

## Role of Advisory Councils under the new Common Fisheries Policy

### Legal duties of Member States and the European Commission regarding consultation of Advisory Councils

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#### Introduction

The new Common Fisheries Policy (CFP)<sup>1</sup> aims to bring decisions about fisheries management closer to those who have the best knowledge to contribute to making those decisions. Through its new regionalised governance mechanisms, Member States will be much more closely involved in the creation and implementation of a range of measures, with the aim of better allowing adjustment to regional conditions, mobilisation of local knowledge, and adaptive, real-time management. Stakeholders have an important role in this process – their involvement is enshrined as a principle of good governance under the CFP framework generally, and is specifically built in to the regionalisation mechanisms and other provisions.<sup>2</sup>

Fisheries Advisory Councils, originally established under the title Regional Advisory Councils during the period of the 2002 Common Fisheries Policy, have an enhanced role under the new CFP. Advisory Councils consist of representatives from fishing and aquaculture organisations, plus interest groups such as environmental and consumer NGOs, covering a number of geographical areas and fields of competence.<sup>3</sup> Under the previous CFP, Member States and the European Commission were able to consult Regional Advisory Councils in order to seek the input of their members on a variety of matters.<sup>4</sup> However – there was no obligation to do so. The new CFP strengthens their role, making it a duty for Member States and the Commission to consult Advisory Councils under certain circumstances, and elaborating on the process to be followed for this consultation – expressly requiring, for example, that their advice must be taken into account.

This briefing will examine closely the main provisions of the CFP establishing this new consultation obligation. It aims to clarify what the duty to consult entails, and when it applies. We will see that the requirement for consultation of Advisory Councils is a strong legal duty, applying in the framework of regional cooperation, to the adoption of multiannual plans, and in other circumstances where the views of Advisory Councils might be relevant to the measure in

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<sup>1</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy (OJ L 3/54 28.12.2013)

<sup>2</sup> For a further, detailed discussion of stakeholder involvement in EU fisheries policy, including the rationale in support of stakeholder engagement, the following report of Aalborg Universitet to the Commission may be of interest: SOCIOEC [289192] Deliverable 4.1 Report on governance and stakeholder involvement in fisheries and analysis of EU policy framework.

<sup>3</sup> Article 43 of the CFP creates Advisory Councils for the outermost regions, aquaculture, markets, and the Black Sea. These are in addition to the already existing Advisory Councils (previously Regional Advisory Councils) for the Baltic, Mediterranean and North Seas, north-western and south-western waters, pelagic stocks, and the high-seas.

<sup>4</sup> Article 31(4) Regulation (EC) No 2371/2002 - *Regional Advisory Councils may be consulted by the Commission in respect of proposals for measures, such as multi-annual recovery or management plans... they may also be consulted by the Commission and by the Member States in respect of other measures.*

question. Where consultation is not a duty, it remains an option for either the Commission, or Member States, at their discretion.

## The key provisions of the CFP

The role and importance of Advisory Councils is introduced in the CFP's Recitals, number 65 of which acknowledges that *"Dialogue with stakeholders has proven to be essential for achieving the objectives of the CFP. [...] Advisory Councils should enable the CFP to benefit from the knowledge and experience of all stakeholders."* Also to be noted is Recital 24, which is concerned with multiannual plans, and states that these *"should be adopted in consultation with Advisory Councils"*.

Article 3 of the CFP sets out a number of general principles of good governance by which the policy shall be guided. Amongst these, is *"the appropriate involvement of stakeholders, in particular Advisory Councils, at all stages – from conception to implementation of the measures."*<sup>5</sup>

The consultation of Advisory Councils is then specifically dealt with in a number of Articles, in particular Articles 6, 12, 13, 18, 20 and 44 (emphasis added in all cases).

