

# Technical measures and the procedural jigsaw

## Key points and recommendations

- Common objectives and targets for technical measures are essential to ensure Common Fisheries Policy (CFP) objectives are met throughout EU waters. Regionalisation processes in the CFP Basic Regulation<sup>1</sup> and in the Technical Conservation Measures Framework (TCMF) Proposal<sup>2</sup> introduce flexibility and the ability for decision-making to develop regionally tailored technical measures.
- The TCMF must ensure that joint recommendations on regionalised technical measures achieve the objectives of the CFP Basic Regulation in a coherent and coordinated way. Reliable scientific advice and evidence must remain a strong requirement in the proposal and must show that regional technical measures will be at least as good, if not better, at achieving these objectives than the existing regional baselines in the proposal.
- The regionalisation process in Article 18 of the CFP Basic Regulation is the default regionalisation process that enables Member States to develop joint recommendations on regionalised technical measures. In the medium term, these joint recommendations will feed into the discard plans to implement the landing obligation. In the longer term, once all regional multiannual plans (MAPs) are in place, joint recommendations on regionalised technical measures will be linked and implement the relevant MAPs. Each MAP will be the 'umbrella' framework in its sea region that regulates all the regionalised aspects of fisheries management.
- Member States and the European Commission must ensure that technical conservation measures adopted under Article 25 of the TCMF Proposal are consistent with the technical measures adopted to comply with environmental requirements under the Nature Directives<sup>3</sup> and the Marine Strategy Framework Directive<sup>4</sup> (MSFD) under Article 11 of the CFP Basic Regulation.
- Similar regionalisation processes are foreseen to implement the landing obligation (joint recommendations from regional Member States groups that are incorporated into discard plans and later MAPs), regional technical measures (joint recommendations under the TCMF and MAPs), and to protect sensitive species and habitats (joint recommendations

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1 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. (hereinafter referred to as CFP Basic Regulation).

2 Proposal for a Regulation of the European Parliament and the Council on the conservation of fishery resources and the protection of marine ecosystems through technical measures, amending Council Regulations (EC) No 1967/2006, (EC) No 1098/2007, (EC) No 1224/2009 and Regulations (EU) No 1343/2011 and (EU) No 1380/2013 of the European Parliament and of the Council, and repealing Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005, COM(2016)134 final. (hereinafter referred to as TCMF Proposal).

3 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L206, 22.07.1992, p.7 (hereinafter referred to as Habitats Directive); Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L20, 26.01.2010, p.9 (hereinafter referred to as Birds Directive).

4 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.

under Article 11 of CFP Basic regulation and joint recommendations under the TCMF). This is good for clarity among stakeholders and decision-makers, and should help ensure coherence in the implementation of EU fisheries and environmental policies.

## Background

On 11 March 2016, the European Commission released its proposal for a regulation on the technical conservation measures framework for fisheries (hereinafter referred to as TCMF Proposal). The current technical measures framework is one of the last pieces of existing EU fisheries legislation that needs to be revised to align it with the new CFP Basic Regulation.<sup>5</sup> The new framework will replace several pieces of legislation<sup>6</sup> that are no longer in line with the requirements of the reformed CFP.

Technical measures outline the operational boundaries for how, when, and where fishing activities should be carried out, and are defined as *'tools to support the implementation of the Common Fisheries Policy'*.<sup>7</sup> They may include measures that relate to the operation of the gear or its design characteristics, establish minimum reference sizes below which fish cannot be sold for human consumption and set spatial and temporal controls or closed areas<sup>8</sup> for environmental protection purposes. This means technical measures relate not only the management of fish stocks but also to the elimination or reduction of adverse impacts of fishing on the marine environment as a whole. In addition to establishing a common baseline for fishing operations in EU waters, these measures are the technical "details" needed to implement regional discard plans<sup>9</sup> or regional multiannual plans (MAPs).<sup>10</sup>

The purpose of the revised TCMF, as explicitly referred to in the title of the regulation, is to design technical measures that will contribute to the conservation of fishery resources and the protection of marine ecosystems. This should therefore ensure that technical measures contribute to achieving the objectives of the CFP, including coherence with relevant EU environmental legislation.

The Commission's proposal also aims to simplify the current network of rules, creating the flexibility required to adopt technical measures tailored to suit regional needs.<sup>11</sup>

In this briefing we will analyse the processes proposed in the TCMF Proposal for the adoption and implementation of technical measures. We will also analyse how these processes fit with other instruments implementing the CFP, particularly discard plans and MAPs.

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5 The CFP Basic Regulation was adopted in 2013.

