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Transparency in the Common Fisheries Policy

Version 2

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Introduction

Transparency is a fundamental component of accountable democratic governance. It is crucial in allowing the implementation of legislation to be monitored and ensures it is complied with. It therefore plays an extremely important role in fisheries management.

Transparency must be understood as one of the main elements of the compliance framework of the Common Fisheries Policy (CFP)¹. The EU fisheries compliance framework is composed of two key pieces of dedicated enforcement legislation - the Control Regulation² and the IUU Regulation.³ This is complemented by provisions introduced in the European Maritime and Fisheries Fund (EMFF) Regulation⁴ making public aid conditional on compliance, as well as provisions in the CFP⁵, EMFF and CMO⁶ Regulations that require transparency in various other respects.

As highlighted in ClientEarth's previous briefing on transparency in November 2011, published at the start of the most recent CFP reform, transparency provisions allow individuals and NGOs to monitor national and EU authorities. This helps to ensure that those authorities do not violate the law, that the fishing industry's activities are properly regulated and that public funding is spent in a reasonable and legally compliant way.⁷ In this way, transparency rules make an invaluable contribution to compliance overall.

Transparency does not only encompass the availability of information (upon request or directly published electronically or otherwise), but can also include accessibility of information, consultation with stakeholders and participation in the decision-making process and reporting both by the European Commission and by the Member States. In this briefing we will analyse how transparency should be applied in the light of the principles enshrined in the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) but also in the light of the international obligations of the EU in relation to the UNECE Convention on

1 The Common Fisheries Policy should be understood as the overall legal framework setting the Common Fisheries Policy including in particular Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L354, 28.12.2013, p.22, (the CFP Regulation), Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council, OJ L149, 20.5.2014, p.1, (the EMFF Regulation), Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000, OJ L354, 28.12.2013, p.1, (the CMO Regulation).

2 Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006, OJ L 343, 22.12.2009, p.1 (the Control Regulation).

3 Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing OJ L 286, 29.10.2008, p. 1. (the IUU Regulation).

4 Regulation (EU) No 508/2014 of the European Parliament and of the Council of 15 May 2014 on the European Maritime and Fisheries Fund and repealing Council Regulations (EC) No 2328/2003, (EC) No 861/2006, (EC) No 1198/2006 and (EC) No 791/2007 and Regulation (EU) No 1255/2011 of the European Parliament and of the Council, OJ L149, 20.5.2014, p.1. (the EMFF Regulation).

5 Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L354, 28.12.2013, p.22. (the CFP Regulation).

6 Regulation (EU) No 1379/2013 of the European Parliament and of the Council of 11 December 2013 on the common organisation of the markets in fishery and aquaculture products, amending Council Regulations (EC) No 1184/2006 and (EC) No 1224/2009 and repealing Council Regulation (EC) No 104/2000, OJ L354, 28.12.2013, p.1. (the CMO Regulation).

7 Technical briefing on transparency and compliance, November 2011, p.1, paragraph 4 www.clientearth.org/reports/technical-briefing-transparency-compliance-common-fisheries-reform.pdf

Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)⁸ to which the EU is party.

We will also analyse how transparency in all forms has actually been introduced in the CFP, EMFF and CMO Regulations, set out the positive examples where access to information is already sufficiently provided for, and point out the areas where further action is required. EU institutions, regulatory authorities and Member States will need to publish additional information and allow wider access to information if EU and international access to information requirements are to be met. In this context, civil society and the public have an important role in monitoring and encouraging authorities to comply with these duties, including by requesting access to relevant information.

Principles of good governance and transparency

The Treaty on European Union and the Treaty on the Functioning of the European Union

Article 10(3) of the Treaty on European Union (TEU) requires decisions to be taken as openly and as closely as possible to the citizen. This is part of the provisions on democratic principles of the Treaty on European Union. It requires a high level of transparency, which includes consultation before and during the decision making process, but also after the adoption of legislation. This ensures transparency during the implementation of any decision of the Union.

Article 11(1), (2) and (3) of the TEU requires that the EU institutions maintain transparency in the exchange between the institutions (which includes the reporting of obligations, MEPs' questions and the institutions' positions in the negotiation of new legislation), maintain dialogue with representative associations and civil society and carry out public consultations with the purpose of ensuring the coherence and transparency of Union actions. This means that even when secondary legislation does not clearly require the publication of reports, such reports should still be automatically published by virtue of the principle enshrined in the TEU.

Article 12 of the Treaty on the Functioning of the European Union (TFEU) requires that consumer protection requirements are adopted. This should encompass the appropriate and accurate labelling of products such as fishery and aquaculture products.

Article 15(1) TFEU requires EU institutions to work as openly as possible in order to ensure the participation of civil society and therefore the promotion of good governance. This also includes granting access to the EU institutions' documents to any natural or legal person. Article 15(3) TFEU foresees the adoption of a regulation limiting such access on the grounds of public or private interests. The EU's Access to Information Regulation was adopted in 2001 in order to

⁸ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted on 25th June 1998 (Aarhus Convention).

meet the requirements of Article 255(2) of the EC Treaty (now incorporated into Article 15 TFEU) and currently applies to any type of information.⁹

In addition to these general rules, the Aarhus Convention, to which the EU is a signatory, introduced a number of obligations concerning the accessibility of environmental information, the participation of stakeholders and access to justice which will be analysed in section 2.3 of this briefing.

Regulation (EC) No1049/2001 on public access to European Parliament, Council and Commission documents (the Access to Information Regulation)

The scope of this Regulation is very broad and covers any type of document held by EU institutions. The right to access covers the documents drawn up or received by EU institutions and in their possession in all areas of activity.¹⁰ This means that the EU institutions are subject to these obligations for all documents they possess or receive that are linked to the CFP, EMFF and CMO regulations. In line with the principle of sincere cooperation, Member States have to cooperate with the European Commission to enable it to implement this Regulation.¹¹ Such cooperation can cover, for example, the provision of Member States' reporting documents to the EU institutions.

The right to access in the Access to Information Regulation covers situations where documents are both requested and directly accessible, requiring each EU institution to provide public access to a register of documents in electronic form¹² and providing that “[t]he institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register in accordance with the rules of the institution concerned.”¹³

The Regulation allows the EU institutions to refuse access to information where disclosure would undermine:

- the public interest (i.e. public security, defence and military matters, international relations, financial, monetary or economic policy of the Union or a Member State);¹⁴
- the privacy and the integrity of the individual (i.e. protection of personal data);¹⁵ or
- the protection of commercial interests of a natural or legal person (including intellectual property), court proceedings and legal advice, or the purpose of inspections, investigations and audits, unless there is an overriding public interest in disclosure¹⁶

9 Regulation (EC) No1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145, 31.05.2001, p.43.

10 Article 2(3) of Regulation (EC) No1049/2001.

11 See Article 4(3), TEU.

12 Article 11 of Regulation (EC) No1049/2001

13 Article 12 of Regulation (EC) No1049/2001

14 Article 4(1)(a) of Regulation (EC) No1049/2001.

15 Article 4(1)(b) of Regulation (EC) No1049/2001.

16 Article 4(2) of Regulation (EC) No1049/2001.

Where documents for internal use contain either opinions expressed as part of deliberations and preliminary consultations within an institution or which relate to a matter where the institution has not taken a decision, the disclosure can be refused, even after the adoption of the decision, if the institution considers that such disclosure would seriously undermine the decision-making process.¹⁷

Although the list of exceptions is quite long, if there is any exception to a general principle recognised in the Treaty it must be interpreted restrictively.¹⁸ It should also be noted that for environmental information, these exceptions are more limited by virtue of the operation of the Aarhus Convention (see next section below) and must, moreover, always be weighed against the public interest in the disclosure of that information (see also next section below).