Article 6(2) sets out general provisions on conservation measures, establishing that as a general rule, advice received from Advisory Councils shall be taken into account in the adoption of these, as follows:

*"When applying this Regulation, **the Commission shall consult the relevant advisory bodies and the relevant scientific bodies. Conservation measures shall be adopted taking into account** available scientific, technical and economic advice, including, where relevant, reports drawn up by STECF and other advisory bodies, **advice received from Advisory Councils** and joint recommendations made by Member States pursuant to Article 18."*

Articles 12 and 13 impose a consultation duty in connection with the adoption of urgent or emergency measures in cases where serious threats are identified to either marine biological resources or the marine ecosystem. Under these Articles, procedures are established for the adoption of temporary measures by the Commission, or by the Member States themselves (within their sovereign waters) in such cases. Concerning Commission temporary measures, Article 12 provides that Member States may make reasoned requests for such Commission measures to be put in place, and that if a Member State does this, it must:

*"communicate the request [...] to the Advisory Councils concerned. The [...] Advisory Councils may submit their written comments within 7 working days..."*

Concerning Member State temporary measures, Article 13 similarly requires that where the measures in question are liable to affect fishing vessels of other Member States:

*"such measures shall be adopted only after consulting [...] the relevant Advisory Councils on a draft of the measures accompanied by an explanatory*

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<sup>5</sup> Article 3(f).

*memorandum. The consulting Member State may set a reasonable deadline for the consultation which shall, however, not be shorter than one month."*

Article 18 is where the new CFP's regionalised governance procedures are introduced. Firstly, Article 18(1) establishes that Member States may *"agree to submit joint recommendations for achieving the objectives of the relevant Union conservation measures, the multiannual plans or the specific discard plans"*. Under Article 18(2) Member States are obliged to consult Advisory Councils as part of this process:

*"For the purpose of paragraph 1, Member States having a direct management interest affected by the measures referred to in paragraph 1 shall cooperate with one another in formulating joint recommendations. **They shall also consult the relevant Advisory Councils.** [...]"*

In Article 20, Member States are permitted to take non-discriminatory measures within their 12 nautical mile zones for the purposes of conserving and managing fish stocks, and maintaining or improving the conservation status of marine ecosystems. Once again, where such measures are liable to affect the vessels of other Member States, they may be adopted:

*"only after consulting [...] the relevant Advisory Councils on a draft of the measures, which shall be accompanied by an explanatory memorandum that demonstrates, inter alia, that those measures are non-discriminatory. For the purpose of such consultation, the consulting Member State may set a reasonable deadline, which shall, however, not be shorter than two months."*

Finally, Article 44 paragraphs 1, 3 and 4 state as follows:

*(1) "**When applying this Regulation, the Commission shall, where relevant, consult the Advisory Councils**"*.

*(3) "**Advisory Councils shall be consulted on joint recommendations pursuant to Article 18. They may also be consulted by the Commission and Member States in respect of other measures. Their advice shall be taken into account.** Those consultations shall be without prejudice to the consultation of STECF or other scientific bodies. The opinions of the Advisory Councils may be submitted to all Member States concerned and to the Commission"*.

*(4) "**The Commission and, where relevant, the Member State concerned shall reply within two months to any recommendation, suggestion or information received** pursuant to paragraph 1. Where the final measures that are adopted diverge from the Advisory Councils' opinions, recommendations and suggestions received pursuant to paragraph 1, the Commission or the Member State concerned shall **state detailed reasons for the divergence**"*.

It can be seen that both Member States and the Commission have either the duty, or the option, of consulting Advisory Councils in a variety of different circumstances, and that certain procedures apply. The following sections will aim to clarify to whom the duty to consult applies, when, and how it must be carried out.

## Consulting Advisory Councils – who, when and how?

### Consultation by Member States in the context of joint recommendations

According to Article 18(2), Member States must (“shall”) consult the relevant Advisory Councils when formulating joint recommendations for achieving the objectives of conservation measures, multiannual plans or specific discard plans. This clear obligation is repeated in the first sentence of Article 44(3).

### Consultation by Member States on emergency measures, and measures within the 12 nautical mile zone

As can be seen from Articles 13 and 20, as extracted above, where Member States are adopting temporary emergency measures, or measures within their 12 nautical mile zones, which are liable to affect other Member States’ vessels, they have a duty to consult the relevant Advisory Councils. If requesting the Commission to adopt temporary measures under Article 12, a Member State is not specifically required to “consult”, but must submit a copy of its request to the relevant Advisory Councils, which may then make written comments on it.