6 The proposal amends Council Regulations (EC) No 1967/2006, (EC) No 1098/2007, (EC) No 1224/2009 and Regulations (EU) No 1343/2011 and (EU) No 1380/2013 of the European Parliament and of the Council, and repeals Council Regulations (EC) No 894/97, (EC) No 850/98, (EC) No 2549/2000, (EC) No 254/2002, (EC) No 812/2004 and (EC) No 2187/2005.

7 Explanatory memorandum of the COM TCMF Proposal, p.5.

8 COM TCMF Proposal p.2.

9 Article 15(6) of the CFP Basic Regulation.

10 Article 9 and Article 10 of the CFP Basic Regulation.

11 Explanatory memorandum of the COM TCMF Proposal, p.5.

## 1 The TCMF Proposal: combining regionalisation and EU-level measures

The TCMF Proposal lays down general and specific objectives (Article 3) and targets (Article 4) to be achieved throughout EU waters.

The objectives are broad and cover aspects of the CFP such as the optimisation of exploitation patterns to increase the protections of juveniles or the minimisation of bycatches or the compliance of fisheries management with EU environmental obligations.<sup>12</sup>

However, the targets in the TCMF Proposal are more concrete:

- ensure that catches of marine species below minimum conservation sizes do not exceed 5% by volume,
- ensure that bycatches of non-commercially exploited species do not exceed levels provided in EU law and international agreements, and
- ensure that environmental impacts of fishing activities on seabed habitats do not exceed levels needed to achieve Good Environmental Status under the MSFD.<sup>13</sup>

These common objectives and targets incorporate not only the specific TCMF objectives but also the objectives of the CFP, with Article 3 stating "*technical measures shall contribute to the objectives of the CFP set out in Article 2 of [the CFP Basic Regulation] and in particular paragraphs 2,3 and 5(a) and (j) of that Article*". The TCMF Proposal also provides for a regionalisation process where the regional baseline technical measures can be amended, supplemented or derogated from. However, these common objectives and targets are essential to ensure that the TCMF and CFP objectives are met throughout EU waters. The objectives and targets apply to all measures, whether common or regional. These two types of measures are discussed below.

### Common Technical Measures

Chapter II (supported by Annexes I-IV) outlines common measures. Common technical measures cover fundamental prohibitions and restrictions that cannot be modified at a regional level and are based on scientific evidence regarding the impact of these activities on targeted or untargeted species, bycatch, habitats and the wider marine environment.<sup>14</sup> They include measures pertaining to the use of towed and static gears, or prohibiting particularly harmful

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12 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L206, 22.07.1992, p.7.(Habitats Directive); Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L20, 26.01.2010, p.9 (Birds Directive); Directive 2008/56/EC of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (hereinafter referred to as MSFD), OJ L164, 25.06.2008, p.19 (MSFD); Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1.

13 Article 1 of the MSFD and Commission Decision of 1 September 2010 on criteria and methodological standards on good environmental status of marine waters, C(2010) 5956, OJL232, 2.9.2010, p.14.

14 Saila et al. 1993: Review of the use of underwater explosives and their harmful effect (on fish, coral reefs) of blast fishing and use of poisons; McManus et al 1997: study about effects of destructive fishing methods (blasting, coral-grabbing anchors, cyanide) on coral reefs, and recovery; Fox & Caldwell 2006: study about (lack of) recovery of coral reefs impacted by blast / dynamite fishing; Fox et al. 2003: study about long-term effects of blast fishing.

fishing methods, such as those using explosives. Importantly, common technical measures cannot be modified and will apply irrespective of technical measures adopted at regional level.<sup>15</sup>

## Regional Technical Measures

In addition to the common technical measures, the proposal sets out baseline technical measures for each EU sea region in Annexes V to XI. These baseline measures will apply unless other measures are adopted through the regionalised process.<sup>16</sup> The requirements and procedures for the adoption of technical measures at regional level are provided for in Chapter III of the TCMF Proposal. This process is discussed in more detail in section 2. The idea is that regional technical measures may be more effective at meeting regional needs and specificities. And, because these are implemented through delegated acts instead of through the co-decision process, it should be possible to alter them more quickly if necessary due to changing conditions or new developments.