It is important that those requesting such information note that the exceptions listed should be the only ones accepted as limitations to access to documents requested from the EU institutions.

Conclusion and recommendation – Access to Information Regulation

- Under the Access to Information Regulation the public has a right to access all documents relating to activities under the CFP, EMFF and CMO Regulations that any of the EU institutions draw up, receive or have in their possession, unless permitted exceptions apply, which should be interpreted restrictively. The institutions shall as far as possible make documents directly accessible to the public in electronic form or through a register.

The Aarhus Convention and the EU's implementing legislation

The Aarhus Convention is an international convention to which the EU has been a party since May 2005. It establishes a number of rights for the public (individuals and their associations) with regard to the environment. There are three main “pillars”: the right of everyone to receive environmental information that is held by public authorities (“access to environmental information”), the right to participate in environmental decision-making (“public participation”) and the right to review and the right of access to court or administrative proceedings on environmental matters (“access to justice”).

In 2003 two EU directives concerning the first and second “pillars” of the Aarhus Convention were adopted: a directive on public access to environmental information¹⁹ and a directive on public participation in some environmental decision-making processes.²⁰ These directives are concerned with ensuring that Member States apply the Aarhus Convention's provisions to the activities of their national public authorities. There is also an EU Regulation applying all three

¹⁷ Article 4(3) of Regulation (EC) No1049/2001.

¹⁸ Article 4(6) and (7) of Regulation (EC) No1049/2001.

¹⁹ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L41, 14.02.2003, p.26.

²⁰ Directive 2003/4/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, p. 17.

pillars of the Aarhus Convention to the actions of Community institutions and bodies, such as the European Commission itself.²¹

The important provisions on transparency and participation that the Aarhus Convention introduces into EU law apply to environmental information held by public authorities and to environmental decision-making processes.

Environmental Information

Crucially, “environmental information” is defined broadly in the Aarhus Convention and in the EU instruments that implement it.

According to Article 2(3) of the Aarhus Convention, “environmental information” includes information on:

“(a) [t]he state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;

(b) [f]actors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

*(c) [t]he state of human health or safety, conditions of human life, cultural sites and built structures, inasmuch they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in sub-paragraph (b) above.*²²

Public authority

A “public authority”, according to Article 2(2) of the Aarhus Convention and Article 2(2) of the Aarhus implementing Directive at Member State level²³ means:

“(a) [g]overnment at national, regional and other level;

(b) [n]atural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;

(c) [a]ny other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;

²¹ Regulation 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters to Community Institutions and Bodies.

²² Closely mirrored by Article 2(1) Directive 2003/4/EC.

²³ Article 2(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L41, 14.02.2003, p.28.

(d) [t]he institutions of any regional economic integration organization referred to in article 17 which is a party to this Convention..."

This definition does not include bodies or institutions acting in a judicial or legislative capacity.

Paragraph (d) covers EU institutions, including the European Commission.

It can be seen that a wide range of information held by Member States, the European Commission and other public authorities in relation to the CFP, the EMFF and the CMO Regulations will fall within this definition. Fishing activities, their impact on the state of the fish stocks and on the marine ecosystem affect elements of the environment such as the oceans (water and seabed) and biodiversity in particular.²⁴ This means that information or scientific data regarding fishing activities and fish stocks held by public authorities, including the European Commission and Member State authorities, are normally environmental information under the Aarhus Convention and the relevant EU implementing legislation. Therefore, the Aarhus Convention applies to data and information relevant to fisheries.

As an integral part of EU law, applicable to both Member State and EU institutions through the Aarhus Convention, Aarhus Directives and Regulations as noted above, the Aarhus Convention rules apply notwithstanding that the CFP, EMFF and CMO Regulations do not directly refer to them. A direct reference would have been desirable in the interests of clarity, particularly for interested parties who may not otherwise be aware of the Aarhus Convention and its significance. However, the absence of a direct reference does not affect the position that Aarhus Convention requirements on transparency and on public participation in decision making processes apply in this context.

Exceptions and limitations to the rights of access to information

The rights of access to information guaranteed by the Aarhus Convention are quite broad and subject only to a number of stated exceptions (see below) that "shall be interpreted in a restrictive way, taking into account the public interest served by disclosure."²⁵ It is also important to note that the exceptions permitted under the Aarhus Convention are more limited than the exceptions to rights of access to information permitted under general EU legislation on transparency (i.e. see above the section on Regulation (EC) No1049/2001).

Specifically, under Article 4(3) of the Aarhus Convention, and respectively in Article 6 of the Aarhus implementing regulation in the EU institutions²⁶ and Article 4(3) of the Aarhus implementing directive at Member State level,²⁷ requests for information may be refused only if:

24 From Decline to Recovery - A rescue Package for the Global Ocean- Global Ocean Commission Report 2014, pp.5-6, www.globaloceancommission.org/wp-content/uploads/GOC_Report_20_6.FINAL_spreads.pdf; Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive), OJ L164, 25.06.2008, p.19, 25 Article 4(3) and 4(4) of the Aarhus Convention; see also Article 4 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L41, 14.02.2003, p.26.

26 Regulation(EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies 1379/2013, OJ L264, 25.09.2006, p.17.

27 Article 4 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L41, 14.02.2003, p.29.

"(a) [t]he public authority to which the request is addressed does not hold the environmental information requested;

(b) [t]he request is manifestly unreasonable or formulated in too general a manner; or

(c) [t]he request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure."

Under Article 4(4) of the Aarhus Convention²⁸, a request for environmental information may be refused if the disclosure would adversely affect:

(a) [t]he confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;

(b) [i]nternational relations, national defence or public security;

(c) [t]he course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;

(d) [t]he confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;

(e) [i]ntellectual property rights;

(f) [t]he confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;

(g) [t]he interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or

(h) [t]he environment to which the information relates, such as the breeding sites of rare species."

For those requesting the environmental information it is important to note that requests where these exceptions apply "may" be refused. This means that there is no obligation on public authorities to apply any of the exceptions; this is merely a discretionary power.

However the jurisprudence *IATA and ELFAA* of the ECJ²⁹ should be recalled in this context. The Court stated that international agreement concluded under the conditions provided for in the TFEU are binding on EU institutions and on Member States and prevail over provisions of

²⁸ Article 6 of Regulation (EC) No 1367/2006 and Article 4 of Directive 2003/4/EC.
²⁹ Case IATA and ELFAA, C-344/04 [2006] ECR I-403, para.35.

secondary EU legislation. Therefore, the wording of the Aarhus Convention prevails over EU secondary legislation; but this can only be confirmed by the ECJ in a judgement.