### Consultation by the Commission “where relevant”

According to Article 44(1), the Commission “**shall**” consult Advisory Councils “**where relevant**”. This provision contains a degree of discretion – the Commission must make a judgement as to whether consulting Advisory Councils on any given measure is relevant or not. However, it also contains a duty – where it is relevant, the consultation must be performed. Clearly, in relation to joint recommendations there is no discretion – consultation is automatically required (see Article 44(3) that says that Advisory Councils **must** (“shall”) be consulted). In relation to other measures, the Commission does need to make a judgement. However, the Commission’s discretion is not absolute: the meaning of this requirement must be placed in the context of other provisions of the CFP.

Firstly, Recital 24 clearly states that multiannual plans should be adopted in consultation with Advisory Councils – or in other words, there is clear guidance from the legislator that consultation will be relevant here. This is supported by Article 3(f), which establishes the general principle that involvement of Advisory Councils should guide the CFP, and at all stages, from conception to implementation of measures. In addition, Article 6(2) explains that the Commission must (“shall”) consult the relevant advisory bodies (not defined – but Advisory Councils are an obvious example) “when applying this Regulation” – in particular, conservation measures must be adopted taking into account advice received from, again where relevant, Advisory Councils. The sum of these provisions creates a strong presumption in favour of consulting Advisory Councils in a broad range of circumstances.

### Consultation by Member States in other circumstances

As well as in the context of joint recommendations, emergency measures and measures within the 12 nautical mile zone, Member States have a discretion to consult Advisory Councils in

respect of other measures, under Article 44(3): Advisory Councils *"may also be consulted by the Commission and by Member States in respect of other measures"*. Again, the context provided by Recital 24 and Article 3(f) is relevant here, and indicates that this is not a completely unfettered discretion. Where Advisory Council's advice would be relevant, there should be a presumption in favour of consultation.

### Consultation procedure

Whenever Advisory Councils are consulted – be it on joint recommendations, or in respect of other measures, their advice is legally required to be taken into account. This is clear from the wording of Article 44(3). The obligation of 'taking advice into account' does not entail the assumption that the recommendations proposed by an Advisory Council must be followed and implemented, but that they must be properly considered, not ignored, and rejected only when there are reasons for doing so. The idea of taking advice into account is a common sense and generally accepted element of stakeholder consultation, as will be seen in the following section.

Article 44(4) sets out certain further requirements in respect of the process that must be followed when conducting a consultation: a reply to the information received must be given within 2 months, and, if the final measures adopted are not the same as the Advisory Council has proposed, detailed reasons for the divergence must be provided. It is clear from the text that the Commission must always follow this process.

It is less clear whether, and when Member States must also follow this process. The text of Article 44(4) relates the process to *"any recommendation, suggestion or information received pursuant to paragraph 1"* - and Article 44(1) only concerns the consultation of Advisory Councils by the Commission. However, Member States are also clearly referred to in Article 44(4) itself. The reference to paragraph 1 may therefore be a drafting error or oversight – the logical interpretation is that the same process should apply where Member States consult Advisory Councils too. The broadest interpretation would conclude it applies when such consultation takes place in the context of joint recommendations under Article 18, or in respect of other measures at the Member States' discretion, under Article 44(3). This would be consistent with good governance and the wider understanding of "consultation" in EU law as described in the next section.

Where Member States are required to consult Advisory Councils in respect of temporary emergency measures, or measures within their 12 nautical mile zones, Articles 12, 13 and 20 apply certain specific procedures in terms of timelines and the documents with which the Advisory Councils must be provided. Under Articles 13 and 20, the Advisory Councils must be provided with a draft of the proposed measure and explanatory memorandum, and given at least a month to respond on emergency measures (Article 13), and at least two months on measures in the 12 nautical miles (Article 20). For emergency measures to be adopted by the Commission at the request of a Member State, under Article 12, the process is different again – here the deadline for Advisory Councils to comment on a Member State request is just one week.



## The meaning of 'consultation' in wider EU law and policy

The concepts of public participation in decision-making, and consultation of interested and affected stakeholders, have an important place in EU governance. They are enshrined in the Treaty, and incorporated into a number of EU legal instruments, as well as emphasised in certain EU policy documents, which set out principles as to how consultation should properly be carried out. These all add important context to guide the correct interpretation of the CFP's provisions on consultation of Advisory Councils. By becoming a party to the Aarhus Convention,<sup>6</sup> the EU undertook specific legal duties in respect of public participation in decision-making in environmental matters.

