement of the aquatic environment …"[274] "and thereby contributes to, *inter alia*, "the protection of territorial and marine waters".[275]

For surface waters, Member States must, *inter alia*: (a) "implement the necessary measures to prevent deterioration of the status of all bodies of surface waters" (with

[273] Article 1(a).
[274] Article 1(c).
[275] Article 1.

some exceptions);[276] and (b) "protect, enhance and restore all bodies of surface water … with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V" (again, with some exceptions).[277] Thus, under "(b)" above and subject to some exceptions, "good surface water status" is to be achieved. But under "(a)" above, with some exceptions, "high status" is not to deteriorate to "good status".

The term "surface water status" is defined as "the general expression of the status of a body of surface water, determined by the poorer of its ecological status and its chemical status".[278] As noted above, "chemical status" will not be considered further here. In turn, the surface water's status is "good" when "both its ecological status and chemical status are at least 'good'".[279] The term "ecological status" is defined as "an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V".[280] In turn, "good ecological status" is "the status of a body of surface water, so classified in accordance with Annex V".[281]

Turning to Annex V, that annex identifies "[q]uality elements for the classification of ecological status".[282] For transitional waters, the biological elements are: "Composition, abundance and biomass of phytoplankton"; "Composition and abundance of other aquatic flora"; "Composition and abundance of benthic invertebrate fauna;" and "Composition and abundance of fish fauna".[283] For coastal waters, the biological elements are the same as for transitional waters, minus "Composition and abundance of fish fauna".[284] Thus, in respect of coastal waters, the composition and abundance of fish fauna is not an index of ecological status.

[276] Article 4(1)(a)(i).
[277] Article 4(1)(a)(ii).
[278] Article 2(17).
[279] Article 2(18).
[280] Article 2(21).
[281] Article 2(22).
[282] Section 1.1.
[283] Section 1.1.3.
[284] Section 1.1.4.

Therefore, in contrast to transitional waters, impacts on fish fauna do not directly affect the ecological status of coastal waters. That limits the usefulness of the WFD as a driver for controlling the activities of fishing vessels in coastal waters. However, even in respect of transitional waters, the inclusion of "Composition and abundance of fish fauna" as an index of ecological status is of limited use. That limitation arises from the definitions of "High status", "Good status" and "Moderate status" for fish fauna in transitional waters, which are as follows:[285]

High status	**Good status**	**Moderate status**
Species composition and abundance is consistent with undisturbed conditions.	The abundance of the disturbance-sensitive species shows slight signs of distortion from type-specific conditions attributable to anthropogenic impacts on physicochemical or hydromorphological quality elements.	A moderate proportion of the type-specific disturbance-sensitive species are absent as a result of anthropogenic impacts on physicochemical or hydromorphological quality elements.

Thus both "Good status" and "Moderate status" are defined by reference to distortion or absence caused by "anthropogenic impacts on physicochemical or hydro-morphological quality elements". Fishing activities may have impacts on physicochemical or hydromorphological quality elements (e.g. by affecting structure of the seabed or by affecting transparency). But fishing activities also have impacts on the composition and abundance of fish fauna more directly by extracting fish; the latter impacts do not expressly fall within the definitions of "Good status" and "Moderate status" for fish fauna in transitional waters. Though the definition of "High status" makes no reference to particular categories of human impact, it is arguable that the definition should be read in the light of the definitions of "Good status" and "Moderate status".

Despite the exclusion of fish fauna as an index of ecological status in coastal waters, and the limited use of fish fauna as an index in transitional waters, some scope may

[285] Section 1.2.3.

exist to use the WFD to control fishing activities in coastal waters and transitional waters by virtue of other indices. One candidate is "Composition and abundance of benthic invertebrate fauna", which is an index for both coastal waters and transitional waters (see above).

The composition and abundance of benthic invertebrates could potentially be affected by fisheries for such species and also by, *inter alia*, bottom trawling targetting fish fauna. The attribution of such effects is not ruled out by the definitions of "High status", "Good status" and "Moderate status" for benthic invertebrate fauna in both transitional and coastal waters, which are as follows:[286]

High status	**Good status**	**Moderate status**
The level of diversity and abundance of invertebrate taxa is within the range normally associated with undisturbed conditions. All the disturbance-sensitive taxa associated with undisturbed conditions are present.	The level of diversity and abundance of invertebrate taxa is slightly outside the range associated with the type-specific conditions. Most of the sensitive taxa of the type-specific communities are present.	The level of diversity and abundance of invertebrate taxa is moderately outside the range associated with the type-specific conditions. Taxa indicative of pollution are present. Many of the sensitive taxa of the type-specific communities are absent.