The collection and dissemination of environmental information

The Aarhus rules cover not only the access to environmental information by request (in Article 4) but also the requirement for public authorities to actively collect and disseminate environmental information i.e. make it publicly available.³⁰ Whilst Article 4 of the Aarhus Convention applies to “environmental information” generally, the Article 5 obligations are in relation to specific categories of information. These include, inter alia, information relevant to public authorities’ functions, information about proposed and existing activities that may significantly affect the environment, information in times of emergencies, information on the state of the environment, product information, pollutant release and transfer information, information about laws, programmes, policies, agreements and other documents relating to the environment and information about how to obtain information³¹ along with progress reports on implementation, steps taken in infringement proceedings, data relating to the monitoring of activities affecting, or likely to affect, the environment, environmental impact studies and risk assessments.³² The obligations also apply to the documents listed in Articles 12 and 13 of the Access to Information Regulation.

Article 5(2) of the Aarhus Convention states:

“Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information accessible to the public is **transparent** and that environmental information is effectively accessible...” (emphasis added).

This can be ensured through, inter alia, providing information to the public about the type and scope of environmental information held by the relevant public authorities, establishing practical arrangements such as publicly accessible lists, registers and files and providing access to information contained in these free of charge.³³

Environmental information is also to be made progressively available in electronic databases which are easily accessible to the public through public telecommunications networks, provided the information is already available in electronic form.³⁴ Under Article 5(3) Aarhus Convention this information is to include: the reports on the state of the environment, texts of legislation relating to the environment, as appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements and other information, to the extent that the

30 Article 5 Aarhus Convention, Articles 1(b) and 4 Regulation(EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies 1379/2013, OJ L264.

31 Article 5 Aarhus Convention.

32 Article 4 Regulation(EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies 1379/2013, OJ L264.

33 Article 5(2) Aarhus Convention.

34 Article 5 Aarhus Convention, Articles 1(b) and 4(1) Regulation(EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies 1379/2013, OJ L264.

availability of such information in this form would facilitate the application of national law implementing this Convention.

Though the rules regarding collection and dissemination of environmental information apply less generally to environmental information, the categories that are covered in both the Aarhus Convention and its EU implementing acts are reasonably wide. As such, it is likely that fisheries-related information which, as discussed above, can be classed as environmental information, will fall under these provisions. To the extent that it does, this information should therefore be made publicly available without the need for a specific information request, though this is still subject to the exemptions in Article 4 of the Convention.³⁵

Public participation

Concerning public participation, the following features of the Aarhus Convention are also important to note. Firstly, the “*public*” is broadly defined and includes both individual citizens and environmental organisations, for example.³⁶ Secondly, the opportunity for public participation must be provided early in a process (when all options are open), and it must be effective.³⁷

The CFP and EMFF Regulations partly ignore obligations under the Aarhus Convention and the directives on access to justice and of participation in the decision making process and instead introduce a range of limitations that go against the relevant requirements (see discussion below).

Conclusion and recommendation – Aarhus Convention and the EU’s implementing legislation

- The Access to Information Regulation and partly the CFP itself require public access to fisheries data held by EU institutions. The Aarhus Convention and its transposing EU directives and regulations grant the right to public access to environmental information held by public authorities, Member States and EU institutions. This international obligation has been integrated in the EU legal order and therefore applies also to the CFP. It is subject to exceptions in line with the Aarhus rules but these should be interpreted restrictively and there is no obligation on public authorities to apply the exceptions; they are simply given a discretionary power to do so.
- Much, if not all, fisheries-related information can be considered 'environmental information' under the Aarhus Convention. Consequently, the CFP, CMO and EMFF Regulations must be interpreted in such a way as to guarantee compliance with the Aarhus Convention. Exceptions must be in line with those allowed by the Aarhus Convention, and should also be interpreted restrictively. The information should be available both upon request and, to the extent that it falls within the relevant categories, through the public accessibility requirements in the Aarhus Convention and its transposing legislation.

³⁵ Article 5(10) Aarhus Convention.

³⁶ Article 2(5) Aarhus Convention.

³⁷ Article 6(4) Aarhus Convention.

Principles of good governance and transparency in the CFP

In line with the recommendations in our briefing of 2011, the new CFP Regulation has included transparency as a guiding principle of good governance.

Article 3 of the CFP Regulation lists the principles of good governance and states that:

"The CFP shall be guided by the following principles of good governance:

[...]

*(f) **appropriate involvement of stakeholders**, in particular Advisory Councils, at all stages-from conception to implementation of the measures; ...*

*(k) **transparency** of data handling in accordance with existing legal requirements, with due respect for private life, the protection of personal data and confidentiality rules; availability of data to the appropriate scientific bodies, other bodies with a scientific or management interest, and other defined end-users..."*
(emphasis added)

Involvement of stakeholders and transparency of data handling are therefore recognised in the new legislation as two important elements of transparency, which increase the legitimacy of the decisions taken under the CFP framework, allow a better knowledge and understanding of the policy, and result in a greater possibility of monitoring whether its objectives are being achieved.

The appropriate involvement of stakeholders is analysed in more detail below, with reference to specific provisions in the CFP Regulation.

The phrase "*end-users of scientific data*" is defined in the CFP Regulation as "*a body with a research or management interest in the scientific analysis of data in the fisheries sector.*"³⁸

Article 3(k) can be broken down into two important elements. The first is that the CFP is built on the principle of transparency of data handling "*in accordance with existing legal requirements*". This is an overriding requirement which, in referring to existing legal requirements, incorporates Aarhus requirements and those of the Access to Information Regulation.

The second important element emphasises that, in addition to general legal requirements on public access to information, there is another important principle of good governance in fisheries management: the need for data to be available to "*the appropriate scientific bodies, other bodies with a scientific or management interest, and other defined end-users*". This does not, and legally cannot, restrict the general right of access to information. Such a restriction would breach legal requirements under the Aarhus Convention, an international convention that cannot be amended by EU secondary legislation. What it does though is reflect the huge importance of scientific and technical advice in effective fisheries management and of the need for good governance.

³⁸ Article 4(32) of the CFP Regulation.

This is further borne out by other provisions in the CFP Regulation. For example, Article 25(2)(c) and (e), which state:

“The collection, management and use of data shall be based on the following principles:

*... (c) safe storage and protection of collected data in computerised databases, **and their public availability** where appropriate, including at aggregated level, whilst ensuring confidentiality; ...*

*(e) the availability in a timely manner of the relevant data and the respective methodologies by which they are obtained, for bodies with a research or management interest in the scientific analysis of data in the fisheries sector **and for any interested parties**, save in circumstances where protection and confidentiality are required under applicable Union law.”* (emphasis added)

Similarly, Recital 46 states that *“Member States should manage and make the collected data available to end-users **and to other interested parties.**”* (emphasis added)

Again, the references to the public and to *“any interested parties”* are made in addition and separately from the references to scientific and research bodies, i.e. *“end-users”*.

Taken together, all of this means that fisheries data and information on fisheries management must be accessible to the public under the CFP Regulation itself, as well as according to the rules of the Access to Information Regulation and under relevant ‘Aarhus rules’, if it is *“environmental information”* under the Aarhus Convention and relevant EU legislation, and if it is held by the EU institutions or by a public authority (as defined by the Aarhus Convention³⁹). This will cover much, if not all, information on fisheries under the wide definition that Aarhus Convention set out above that is to be held by national authorities, Member States and the European institutions, as well as potentially – if they perform public functions – official scientific advisory bodies.