However, technical measures developed at regional level must contribute to the objectives of the CFP, in line with Article 3(1) of the TCMF Proposal, as well as meet the objectives and targets of the TCMF itself. To this end, the TCMF Proposal states that technical measures adopted at regional level shall "*as a minimum be equivalent in terms of exploitation pattern and level of protection for sensitive species and habitats*" as the baseline technical measures.<sup>17</sup> It follows that regionalised technical measures must be at least as good, if not better, at achieving the objectives of the TCMF and the CFP in terms of exploitation patterns and level of protection for sensitive species and habitats than the baseline technical measures. In addition, regionalised technical measures must also be designed to achieve the other objectives of the CFP as referred to in Article 3 of the TCMF Proposal. If they are not, the measures cannot be adopted and the baseline measures provided in the Annexes must remain in place.

The question is: how to ensure that technical measures adopted at regional level are equivalent to or better than the baseline technical measures at achieving the CFP and TCMF objectives?

## Best available scientific advice

One of the principles of the CFP relates to good governance, part of which requires that CFP measures must be established in accordance with the best available scientific advice.<sup>18</sup> In line with this principle, technical measures proposed at regional level must be supported by robust scientific evidence. This evidence should demonstrate they will perform equally well, if not better, at achieving the CFP's objectives and the targets of the TCMF as the baseline technical measures in the TCMF Annexes.<sup>19</sup>

The need for a robust scientific basis for the technical measures is further highlighted in Article 19(6), which empowers the European Commission to request the Scientific, Technical and Economic Committee for Fisheries (STECF)<sup>20</sup> to assess the joint recommendations. The European Commission must follow this procedure and take STECF's advice into account when

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<sup>15</sup> Article 7 to 13 and Annex I to Annex IV of the TCMF Proposal.

<sup>16</sup> Annex V to Annex XI of the TCMF Proposal.

<sup>17</sup> Article 18(3) of the TCMF Proposal.

<sup>18</sup> Article 19(4) b) of the TCMF Proposal and Article 3(c) of the CFP Basic Regulation.

<sup>19</sup> Article 18(3) of the TCMF Proposal.

<sup>20</sup> <https://stecf.jrc.ec.europa.eu/>

deciding whether to adopt the joint recommendations as delegated acts to bring the proposed regional technical measures into force.

## 2 Regionalisation: several instruments but only one CFP

Article 18 of the CFP Basic Regulation sets out the regionalisation process through which regionalised management measures can be adopted. The process can be summarised as follows: Member States that share a direct management interest in a fishery can agree to cooperate and submit joint recommendations for new measures relevant to that fishery to be adopted. This regionalisation process is included in several instruments implementing various aspects of the CFP such as discard plans to implement the landing obligation,<sup>21</sup> fisheries management measures to comply with EU environmental legislation,<sup>22</sup> or new technical measures through the TCMF<sup>23</sup> or MAPs<sup>24</sup>. As part of this process, Member States must consult the relevant Advisory Councils. They may then submit the joint recommendations to the European Commission. The European Commission is empowered to adopt delegated acts provided the measures proposed are compatible with the relevant conservation measure and/or multiannual plan, are in line with the objectives of the CFP and are at least as stringent as measures under EU law.<sup>25</sup>

The procedure of Article 18 of the CFP Basic Regulation is mentioned in the TCMF Proposal as the default procedure to be used to adopt technical measures at regional level.<sup>26</sup> Article 19 of the TCMF Proposal incorporates this regionalisation process and Article 32 of the TCMF Proposal empowers the European Commission to adopt delegated acts establishing technical measures at regional level in order to implement MAPs. Through this regionalisation process, Member States may therefore submit joint recommendations for the establishment of technical measures to amend, supplement or derogate from the baseline technical measures. However, Member States can adopt joint recommendations in this context only if they provide scientific evidence showing that the proposed technical measures are equivalent to or better than the baseline technical measures at achieving the objectives of the CFP, as discussed in section 1.

Articles 20 to 25 of the TCMF Proposal cover specific types of technical measures: those relating to the species and size selectivity of fishing gears, to closed or restricted areas to protect juveniles and spawning aggregations, to minimum conservation reference sizes, real-time closure and moving on provisions, to the use of innovative fishing gears and to nature conservation measures. They all refer to Article 19 of the TCMF Proposal which means that the regionalisation process to be used is the one of Article 18 of the CFP Basic Regulation and that the joint recommendations must be adopted in the framework of MAPs.

Finally, Article 26 of the TCMF Proposal makes reference to Article 15(6) of the CFP Basic Regulation which in its turn makes reference to Article 18 of the CFP Basic Regulation. Therefore the same regionalisation process can be used to introduce regionalised technical measures in temporary discards plans in the context of implementing the landing obligation.

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21 Article 15(6) of the CFP Basic Regulation.