In conclusion, some possibilities may exist to use the WFD as a driver to control fishing activities in coastal waters and transitional waters of Member States, including in the Baltic Sea. However, those possibilities relate to very limited areas of sea and, other than for benthic invertebrates fisheries, are indirect. Overall, it is clear that the requirements under the WFD offer only very limited possibilities for helping to achieve an EAFM in the Baltic Sea. To the extent that the WFD does justify control of fishing vessel activities, it is relevant to ask where the power lies to adopt such

[286] Sections 1.2.3 and 1.2.4.

controls. Questions asked in that respect regarding the HD and BD (see section 7.2 above) apply equally to the WFD.

7.4 Helsinki Convention

Introduction

The Helsinki Convention was adopted in 1992 and entered into force in 2000. Its current parties are **Denmark**, **Estonia**, **Finland**, **Germany**, **Latvia**, **Lithuania**, **Poland**, **Russia** and **Sweden** (i.e. all nine Baltic Sea coastal States) as well as the **EC**.[287] This section considers the provisions of the Helsinki Convention, but for reasons of time does not address practice under that treaty.

Summary of treaty provisions

Article 1, on *Convention Area*, states that the treaty "shall apply to the Baltic Sea Area". It then defines that area as "the Baltic Sea and the entrance to the Baltic Sea bounded by the parallel of the Skaw in the Skagerrak at 57° 44.43'N". Thus the area covered by the Helsinki Convention is larger than the Baltic Sea for the purposes of this report (see section 2 above). Article 1 clarifies that the Baltic Sea Area "includes the internal waters, i.e., for the purpose of this Convention waters on the landward side of the base lines from which the breadth of the territorial sea is measured up to the landward limit according to the designation by the Contracting Parties".

Article 2 contains definitions, with a strong emphasis on terms related to pollution. **Article 3** sets out "Fundamental principles and obligations", but those are restricted to pollution (with the possible exception of the second sentence of Article 3(6)). **Article 4**, on *Application*, has a broader scope. Article 4(1) states that: "This Convention

[287] See: <www.helcom.fi/Convention/en_GB/convention/>. Regarding the EC, see: **(a)** Council Decision 94/156/EC of 21 February 1994 on the accession of the Community to the Convention on the Protection of the Marine Environment of the Baltic Sea Area 1974 (OJ L 73/1, 16.3.1994); and **(b)** Council Decision 94/157/EC of 21 February 1994 on the conclusion, on behalf of the Community, of the Convention on the Protection of the Marine Environment of the Baltic Sea Area (OJ L 73/19, 16.03.1994).

shall apply to the protection of the marine environment of the Baltic Sea Area which comprises the water-body and the seabed including their living resources and other forms of marine life".

Article 4(2) adds that: "Without prejudice to its sovereignty each Contracting Party shall implement the provisions of this Convention within its territorial sea and its internal waters through its national authorities". That provision is rather confusing, since it omits any reference to the EEZ or continental shelf (see section 3 above) and therefore could be construed as meaning that the parties to the treaty are not bound to implement its provisions in the EEZ or on the shelf. Such an interpretation would be not sit well with the definition of "Baltic Sea Area" in Article 1 or with some references elsewhere in the treaty to areas over which the parties exercise sovereign rights.[288]

Articles 5, 6, 8 and 10-14 relate exclusively to pollution. **Article 7**, on *Environmental impact assessment*, has a broader application in that it relates to "a proposed activity that is likely to cause a significant adverse impact on the marine environment of the Baltic Sea Area". **Article 9**, on *Pleasure craft*, also applies more broadly than just pollution since it relates to abatement of "harmful effects on the marine environment of the Baltic Sea Area" and mentions, *inter alia*, "hydrodynamic effects" as an example.

Article 15 is entitled *Nature conservation and biodiversity*, and is considered in more detail below. **Articles 16-18** deal with certain procedural matters. **Articles 19-23** relate to the Helsinki Commission (including Article 23(2) on voting by the EC – see below). One of the functions of the Commission is "to make recommendations on measures relating to the purposes of this Convention".[289] **Article 24** relates to scientific and technological cooperation.

Article 25, on *Responsibility for damage*, states that parties "undertake jointly to develop and accept rules concerning responsibility for damage resulting from acts or

[288] Article 13(1); Annex IV, Regulation 3(1).
[289] Article 20(1)(b).

omissions in contravention of this Convention …". **Articles 26-38** are final provisions (including Article 35(4) on the allocation of rights and duties between the EC and the Member State parties – see below).