Although the Access to Information and Aarhus rules applied to the previous CFP Regulation and to related legislation, such as the Control Regulation, they were not expressly mentioned in the old CFP Regulation, and they have not been applied. On the contrary, under data collection rules, references to end-users of data may have been interpreted in a restrictive way in the past. As far as this was the case, it was an incorrect and overly restrictive application of the law. The new CFP Regulation has rectified this.

The European Commission has already incorporated higher levels of transparency and access to marine and fisheries related information in its policies – aimed at both increasing the accessibility of marine and fisheries data coming from different sources and at integrating these different data in one accessible tool.⁴⁰ These two objectives are highlighted as part of the Marine Knowledge 2020 Roadmap within the Integrated Maritime Policy of the European Commission. In its document on the Marine Knowledge 2020 Roadmap, the European Commission has

³⁹ Article 2(2) of the Aarhus Convention and transposed in Article 2(2) of Directive 2003/4/EC.

⁴⁰ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Innovation in the Blue Economy realising the potential of our seas and oceans for jobs and growth (COM(2014) 254 final) and the Commission Staff working document Marine Knowledge 2020: roadmap, SWD(2014) 149 final, (Accompanying the Communication above mentioned), (the Marine Knowledge 2020 Roadmap).

identified a process to follow at EU level in order "*to ensure that marine data is easily accessible, interoperable and free of restrictions on use*" and developed a technical tool for this purpose called European Marine Observation and Data Network (EMODnet), which is freely accessible to the public.⁴¹

The EMFF foresees in its Article 82(b)(iii) financing for "*the progressive development of a comprehensive and publicly accessible high quality marine data and knowledge base which shall facilitate the sharing, re-use and dissemination of those data and knowledge among various user groups, thus avoiding a duplication of efforts; for that purpose, the best use shall be made of existing Union and Member States' programmes.*" Even if EMODnet is not specifically mentioned, this shows that the European legislators recognise the importance of having marine and fisheries data publicly available for various purposes, i.e. scientific, environmental or economic.

The Marine Knowledge 2020 roadmap only covers data that can be freely distributed and that are not considered personal under the data protection principles.⁴² According to the European Commission, data linked to fisheries control often can be considered personal data.⁴³ However, in referring to fisheries data collected under the data collection framework of the CFP, the European Commission clarifies that "*both scientific and economic data whose collection is partially funded by the EU*" should be included in EMODnet.⁴⁴

Although the Marine Knowledge 2020 Roadmap is not a legally binding act, the content of the documents gives a clear indication about the European Commission's understanding that economic and scientific, and even control-related, data gathered within the data collection framework of the CFP must be accessible also to the wider public in compliance with the requirements of the Aarhus Convention and the new CFP provisions.

It is now very important for the purposes of transparency and accountability that all national authorities, Member States and EU institutions ensure that access to fisheries information is possible for the public and for environmental organisations in line with the CFP Regulation itself and with relevant access to information rules.

41 See www.emodnet.eu/what-emodnet.

42 Marine Knowledge 2020 Roadmap, paragraph 5, p.13.

43 Marine Knowledge 2020 Roadmap, paragraph 5, p.13.

44 Marine Knowledge 2020 Roadmap, paragraph 5, p.13.

Conclusion and recommendation – principles of good governance and transparency in the CFP

- The CFP Regulation has clearly integrated principles of good governance i.e. access to information and participation of stakeholders, which should be respected throughout the implementation of the whole CFP at the various levels of decision making process (EU level, national level and in the framework of the regionalisation).
- Accessibility of data cannot, as a general principle, be restricted to a narrow category of end users, but must be made widely publicly available in line with the access to information provisions of the Aarhus Convention and its EU transposing acts, unless one of the specific exceptions in the Aarhus Convention applies.

Publicity requirements in the CFP, the EMFF and the CMO Regulations

In addition to providing for general rights of access to fisheries data, the CFP, EMFF and CMO Regulations also contain some specific provisions. Some of the obvious instruments through which fisheries-related information is stored and accessible to the public are registers of the relevant information or electronic (or other) publication of information. These are set out below.

Publicity requirements under the CFP Regulation

Registers

The CFP Regulation provides for two types of registers:

- Article 21(3) provides that any Member State using a system of transferable fishing concessions must maintain a register of such concessions.
- Article 24 provides that Member States must record “*information on ownership, on vessel and gear characteristics and on the activity of Union fishing vessels flying their flag that is necessary for the management of measures*”⁴⁵ under the CFP Regulation. They must submit this information to the European Commission, which itself is under an obligation to “*maintain a Union fishing fleet register containing the information*”⁴⁶ and to “*provide public access to the Union fishing fleet register, while ensuring that personal data is adequately protected*”.⁴⁷ To ensure this, the European Commission is empowered to adopt implementing acts.⁴⁸

Both registers should be publicly accessible in line with the requirements for transparency and public access to information described above. While this is already the case for the Union fishing

45 Article 24(1) CFP Regulation.

46 Article 24(2) CFP Regulation.

47 Article 24(3) CFP Regulation.

48 Article 24(4) CFP Regulation.

fleet register⁴⁹, in relation to transferable fishing concessions Member States are to be responsible for the publication of such a register.

Other provisions requiring public access to documents

In addition to these registers, the CFP Regulation requires the following information to be made publicly available:

- In relation to Member State measures applicable to fishing vessels flying their flag or to persons established in their territory under Article 19 and Member State measures within the 12 nautical mile zone under Article 20, Member States must make publicly available appropriate information concerning the measures adopted.⁵⁰
- With regard to the relevant biological, environmental, technical and socio-economic data (i.e. the data collection framework) necessary for fisheries management, Article 25(2)(c) and (e) (discussed above), requires data to be made publicly available, as does Article 25(3) of the CFP Regulation for Member State reports on the execution of their national data collection programmes.
- Article 31(10) of the CFP Regulation requires not only European Commission ex-ante and ex-post evaluations of each protocol to a Sustainable Fisheries Partnership agreement, but also that a summary of those evaluations be made publicly available.
- Article 22(2) of the CFP Regulation requires that Member States' fleet capacity reports must be made publicly available.⁵¹
- Annex III, paragraph 2(f) of the CFP Regulation requires recommendations of the executive committee of advisory councils to be made available to the public on request, and meetings of the general assembly of advisory councils must be open to the public (paragraph 2(g)). Paragraph 2(e) also imposes a general requirement for transparency.

It should also be noted in this context that the Control Regulation⁵² introduced the obligation to set up national registers for infringements in the fisheries sector,⁵³ which should similarly be publicly accessible in line with the requirements for transparency and public access to information described above.

49 <http://ec.europa.eu/fisheries/fleet/index.cfm?method=Search.menu>

50 Article 19(3) and 20(3) CFP Regulation.

51 Recital 43 and Article 22(2) CFP Regulation.

52 See footnote 8.

53 Article 93 of Council Regulation (EC) No 1224/2009.

Conclusion and recommendations – publicity requirements under the CFP Regulation

The publicity provisions under the CFP Regulation, requiring the public availability of information through registers and in other forms, are very positive in moving towards greater transparency and are in line with the obligations set out in the Aarhus Convention and implementing acts to make environmental information publicly available. In that context, access to information must be protected and applied vigorously and to this end we have the following recommendations:

- Data collected under the data collection framework of the CFP should be accessible to all EU citizens.
- Whilst the European Commission is to maintain the Union fishing fleet register, which is already in place, Member States themselves are to be responsible for establishing registers of transferable fishing concessions. It is important that these registers be maintained, and that information is published at the earliest opportunity to ensure full transparency.
- It would be helpful if the information was available in at least one of the working languages of the European Commission to be published on websites set up by the Member States.