To begin with, the Treaty on European Union establishes the importance of participation and consultation in Article 11. This requires that the EU institutions “*shall maintain an open, transparent and regular dialogue with representative associations and civil society*”, and that the Commission “*shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent.*”

A 2001 policy document from the Commission entitled '*European Governance - A White Paper*'<sup>7</sup> ("the White Paper") highlights that specialist stakeholder expertise will be useful in anticipating and identifying the nature of problems and uncertainties, and has a significant role to play in the preparation and monitoring of decisions.<sup>8</sup> According to the White Paper, early consultation opens up the process of EU policy-making to a more effective and inclusive outcome, allowing Member States “*to listen and learn from regional and local experiences*”.<sup>9</sup> It notes that Union legitimacy “*depends on involvement and participation*”.<sup>10</sup>

In 2002, drawing on the White Paper, the Commission adopted a set of general principles and minimum standards for consultation of interested parties,<sup>11</sup> with a view to instigating a Commission wide approach on how consultation should be undertaken. According to this document, the principles of participation, openness and accountability, effectiveness and coherence should define how consultation exercises are approached. It is recognised that to be effective, consultation must begin as early as possible, with parties being involved at a stage when they can still have an impact.<sup>12</sup> The minimum standards include the requirement that those consulted should be given sufficient time for providing their responses (including such considerations as holiday periods, and giving organisations time to consult their own members where appropriate), and provided with adequate feedback.<sup>13</sup>

The general principles and minimum standards predate the specific provisions regarding Advisory Councils in the CFP, and will not be applied where sector specific rules have been put in place. However, it can be seen from the existence and content of this document that the EU

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<sup>6</sup> The Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998 (the “Aarhus Convention”).

<sup>7</sup> European Governance – a White Paper – COM (2001) 428 final

<sup>8</sup> Ibid, page 15.

<sup>9</sup> Ibid, page 10.

<sup>10</sup> Ibid, page 8.

<sup>11</sup> Towards a reinforced culture of consultation and dialogue – General Principles and Minimum Standards for consultation of interested parties by the Commission – COM (2002) 704 final

<sup>12</sup> Ibid, page 18.

<sup>13</sup> Ibid, page 21.

concept of good administration holds strong regard for the idea that consultation is useful, and that it should be performed according to adequate procedures. When considering the duties to consult under the CFP, this context should be recalled.

### Participation in decisions with environmental implications

In 2005, the EU became a party to the Aarhus Convention, an international treaty that sets out rules on public participation in decision making on environmental matters. Its provisions are applied to the institutions of the EU – such as the Commission – through Regulation 1376/2006 (the “Aarhus Regulation”).

The Aarhus Regulation is concerned with the participation of the public generally in environmental decision-making – i.e., its remit is much broader than the consultation of specific stakeholder bodies such as Advisory Councils. The rules it contains will be invoked wherever decisions are being made about “plans and programmes relating to the environment”.<sup>14</sup> Some of the measures required under the CFP will fall within the definition of plans and programmes relating to the environment. Specifically, this will be the case where the measures contribute to or have significant effects on EU environmental policy.<sup>15</sup> Multiannual plans and discard plans for instance, will strongly influence whether EU environmental objectives under the 2020 Biodiversity Strategy (Target 4),<sup>16</sup> and Good Environmental Status in EU waters under the Marine Strategy Framework Directive,<sup>17</sup> are achieved.

As a result, the arrangements made by the Commission for consulting Advisory Councils in relation to such measures should, in addition to the procedures contained in the CFP itself, adhere to the standards provided in the Aarhus Regulation. In short, this means that the consultation must provide early and effective opportunities for participation, when options are still open; that access must be given to draft proposals and relevant environmental information, and that reasonable time frames (at least 8 weeks for receiving comments) must be applied. Reasons and considerations on which the final decision is based must also be made available.<sup>18</sup>

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<sup>14</sup> Regulation 1376/2006, Article 9.

<sup>15</sup> Ibid Article 2(e).

<sup>16</sup> Our Life Insurance, Our Natural Capital: an EU biodiversity strategy to 2020 (COM (2011) 244)

<sup>17</sup> Directive 2008/56/EC establishing a framework for Community action in the field of environmental policy (Marine Strategy Framework Directive)

<sup>18</sup> Regulation 1376/2006, Article 9(1), (3), (4) and (5).

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