The treaty has seven annexes, which form an integral part of the treaty,[290] as follows:

Annex	**Title**
I	Harmful substances
II	Criteria for the use of Best Environmental Practice and Best Available Technology
III	Criteria and measures concerning the prevention of pollution from land-based sources
IV	Prevention of pollution from ships
V	Exemptions from the general prohibition of dumping of waste and other matter in the Baltic Sea Area
VI	Prevention of pollution from offshore activities
VII	Response to pollution incidents

Restrictions on activities of fishing vessels

Despite its strong focus on pollution, the Helsinki Convention does contain some articles that are broader in scope. Principal amongst those is Article 15, on *Nature conservation and biodiversity*, which states that:

> The Contracting Parties shall individually and jointly take all appropriate measures with respect to the Baltic Sea Area and its coastal ecosystems influenced by the Baltic Sea to conserve natural habitats and biological diversity and to protect ecological processes. Such measures shall also be taken in order to ensure the sustainable use of natural resources within the Baltic Sea Area. To this end, the Contracting Parties shall aim at adopting subsequent instruments containing appropriate guidelines and criteria.

In principle, the duty in Article 15 to "take all appropriate measures … to conserve natural habitats and biological diversity and to protect ecological processes … [and] … to ensure the sustainable use of natural resources …" includes, *inter alia*, measures

[290] Article 28.

to restrict the activities of fishing vessels for the purposes of nature conservation and fisheries conservation.

As noted above, both the EC and eight Member States are parties to the Helsinki Convention. The EC is able to be a party to the Convention because the treaty expressly provides for so-called "regional economic integration organisations" to be parties.[291] The treaty contains rules on how the relationship between the EC and the Member States parties is to be taken into account. In particular, Article 23(2) deals with the right to vote and Article 35(4) deals with the attribution of rights and duties.

Article 23(2) states that: "The [EC] and any other regional economic integration organization, in matters within their competence, shall exercise their right to vote with a number of votes equal to the number of their member states which are Contracting Parties to this Convention. Such organizations shall not exercise their right to vote if their member states exercise theirs, and vice versa".

Article 35(4) states that: "The [EC] and any other regional economic integration organization which becomes a Contracting Party to this Convention shall in matters within their competence, on their own behalf, exercise the rights and fulfill the responsibilities which this Convention attributes to their member states. In such cases, the member states of these organizations shall not be entitled to exercise such rights individually".

Fisheries conservation is a matter falling within the exclusive competence of the EC. Does Article 35(4) mean that the duty in Article 15 of the Helsinki Convention, to the extent that it relates to fisheries conservation, applies only to the EC (and Russia) rather than to the Member State parties? The answer to that question is potentially complicated by the fact that the EC has delegated some powers regarding fisheries conservation back to the Member States.

Arguments in favour of the duty falling on the EC, to the exclusion of the Member State parties, include, *inter alia*: (a) anything else would lead to Russia being

[291] Articles 35(2), 36(3) and 38(b); see also Articles 2(10), 23(2) and 35(4).

confused about which entity, i.e. the EC or the Member State parties, should be responsible in international law for any breach of the duty regarding fisheries conservation; (b) difficulties would potentially arise if a fisheries conservation matter needed to be put to the vote (cf. Article 23(2) – see above); and (c) the delegation of certain powers by the EC to the Member States is an internal matter within the EC arising from EC secondary legislation and is without prejudice to the EC having exclusive competence in respect of fisheries conservation.

Arguments in favour of the duty falling primarily on the EC, but secondarily on the Member States parties to the extent that they have delegated powers, include, *inter alia*: (a) failure to bind the Member State parties would not reflect the fact that they have some powers, albeit delegated under EC secondary legislation, to implement Article 15; and (b) the Helsinki Convention does not provide for the EC to make any formal declaration about the division of competence between the EC and the Member States on particular matters (cf. Article 35(2), which merely provides for the EC to agree on "the terms and conditions of its participation" with the Helsinki Commission), and the absence of a formal declaration leaves the matter open to interpretation.

It is beyond the scope of this report to provide a view on whether or not the duty in Article 15 of the Helsinki Convention, to the extent that it relates to fisheries conservation, applies only to the EC (and Russia) rather than to the Member State parties. However, it can at least be said that the answer is not entirely clear and that the matter could usefully be clarified by liaison with, *inter alia*, the Helsinki Commission (e.g. by seeking any terms and conditions of the EC's participation that may have been agreed between the EC and the Helsinki Commission).

As noted above, the duty in Article 15 in principle covers not just measures in relation to fisheries conservation but also restrictions on fishing vessels regarding nature conservation. The Helsinki Convention provides for the EC to exercise its Member States' rights and implement their responsibilities only in matters within the EC's competence (see above). To the extent that Member State parties agree that restrictions on fishing vessels primarily or solely for nature conservation purposes fall

within the EC's competence, the points made above about the EC and the Member State parties apply equally to such restrictions.

However, the situation would be different if Member State parties took the view that restrictions on fishing vessels primarily or solely for nature conservation purposes did not fall within EC competence. The contentious question of who – EC or Member State – has the power to take such measures has been raised in the section on the HD and BD above, and it is beyond the scope of this report to take the matter further at this stage.