Publicity requirements under the EMFF

The EMFF is part of the EU funds that are managed in cooperation with Member States,⁵⁴ meaning that some of the implementation of the EMFF is delegated to Member States. Both Member States and the European Commission therefore need to respect the general EU financial principles, which include the principle of transparency.⁵⁵ The EMFF identifies several publicity requirements to this end. These are aimed at informing both:

- Union citizens who, in line with the transparency principle, should be able to know where, and for what purpose, funds are spent by the European Union,⁵⁶ and
- beneficiaries, both existing and potential, resulting in transparency and also aligning with the principle of non-discrimination which requires potential beneficiaries to be informed properly about funding possibilities (with a fair and widely advertised selection process, known fair and non-discriminatory selection criteria and process that ensures that all beneficiaries are subject to the same implementing rules and reporting requirements).⁵⁷

⁵⁴ Article 59 of Regulation (EU, EURATOM) No 966/2012.

⁵⁵ Chapter 8 of Title II of Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ L298, 26.10.2012, p.26.

⁵⁶ Recital (16) of Regulation (EU, EURATOM) No 966/2012 and Chapter 8 of Regulation (EU, EURATOM) No 966/2012.

⁵⁷ Article 59 of Regulation (EU, EURATOM) No 966/2012 in conjunction with the sector specific rules Article 125 (2) c) and (3)a) of the Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ L347, 20.12.2013, p. 399 and Article 97 and Article 119 of the EMFF.

The EMFF's specific publicity requirements are contained in the following articles:

- **Article 97** requires publicising the Union contribution of national funding so that Union citizens are aware of the contributions coming from the EU budget. National authorities are also required to send to the European Commission on an annual basis relevant data on the projects selected and financed, as well as on the beneficiaries.
- **Article 119** of the EMFF contains some of the key transparency requirements of the EMFF:

"1. *The managing authority shall be responsible in accordance with point (b) of Article 97(1) for: [...]*

(c) publicising to Union citizens the role and achievements of the EMFF through information and communication actions on the results and impact of partnership agreements, operational programmes and operations;

(d) ensuring that a summary of measures designed to ensure compliance with the CFP rules, including cases of non-compliance by Member States or beneficiaries, as well as of remedy actions such as financial corrections taken, is made publicly available.

2. *In order to ensure transparency concerning the support from the EMFF, Member States shall maintain a list of operations in CSV or XML format which shall be accessible through the single website or the single website portal, providing a list of operations and a summary of the operational programme.*

The list of operations shall be updated at least every six months.

The minimum information to be set out in the list of operations, including specific information concerning operations under Articles 26, 39, 47, 54 and 56, is laid down in Annex V.

3. *Detailed rules concerning the information and publicity measures for the public and information measures for applicants and beneficiaries are laid down in Annex V."*

These reports should be published at EU and at national level in line with the requirements for transparency and public access to information described above. Moreover, owing to the importance of these reports to compliance with the CFP Regulation and the EMFF, the European Commission should produce guidance on this the precise nature the extent of the reports and of the measures to be reported on.

The detailed information required in relation to the specific operations that can be financed under the EMFF is listed in **Annex V** of the EMFF. This includes, for example, Community fleet register identification numbers, which are crucial in easily identifying vessels that have been involved in IUU activities (in which case the vessel should not receive funding under the EMFF).

- **Annex V** also requires managing authorities to publish the names of beneficiaries. It appears that this requirement applies as a matter of course only to beneficiaries that are legal entities. The names of beneficiaries who are natural persons it appears, need only

be published "*in accordance with national law*".⁵⁸ However, the wording of Annex V is very unclear in this regard. If correct, this restriction in relation to natural persons is a notable restriction on transparency of EU spending. Despite being aware that the different treatment of data of natural persons and legal entities is linked to the EU data protection law⁵⁹, the human right of data protection⁶⁰ and the EU court jurisprudence⁶¹, it is worth noting that under the Common Agricultural Policy the rules are different. The Common Agricultural Policy (CAP) Regulation,⁶² for example, requires the publication of the names of natural persons (with some exceptions to balance between protecting personal data and protecting the public's right to information) as well as the names of legal entities. There is absolutely no difference in the fundamental principles surrounding this balancing exercise between the EMFF and the CAP. Both are subject to the same rules (already set out) on access to information. Therefore, if it is acceptable and even necessary in the interests of transparency and good governance to supply the names of beneficiaries who are natural persons under the CAP, then it should be the same for the EMFF. Without this, there is the possibility that the requirement will be subject to differing degrees of stringency based on the national laws involved.

- **Article 67** of the EMFF requires the public availability of the technical and financial costs of storing products for which storage aid is available (a type of compensation for storing specified fishery products in certain situations).⁶³
- **Article 95** of the EMFF provides for public access to the results of certain operations financed under Chapter III (sustainable development of fisheries and aquaculture areas) and Title V (measures financed under shared management) of the EMFF.

Conclusion and recommendations – publicity requirements under the EMFF

Transparency in the EMFF ensures that citizens are able to access information about spending of EU funds but also has the potential benefits of attracting beneficiaries and enabling a best practice approach. However, there are a number of ways in which this could be improved:

- The European Commission should produce guidance on the precise nature of the measures to be reported on under Article 119 of the EMFF connected with improving compliance with the CFP and responding to non-compliance. The reports on compliance, cases of non-compliance and remedy actions should be published both at national and EU level (DG MARE website).
- The European Commission should collect examples of best practice and publish these on

⁵⁸ See European Commission webpage 'European transparency initiative: recipients of EU funding' which states that this is the approach - http://ec.europa.eu/fisheries/contracts_and_funding/the_european_transparency_initiative/index_en.htm

⁵⁹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281, 23.11.1995, p. 31.

⁶⁰ Article 8 of the EU Charter of Fundamental Rights, OJ C 83, 30.3.2010, p. 389.

⁶¹ Judgment of the Court (Grand Chamber) of 9 November 2010, Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen.

⁶² Article 111 and article 112 of Regulation (EU) No 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) No 352/78, (EC) No 165/94, (EC) No 2799/98, (EC) No 814/2000, (EC) No 1290/2005 and (EC) No 485/2008, OJ L347, 20.12.2013, p.549.

⁶³ Article 67 of the EMFF on storage aid.

its own website in order to facilitate and incentivise further best practice. This should be published in at least one of the administrative working languages of the European Commission.

- It would be helpful if Member States also published information on best practice.
- More generally, it would be very helpful if published information at Member State level was available in at least one of the working languages of the European Commission, as well as the original language.
- The EMFF should be aligned with the Common Agriculture Policy (CAP) Regulation in providing for the names of natural persons receiving funding to be published.