22 Article 11 of the CFP Basic Regulation.

23 Chapter III of the TCMF Proposal.

24 Article 8 and Article 9 of Regulation (EU) 2016/1139 of the European Parliament and of the Council establishing a multiannual plan for the stocks of cod, herring and sprat in the Baltic Sea and the fisheries exploiting those stocks, amending Council Regulation (EC) No 2187/2005 and repealing Council Regulation (EC) No 1098/2007, OJL191, 15.7.2016, p.1 (referred to hereinafter as the Baltic Sea MAP Regulation).

25 Article 18(5) of the CFP Basic Regulation.

26 Article 18(2) of the TCMF Proposal.

The next question is: how do the technical measures adopted at regional level under the TCMF fit into a legal structure that already provides for the adoption of regional measures through other instruments, such as MAPs and DPs? This is outlined in Chapter III of the TCMF Proposal.

Several implementing instruments of the CFP that may contain technical measures foresee the use of the regionalisation process described above.<sup>27</sup> The main implementing instruments are MAPs, which are meant to establish a framework for the long-term sustainable exploitation of stocks and protection of the marine ecosystem,<sup>28</sup> and discard plans, which are meant to implement the landing obligation and will be in place on a temporary basis until a MAP is adopted in that region.<sup>29</sup>

It is important to look at the regionalisation process and the adoption of the different implementing measures with a long-term perspective. For the time being, a number of implementing acts of the CFP can be developed at regional level. This has the potential to create a confused web of legal instruments and therefore a lack of legal certainty. We have to differentiate between the medium term (next 2-3 years) and the longer term.

In the medium term, before MAPs are in place, technical measures to support the implementation of the landing obligation can be developed at regional level as part of discard plans. For technical measures addressing other aspects of fisheries management, the baseline technical measures in the TFCM Proposal will apply until the relevant MAPs are in place. Once MAPs are adopted, discard plans will not be needed anymore and joint recommendations with regionalised technical measures (whether related to the landing obligation or not) will be directly implementing the MAPs. These joint recommendations adopted under the umbrella of MAPs will become binding through delegated acts adopted by the European Commission.

Finally, Articles 18 and 19 of the TCMF Proposal outline the guiding principles and conditions upon which regionalisation can occur. These articles create a coherent set of legal provisions, ensuring that the same regionalisation procedure outlined in Article 18 of the CFP Basic Regulation can be used to include technical measures adopted at regional level in the MAPs. Once the TCMF Proposal and all MAPs have been adopted, one joint recommendation in a given region will be able to cover all aspects of fisheries management, including technical measures developed at regional level.

### 3 Technical measures and coherence with EU environmental legislation

Technical measures are necessary not only for the management of fished stocks, but also for managing the impacts of fishing on other components of the marine environment, including non-target species, habitats and ecosystems. Therefore as required in the CFP Basic Regulation,<sup>30</sup> it is fundamental to ensure coherence between measures adopted under the TCMF and measures required under EU environmental law (in particular the Nature Directives and Marine Strategy Framework Directive). This is relevant both for the management of fishing activities in

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<sup>27</sup> Article 18(2) of the TCMF Proposal.

<sup>28</sup> Article 9 and Article 10 of the CFP Basic Regulation.

<sup>29</sup> See for example Article 8 and Article 9 of the Baltic Sea MAP Regulation and for discard plans, Article 9 and Article 12 of the Proposal for a Regulation of the European Parliament and of the Council on establishing a multi-annual plan for demersal stocks in the North Sea and the fisheries exploiting those stocks and repealing Council Regulation (EC 676/2007 and Council Regulation (EC) 1342/2008, COM(2016) 493 final and Article 15(6) of the CFP Basic Regulation.

<sup>30</sup> Article 2(5j) of the CFP Basic Regulation.

designated marine protected areas,<sup>31</sup> but also for the management of fishing activities outside of protected areas (for example, bycatch mitigation measures).

In recognition of the importance of managing fishing to achieve environmental aims, the TCMF Proposal includes some common technical measures on the protection of sensitive species and habitats (Articles 11 to 13) as well as some baseline technical measures (Annex V to X).

The common technical measures on the protection of sensitive species and habitats<sup>32</sup> includes a list of prohibited fish and shellfish,<sup>33</sup> marine mammals, sea birds and marine reptiles<sup>34</sup> whose catching is prohibited in EU waters, as well as the procedure to adopt national mitigation measures to deal with accidental bycatches of these species.<sup>35</sup> This section also includes a list of fishing gears whose use is prohibited under certain conditions<sup>36</sup> and a list of species whose capture with driftnets is prohibited<sup>37</sup>.