In conclusion, it is clear that the Helsinki Convention, by virtue of Article 15, requires its parties to take measures to restrict the activities of fishing vessels for the purposes of nature conservation and fisheries conservation to the extent that such measures are needed "to conserve natural habitats and biological diversity and to protect ecological processes … [and] … to ensure the sustainable use of natural resources …". For current purposes, it will be assumed that all such measures (including those for nature conservation purposes) fall within EC competence. On that basis, the duty applies to the EC and Russia, subject to the uncertainty about whether the Member State parties are also bound to the extent of their delegated powers under the CFP.

Irrespective of how competence is divided between the EC and the Member States, it is clear that the duty in Article 15 is relevant to achieving both stock conservation and nature conservation. Its reference to the protection of "ecological processes" hints at an ecosystem approach, though that term provides room for interpretation both ways. Even if protection of "ecological processes" does not equate to an ecosystem approach, it is clear that the measures required by Article 15 include those that could help to achieve an EAFM in the Baltic Sea.

The new fisheries agreement between the EC and Russia can, to some extent, be seen as a response to the duty in Article 15 of the Helsinki Convention. However, it is important not to regard it as the only response necessary to implement Article 15 regarding fisheries. Other responses should include, *inter alia*, actions by the EC and Russia individually on matters and sea areas not covered by the fisheries agreement or

on matters where the EC and Russia cannot reach agreement (as foreseen by Article 6 of the fisheries agreement – see section 5.10 above).

The fisheries agreement between the EC and Russia does not mention the BSRAC. That is not surprising in that the BSRAC is an EC body. However, with a view to better implementing Article 15 of the Helsinki Convention in respect of fisheries, it is arguable that the BSRAC should be able to invite Russia to participate at relevant meetings or, alternatively or additionally, for there to be liaison between the BSRAC and the new Joint Baltic Sea Fisheries Committee. Regarding the latter, the Joint Baltic Sea Fisheries Committee is to adopt its rules of procedure at its first meeting;[292] that could be an opportunity to provide for liaison with the BSRAC.

Regarding invitations by the BSRAC to Russia, Article 6 of Decision 2004/585/EC provides for participation by non-members. Article 6(1) is broad enough to allow for invitations to be extended to Russian scientists. Article 6(4) refers expressly to third countries. It states that: "Representatives of the fisheries sector and other interest groups from third countries … that have a fishing interest in the area or fisheries covered by a [RAC] may be invited to participate in that [RAC] as active observers when issues which affect them are discussed". In the context of the BSRAC, the reference to "third countries" in Article 6(4) would include Russia. The Statutes of the BSRAC (see section 6.7 above) are compatible with Article 6(1) and (4) of Decision 2004/585/EC.

7.5 Conclusion

The duties of the Member States in the Baltic under the BD, HD and WFD, as well as under the 1992 Helsinki Convention, are relevant to helping to achieve an EAFM in the Baltic Sea. Nevertheless, some important limitations apply. One source of constraints arises from the limitations of Member States' delegated powers under the CFP, to the extent that those powers are relied upon for implementing the duties in question. However, the EC may also be willing and able to assist with

[292] Article 14(7).

implementation. It is also relevant to ask whether Member States are entitled to act unilaterally, outside their delegated powers, to implement the duties in question.

Another important limitation arises from the duties themselves. In the case of the HD and BD, implementation of those Directives will not comprehensively deliver an EAFM. That is because, *inter alia*: (a) an EAFM is not just about nature conservation – it is also about stock conservation; (b) the HD and BD do not address all relevant aspects of nature conservation (e.g. species or habitat types not covered by the Directives); and (c) full implementation of the HD and BD in the Baltic Sea has the potential to cause displacement of fishing effort, which is a factor that would also need to be addressed.

In the case of the WFD, some possibilities may exist to use that Directive as a driver to control fishing activities in coastal waters and transitional waters of Member States in the Baltic Sea. However, those possibilities relate to very limited areas of sea and, other than for benthic invertebrates fisheries, are indirect. Overall, it is clear that the requirements under the WFD offer only very limited scope for helping to achieve an EAFM in the Baltic Sea.

Regarding the Helsinki Convention, the main provision of interest is Article 15 on *Nature conservation and biodiversity*. However, it is not entirely clear whether the duty in Article 15, to the extent that it requires restrictions on the activities of fishing vessels for the purposes of fisheries conservation or nature conservation, is exclusively applicable to the EC or is also applicable to the Member States parties insofar as they have delegated powers under the CFP. Clarity on that matter will assist with establishing whether or not the Member States parties should be regarded as partly responsible for implementing Article 15 with regard to fisheries matters.