Publicity requirements under the CMO

The CMO provides for the following publicity requirements (specific consumer requirements are considered later in this briefing):

- Article 20 provides for the publication of information on the recognition or withdrawal of recognition of producer organisations and inter-branch organisations.
- Article 42(2)(b) of the CMO requires the European Commission to "*make market information, such as price surveys, market analyses and studies, available to all the stakeholders and to the general public in an accessible and understandable manner*".⁶⁴

Reporting obligations under the CFP, EMFF and CMO Regulations

Requirements for different governing authorities proactively to report on certain aspects of fisheries management are another important measure for securing transparency. Importantly, any fisheries information (that is environmental information) collected under the following provisions by the European Commission, Member States or other bodies that can be regarded as public authorities, will need to be accessible to the public, whether or not express provision has been made for public access to the relevant information. This makes all of the reporting requirements in the CFP and connected measures even more important. The reporting requirements mentioned below, which do not expressly foresee public access, must still be published (by preference electronically) in line with the requirements for transparency and public access to information described above.

The reporting obligations that are entailed in the new CFP Regulation cover:

- reporting obligations of the Member States or Advisory Councils to the European Commission; and

⁶⁴ CMO Regulation Article 42(2)(b). This is subject to Regulation (EC) No45/2001 on the protection of personal data processed by the EU institutions and bodies.

- reporting obligations of the European Commission to other EU institutions.

Under each of these categories, the CFP Regulation requires reports to be made on specific subjects, as will be explored in the following sections.

Reporting of Member States⁶⁵ or Advisory Councils to the European Commission

Member States are required to report to the European Commission on:

- the balance of the fishing capacity of their fleet and their available fishing resources (Article 22(2) of the CFP Regulation);
- their data collection programme under the CFP (Article 25(3) of the CFP Regulation).

There are a number of concerns regarding the procedures, quality and timeliness of Member States' reports on fishing capacity, as well as the European Commission's guidelines in relation to this.

Advisory Councils are required to report to the European Commission and to the Member States concerned on their annual activities⁶⁶.

Reporting on use of the funds under the EMFF

Under the EMFF, Member States are required to report on the implementation of the EU funds to the European Commission.

Article 114 of the EMFF on annual implementation reports states:

"1. By 31 May 2016, and by 31 May of each subsequent year up to and including 2023, Member States shall submit to the Commission an annual implementation report on the implementation of the operational programme in the previous calendar year. The report submitted in 2016 shall cover the calendar years 2014 and 2015.

2. In addition to the provisions of Article 50 of Regulation (EU) No 1303/2013, annual implementation reports shall include:

(a) information on financial commitments and expenditure by measure;

(b) a summary of the activities undertaken in relation to the evaluation plan;

(c) information on the actions taken in cases of serious infringements as referred to in Article 10(1) of this Regulation, and of non-respect of the conditions laid down in Article 10(2) of this Regulation, as well as on remedy actions;

⁶⁵ Annex III, para 2(o), CFP Regulation.

⁶⁶ Annex III, para 2(o), CFP Regulation.

(d) information on actions taken to comply with Article 41(10) of this Regulation.;

(e) information on the actions taken to ensure the publication of beneficiaries in accordance with Annex V to this Regulation, for natural persons in accordance with national law, including any applicable threshold."

Article 115(3) of the EMFF on the evaluation reports requires "[t]he evaluation reports shall be made available by Member States on the internet and by the Commission on the Union website."

Lastly, Article 118 of the EMFF requires that: "[a] synthesis at Union level of the ex ante evaluation reports shall be undertaken under the responsibility of the Commission. The synthesis of the evaluation reports shall be completed at the latest by 31 December of the year following the submission of the relevant evaluations."

Conclusion and recommendation – reporting of Member States or Advisory Councils to the European Commission

- The reporting obligations of Member States towards the European Commission set out in the CFP regulation and the EMFF regulation enhance transparency and enable the European Commission to comply with its particular reporting duties to the other EU institutions. The reports should be routinely published in line with the obligations set out in the Aarhus Convention and implementing acts requiring that environmental information be made publicly available. The reporting mechanisms are interlinked due to the fact that EU funds in the fisheries and aquaculture sector are managed jointly by the European Commission and the Member States.
- As Member States and the European Commission have this shared management it is fundamental for Member States to report back to the European Commission in order for the European Commission to ensure that funding is granted in line with the general framework for EU funding and with the specific conditions set in the EMFF.

Reporting of the European Commission to the European Parliament and to the Council

The European Commission is also required under the CFP Regulation to report to the European Parliament and European Council on the implementation of certain aspects of the CFP.

These obligations cover reporting on:

- fish stock recovery areas (Article 8(3) of the CFP);
- the balance of fishing capacity with the available fishing opportunities (Article 22(4) of the CFP);
- achieving MSY (Article 50 of the CFP).

Reporting on fish stock recovery areas

Article 8 of the CFP Regulation contains a new requirement for the establishment of a new network of protected areas, known as fish stock recovery areas, which will be identified by Member States on the basis of their particular biological sensitivity as, for example, juvenile or spawning grounds. According to Article 8(3), the European Commission may be empowered to establish such areas, and is also given reporting responsibilities in this respect:

"The Commission may be empowered in a multiannual plan to establish such biologically sensitive protected areas. Article 18(1) to (6) shall apply. The Commission shall report regularly to the European Parliament and to the Council on protected areas."

Recital 22 gives a broader explanation of the reason why the European Commission should report regularly on the functioning of protected areas: *"to ensure a suitable level of democratic accountability and control."*

Article 8(3) of the CFP Regulation raises a number of questions:

- It is notable that the European Commission's reporting duty actually refers to "*protected areas*", as opposed to "*fish stock recovery areas*". Reading the provision in context, it is likely that the intention is for the European Commission to report on fish stock recovery areas. However this, and the question of whether the European Commission is to report on protected areas more broadly, is not entirely clear and would benefit from clarification by the European Commission.
- It is not specified how '*regularly*' the reports should be made, which is regrettable. This leaves unclear deadlines and procedures and stakeholders, the European Parliament and the European Council will have the responsibility of reminding the European Commission of its obligation in order that reports are made at sufficiently regular intervals that they are useful.
- The level of detail required in the reports is unclear.
- The relevant information may be with the Member States - in this situation the Member State itself may need to report on relevant and detailed information to the European Commission or at least make it available upon the European Commission's request.

Although the primary aim of fish stock recovery areas, as the name indicates, is to safeguard fisheries rather than for environmental protection per se, the reports described above would be a good example of information which is also "*environmental information*" for Aarhus purposes, as progress (or lack of progress) with these measures additionally has clear relevance to the state of biodiversity. Therefore, it must be the case that the reports are either made publicly available as a matter of course, or provided upon the request of citizens or NGOs.

Reporting on the balance between the fishing capacity of their fleets and their fishing opportunities

Article 22(4) of the CFP Regulation follows on from the requirement on Member States to report on their fishing capacity under Article 22(2) (as described above):

"On a yearly basis, the Commission shall prepare a report for the European Parliament and for the Council on the balance between the fishing capacity of the Member States' fleets and their fishing opportunities, in accordance with the guidelines referred to in the first subparagraph of paragraph 2. The report shall include action plans referred to in the first subparagraph of this paragraph. The first report shall be submitted by 31 March 2015."

Reporting on capacity is very much needed in order to ensure a general overview at EU level of the balance between fishing capacity and fishing opportunities. It is very positive that the provision clarifies the frequency of the reporting – yearly – and that relevant action plans must be included. This ensures a close monitoring on fundamental measures aiming at achieving and maintaining a balance between the fishing capacity and the available fishing opportunities.⁶⁷

Reporting on achieving MSY and the situation of fish stocks

Article 50 of the CFP Regulation requires that:

"The Commission shall report annually to the European Parliament and to the Council on the progress on achieving maximum sustainable yield and on the situation of fish stocks, as early as possible following the adoption of the yearly Council Regulation fixing the fishing opportunities available in Union waters and, in certain non-Union waters, to Union vessels."