The baseline technical measures in the regional annexes relate to the protection of species or sensitive habitats<sup>38</sup> and includes measures such as temporary or permanent area closures or restrictions, restrictions on the use of certain fishing gears in given areas, mitigation measures for certain species and measures to reduce bycatches.

In line with the common objective of the TCMF Proposal<sup>39</sup> and of the CFP Basic Regulation<sup>40</sup> to develop fisheries management measures that are coherent with EU environmental legislation, Article 25 of the TCMF Proposal allows for the adoption of technical measures for nature conservation purposes that go beyond those already included in regional annexes. These nature conservation measures can include, for example, the listing of sensitive species and habitats most at risk from fishing (beyond those already identified under the Nature Directives) or the specification of mitigation measures to minimise bycatches. These measures could also cover, for example, nature conservation measures under Article 13(5) of the MSFD that address significant impacts of fisheries on the marine environment outside of marine protected areas. Technical conservation measures to protect sensitive species and habitats<sup>41</sup> covered by Article 25 of the TCMF Proposal will be adopted through the regionalisation process described in Article 18 of the CFP Basic Regulation.

In contrast, the process to adopt nature conservation measures to implement Article 13(4) of the MSFD, Article 4 of the Birds Directives and Article 6 of the Habitats Directive, specifically, is outlined in Article 11 of the CFP Basic Regulation. This procedure aims to ensure coherence and consistency of both fisheries management and environmental measures developed at regional level and is very similar to the procedure foreseen in Articles 18 of the CFP Basic Regulation. Both the Article 11 and Article 18 procedures in the CFP Basic Regulation require Member States concerned to agree on conservation measures and develop joint recommendations accordingly, and in both processes relevant EU environmental experts must

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31 Article 6 of the Habitats Directive, Article 4 of the Birds Directive and Article 13(4) of the MSFD.

32 Article 11 to Article 13 of the TCMF Proposal.

33 Annex I of the TCMF Proposal and Annex IV of the Habitats Directive.

34 Annexes II and IV of the Habitats Directive and seabirds covered in Annex I and Annex II of the Birds Directive.

35 Article 1912 of the TCMF Proposal.

36 Annex II of the TCMF Proposal.

37 Annex III of the TCMF Proposal.

38 Annex V to XI of the TCMF Proposal.

39 Article 3(2)(d) of the TCMF Proposal.

40 Article 2(5)(j) of the CFP Basic Regulation.

41 Designated as such according to the requirements of Article 3 and Annex III of the Habitats Directive.

review the JR proposals before they are adopted to ensure they are compatible with the environmental legislation that they intend to implement.

The difference between these two procedures is that measures can only be introduced under Article 11 of the CFP Basic Regulation if they are for the purpose of implementing specific provisions in EU environmental law, particularly in relation to marine protected areas,<sup>42</sup> whereas Article 25 of the TCMF Proposal allows for the wider adoption of nature conservation fisheries measures through the process in Article 18 of the CFP Basic Regulation.

The fisheries management measures for nature conservation purposes, developed through these regionalisation processes, complete the scope of joint recommendations that can be adopted under the TCMF.

## Conclusion

With the combination of common technical measures and regional baseline technical measures, the TCMF Proposal ensures that the EU will have a coherent yet tailored set of fisheries management measures across the EU's regions. The TCMF Proposal also offers the necessary flexibility for groups of Member States to depart from the regional baseline technical measures in the proposal and develop new regional technical measures. Regional technical measures can only come into force if they are supported by scientific evidence demonstrating they will be at least as good, if not better, at achieving the objectives and targets in the TCMF and the objectives of the CFP.

The regionalisation process, outlined in Article 18 of the CFP Basic Regulation, enables joint recommendations with customised regional technical measures to feed into other CFP implementing instruments (i.e. MAPs) by way of delegated acts.

Finally, Article 25 of the TCMF Proposal provides for the development of joint recommendations through regionalisation for the purposes of nature conservation. This complements the process in Article 11 of the CFP Basic Regulation through which Member States can develop fisheries management measures for the purposes of complying specifically with Article 13(4) of the MSFD, Article 4 of the Birds Directive, or Article 6 of the Habitats Directive. Although these joint recommendations for nature conservation purposes are developed through slightly different processes, both sets of joint recommendations should be linked to other CFP implementing instruments such as MAPs. Having the same actors issuing the same type of instruments is an important way of ensuring coherence and complementarity between the CFP objectives and the EU environmental obligations.

In terms of procedures, the CFP jigsaw is complete.

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<sup>42</sup> See our briefings on Article 11 of the CFP Basic Regulation: [Simply Article 11](#) and [Article 11 Report](#).



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