Reporting on achieving MSY and the situation of the stocks is crucial as ending overfishing and restoring stocks to sustainable levels is the major objective of the CFP Regulation. Reporting in this case is important – but in addition, the response of the European Parliament and Council will be critical. In the event that the progress reported is not good, it will be essential that these two institutions are attentive in their monitoring role, and prepared to challenge robustly any lack of progress if needed.

As can be seen from consideration of the Aarhus Convention earlier in the briefing, reports on MSY and the state of fish stocks will fall within the Convention's definition of "*environmental information*". As a result, the wide public access requirements set out under Aarhus rules would apply. In order to satisfy these requirements and for full transparency, these reports should be made publicly available, preferably on the European Commission's website and in at least one of its administrative working languages. This in turn will contribute to underline the important aspects of monitoring implementation and ensure improved compliance.

⁶⁷ See ClientEarth's briefing on reporting on Fishing capacity under the CFP and the EMFF, June 2015, www.clientearth.org/biodiversity/biodiversity-publications/reporting-on-fishing-capacity-under-the-cfp-and-emff-2894

Reporting on use of the funds under the EMFF

The Commission is subject to a number of reporting obligations under the EMFF, including:

- Article 15 on the distribution of funds: *"The Commission shall review the implementation of Chapter I and II of Title VI, including the need for adjustments of the indicative distribution of funds as laid down in Annex III, and shall, by 30 June 2017, submit to the European Parliament and to the Council an interim evaluation report on the results obtained and the qualitative and quantitative aspects of the EMFF."*
- Article 107 (4) on monitoring and evaluation systems: *"The Commission shall present a report on the implementation of this Article [i.e. the establishment of a common monitoring and evaluation system for EMFF operations under shared management] to the European Parliament and to the Council every four years. The first report shall be presented by 31 December 2017."*
- Article 125 on interim evaluation reporting: *"The Commission shall submit to the European Parliament and the Council:*
 - (a) *by 31 March 2017, an interim evaluation report on the results obtained and the qualitative and quantitative aspects of the implementation of the operations financed under this Regulation;*
 - (b) *by 31 August 2018, a communication on the continuation of the operations financed under this Regulation."*
- Article 117 on ex post evaluation reports: *"In accordance with Article 57 of Regulation (EU) No 1303/2013, an ex post evaluation report shall be prepared by the Commission in close cooperation with Member States."*

These are standard obligations for Union funds.⁶⁸ The European Commission is liable to account for the spending of the Union budget to the European Parliament and the Council. Whilst these reporting obligations do contribute significantly to transparency in relation to funding, the timescales envisaged are long (particularly with references to *"interim evaluations"*) and there is a lack of clarity as to what is to be included in the reports.

Conclusions and recommendations – European Commission reporting requirements

- The reports (on fishing capacity, data collection, fish stock recovery areas, progress with achieving MSY and activities of Advisory Councils), which are required to be made by the European Commission to the European Parliament and Council, should be routinely published in at least one of the European Commission's working languages.
- The European Commission should produce detailed rules or guidance to clarify the procedures and timescales to be employed in reporting on fish stock recovery areas (established under Article 8 of the CFP Regulation). In addition, where the relevant information required to report on fish stock recovery areas is held by a Member State, the Member State itself may need to report on any relevant and detailed information to the

⁶⁸ In particular see Article 59 of Regulation (EU, EURATOM) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002, OJ L298, 26.10.2012, p.1.

European Commission or at least make it available upon the European Commission's request.

- The fleet reports on fishing capacity should also be published at national level as soon as these reports are transmitted to the European Commission.
- The fact that plans to reduce the imbalance between Member States' fishing capacity and their available fishing opportunities must be publicly available strengthens Member States' accountability regarding the success or failures of these measures. It also requires Member States to change these measures should the reporting show that they are failing to achieve their objective. Transparency in this case will certainly and more easily have a direct effect on measures adopted by Member States.

Participation and involvement of stakeholders

Consultation of Advisory Councils

Fisheries Advisory Councils, originally established under the title Regional Advisory Councils during the period of the 2002 Common Fisheries Policy, are an important way in which the CFP provides for more public participation in fisheries decision-making, as well as more transparency. Advisory Councils have an enhanced role under the new CFP. They 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.⁶⁹

ClientEarth has analysed in detail in a separate briefing the new requirements introduced in the CFP Regulation for the consultation of the Advisory Councils.⁷⁰ The briefing highlights their role under the new CFP Regulation and how this has been strengthened. In short, 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.⁷¹ However, there was no obligation to do so. The new CFP Regulation makes it a duty for Member States and the European Commission to consult Advisory Councils under certain circumstances, and elaborates on the process to be followed for this consultation – expressly requiring, for example, that their advice *must* be taken into account.

The reason behind this enhanced role for Advisory Councils is summarised in Recital 65, which recognises that "*[d]ialogue with stakeholders, has proven to be essential for achieving the objectives of the CFP.*" It should be noted that alongside the obligation on the European Commission and Member States to consult these entities, Article 44(2) of the CFP Regulation encourages Advisory Councils also to be pro-active by: delivering opinions, suggestions,

⁶⁹ Article 43 of the CFP Regulation 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.

⁷⁰ <http://www.clientearth.org/reports/300614-briefing-on-consultation-of-advisory-councils-under-the-cfp-june-2014.pdf>

⁷¹ 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.

recommendations, informing the European Commission and Member States about problems in the management of fisheries, as well as proposing solutions, contributing to the collection, supply and analysis of data. These are opportunities offered to participate in the decision making process of fisheries management at regional level that should be used by the Advisory Councils.

In addition, Article 44(3) of the CFP Regulation requires the European Commission and Member States to consult the Advisory Councils in the framework of the adoption of joint recommendations. Advisory Councils should also embrace these opportunities of contributing to the decision making process and the implementation of the CFP at EU level.

The enhanced role of Advisory Councils under the CFP does not in itself adequately satisfy the Aarhus Regulation requirements. On a broader level, the Aarhus Regulation is concerned with the participation of the public generally in environmental decision-making i.e. its remit is much wider than the consultation of specific stakeholder bodies such as Advisory Councils. More specifically, these bodies, which have the potential to influence decisions at a high level, are by their nature limited in both membership and scope of discussion. Advisory Councils only leave 40%⁷² of their membership open to stakeholders other than fishing industry representatives⁷³ (for example environmental NGOs and consumer protection entities), which shows that the same levels of participation are not made available to these other groups of stakeholders.

Conclusion and recommendation – participation and involvement of stakeholders

- The new CFP strengthens the rules regarding the participation and consultation of stakeholders by placing a duty upon Member States and the European Commission to consult Advisory Councils.
- These rules should be robustly applied. Whenever Advisory Councils are consulted their advice is legally required to be taken into account, meaning that it must be properly considered, not ignored, and rejected only when there are reasons for doing so.
- Advisory Councils should encourage fullest possible participation by all stakeholder groups.
- Additionally, it should be ensured that at least one representative each from the fishing industry and the 'other interest groups' is present at all meetings.

Transparency for the protection of EU consumers with regard to fishery and aquaculture products

In addition to the obligations it places on public authorities to handle data transparently, the reformed CFP addresses another transparency issue, that of markets and the supply chain for fishery and aquaculture products. This is in line with the requirements of Article 12 of the TFEU

⁷² CFP Regulation 1380/2013 Annex III.

⁷³ CFP Regulation 1380/2013 Annex III - "representatives of fishermen and for the Aquaculture Advisory Council, aquaculture operators, and representatives of the processing and marketing sectors".

requiring protection for the consumer. One of the means to ensure the achievement of this objective is labelling of products directed to consumers. Article 35(1)(d) of the CFP Regulation requires improved transparency in respect of markets and towards consumers in the following terms:

"1. A common organisation of the markets in fishery and aquaculture products (the common market organisation) shall be established to: ...

*(d) improve the transparency and stability of the markets, in particular as regards economic knowledge and understanding of the Union markets for fishery and aquaculture products along the supply chain, ensure that the distribution of added value along the sector's supply chain is more balanced, **improve consumer information** and raise awareness, by means of notification and labelling that provides comprehensible information; ..."* (emphasis added)

Labelling is indeed a means to increase transparency of fishery and aquaculture products. This provision ties in with existing provisions in the Control Regulation (Article 58), which requires certain information to be available at all stages of production and some information to be available also to consumers:

"1. Without prejudice to Regulation (EC) No 178/2002, all lots of fisheries and aquaculture products shall be traceable at all stages of production, processing and distribution, from catching or harvesting to retail stage. ...

5. The minimum labelling and information requirements for all lots of fisheries and aquaculture products shall include:

(a) the identification number of each lot;

(b) the external identification number and name of the fishing vessel or the name of the aquaculture production unit;

(c) the FAO alpha-3 code of each species;

(d) the date of catches or the date of production;

(e) the quantities of each species in kilograms expressed in net weight or, where appropriate, the number of individuals;

(f) the name and address of the suppliers;

(g) the information to consumers provided for in Article 8 of Regulation (EC) No 2065/2001: the commercial designation, the scientific name, the relevant geographical area and the production method;

(h) whether the fisheries products have been previously frozen or not.

6. *Member States shall ensure that the information listed in points (g) and (h) of paragraph 5 is available to the consumer at retail sale stage."*

The concrete legal obligations listed above extend specific, pro-active transparency obligations to producers/retailers of fishery products, and to Member States (in ensuring that enterprises do what is required). It is welcomed that the CFP Regulation, in emphasising the importance of transparency in markets, reinforces the pre-existing labelling requirements of the Control Regulation. The reference to transparency of the markets and towards consumers in the new CFP is a reflection of these legal obligations on the Producer Organisations, which should increase transparency for economic operators and consumers through their role on the markets.

In addition, Recital 21 of the CMO states:

"In order to enable consumers to make informed choices, it is necessary for them to be provided with clear and comprehensive information on, inter alia, the origin and the method of production of the products."

The requirements for such consumer information are contained in Chapter IV of the CMO. Article 35 sets out the mandatory information that is to be indicated through appropriate marking or labelling in order that a fishery or aquaculture product may be offered for sale to the final consumer or a mass caterer.⁷⁴ The mandatory information includes the scientific name of the seafood species and the fishing gear category used to capture wild fish, set out in Annex III of the CMO.⁷⁵ It is notable that there is no comparable mandatory requirement to detail production methods for farmed fish. Whilst this is possibly a reflection on the size of the EU's aquaculture industry, the inclusion of this information would ensure greater transparency.

Article 39 CMO sets out voluntary information that can be provided, including further information on fishing gear set out in Annex III, environmental information, production techniques, ethical or social information and production practices. Importantly, all voluntary information must be clear and unambiguous and verifiable. If not, it should not be included.

The CMO makes provision for the possibility of an eco-labelling scheme for fishery and aquaculture products, in particular on establishing such a scheme on a Union-wide basis and on setting minimum requirements for the use by Member States of an eco-label.⁷⁶ Whilst this should enhance transparency for consumers the European Commission is yet to provide a feasibility report on this.⁷⁷

⁷⁴ Regulation 1169/2011 on the provision of food information to consumers, amending Regulations (EC) No 1924/2006 and (EC) No 1925/2006 of the European Parliament and of the Council, and repealing Commission Directive 87/250/EEC, Council Directive 90/496/EEC, Commission Directive 1999/10/EC, Directive 2000/13/EC of the European Parliament and of the Council, Commission Directives 2002/67/EC and 2008/5/EC and Commission Regulation (EC) No 608/2004 also applies to labelling. This Regulation applies unless there are more specific measures in the CMO, in which case the CMO also applies.

⁷⁵ Regulation 1379/2013 Annex III.

⁷⁶ Regulation 1379/2013 Article 36.

⁷⁷ This report is due 1 January 2015.

Conclusion and recommendations – transparency for the protection of EU consumers

- The improvement of the information available to consumers through labelling is an important aspect of the CFP and CMO Regulations, extending specific, pro-active transparency obligations to producers/retailers of fishery products and to Member States. However, in order for the labelling requirements to be fully effective the following should apply:
- The inclusion of a mandatory requirement under the CMO to detail production methods for aquaculture products equivalent to the requirement to detail fishing gear used for catching wild fish would ensure greater transparency. This should be considered in the next reform of the CMO.
- As long as the information is clear, unambiguous and verifiable, voluntary as well as mandatory information should be included when marking or labelling fishery and aquaculture products so that consumers can make fully informed decisions.

Conclusion

Transparency is an essential element of fisheries management, allowing civil society to monitor national and EU authorities, as well as assisting regulators in improving their own transparency and monitoring, both of which contribute to overall compliance. As this briefing shows, the provisions in the reformed CFP, EMFF and CMO Regulations have largely been improved in terms of the transparency that they will provide. They more clearly apply the rules set out in the Aarhus Convention (although not directly referencing them) and the Access to Information Regulation.

This is important as the Aarhus Convention makes clear that environmental information, which includes fisheries-related information, should be publicly accessible in a broad range of situations, with only a limited number of exceptions. Those requesting or trying to access such information should be aware not only of these limited exceptions but also of the fact that the refusal of a public authority to provide information based on these is discretionary.

Positive steps have been taken in terms of publicity and reporting requirements under the Regulations. However, these will need to be robustly applied. Publicly accessible registers should be maintained and, under the EMFF Regulation the publication by the Commission and Member States of examples of best practice could contribute to the incentivisation of this behaviour in beneficiaries, potential or otherwise. The reporting obligations of the Member States and the European Commission requirements are comprehensive but are interlinked and will require cooperation, as well as further clarification in areas such as reporting on fish stock recovery areas.

Finally, the CFP, EMFF and CMO Regulations have enhanced transparency in the fields of participation of stakeholders and consumer information. Provision for the enhanced participation

of Advisory Councils in the CFP Regulation is more closely meeting the requirements of the Aarhus Convention, though care should be taken to encourage the fullest possible participation by all stakeholder groups. Whilst the requirements could go further, the improvement of the information available to consumers through labelling recognises the importance of transparency in the markets and supply chain.

Overall, it can be seen that specific rules on access to environmental information and public participation in environmental decision-making are in some cases given specific effect under the CFP, EMFF and CMO Regulations' new provisions, but in other cases further interpretation and guidance will be necessary.

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