



Dividing the common pond: Regionalizing EU ocean governance

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ABSTRACT

EU ocean policies increasingly incorporate regional measures. Under the long standing Common Fisheries Policy, such measures aim at improving and reforming existing policy, either by taking into account region specific social or ecologic requirements or by establishing procedures and institutions to achieve a regional fit. By contrast, the EU's emerging integrated Marine Environmental Policy was designed to draw heavily on regional procedural and institutional mechanisms from the outset. The developing regional measures raise the question whether they contribute to improving institutional structures governing the use and conservation of EU waters. This article analyzes the existing and future regional measures of the two policies and their varying purposes and scopes. It develops a typology for categorizing the regional aspects and examines the effects of regional measures on EU institutions and the theoretical EU integration debate.

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1. Introduction

EU legislature increasingly recognizes that 'one size fits all solutions' cannot adequately address special requirements and situations throughout the 27 Member States with their varying interests and needs, e.g. taking into account different socio-economic and ecologic conditions. Accordingly, the EU has adopted bespoke measures in the last decades which are more sensitive to regional conditions and requirements. Such measures may vary largely in purpose, function, and scope and are either directed at specific regional areas or establish institutional mechanisms facilitating regional interests within EU policy making and implementation. They include, for example, transboundary coordination and cooperation requirements for different groups of Member States or stakeholders composed on the basis of a regional fit.

This raises the question of how the developing notion of 'regional measures' fits into the existing institutional and legal architecture of the EU, particularly with a view to the distribution of tasks, competences and obligations. It may also be asked whether the emerging regional arrangements insert an additional layer of institutionalized decision making or implementation to the EU's institutional setup. The answer to this question also contributes to the theoretical discussion on EU integration, which will briefly be outlined in the last section of the paper.

We use the examples of the Common Fisheries Policy (CFP) and the Marine Environmental Policy (MEP), as in both, regional measures play an increasingly important role. The respective measures

are described and analyzed in depth. Both policies are distinct in terms of age, content, and the degree of integration. The CFP is one of the oldest and most integrated EU policies and mainly concentrates on managing and allocating fishing opportunities among Member States. By contrast, EU Marine Environmental Policy is just emerging, yet quite disintegrated, based on shared competences and aims at environmental conservation. Despite these fundamental differences, both of these policies increasingly make use of regional measures and concepts in a systematic way. While regionalization is currently being seriously discussed within the ongoing reform process of the CFP, it has already become a core aspect of the EU's more recent Marine Environmental Policy, particularly within its most comprehensive piece of legislation, the Marine Strategy Framework Directive (MSFD). Regional measures under both policies are based explicitly on the rationale of ecosystem requirements and a variety of socio-economic conditions throughout the EU. The increasing recognition of varying regional needs should also help to overcome persistent deficits in EU policy making and implementation. Moreover, it is now assumed that policies which are more sensitive to specific regional conditions are simpler, cheaper and more effective – technically, economically as well as ecologically.

The paper proceeds as follows. After outlining the content and major governance challenges of the Common Fisheries Policy and the Marine Environmental Policy, the purpose and scope of regional measures in the two policies will be thoroughly examined. Based on this descriptive part, an analysis follows, starting with a typology according to the content, procedure and degree of institutionalization of the different regional measures. A short summary on the development of the CFP and the MSFD helps understanding

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the different regional framings. In a last step, the potential impacts on the EU political system as well as on the multi-level governance approach are discussed.

2. Content and governance challenges of the Common Fisheries Policy and the Marine Environmental Policy

Governing the oceans depicts a major challenge for the EU. The problems include the interconnected nature of marine ecosystems, their fluctuating resources, the transboundary effects of human activities in the sea, as well as the lack of a comprehensive integrating framework for various existing sectoral marine conservation measures. The CFP and the emerging MEP are examples of two different regulatory approaches in the field. On one side they share their geographical scope, the marine ecosystem. To a limited extent, they also serve the same objective, i.e. to prevent the disruption of the ecological equilibrium by destructive (fishing) practices (Com (2001) 143:4). On the other side, though there may be overlap between fisheries management and environmental protection, both have their own distinctive scope and content.¹ The quite different regulatory backgrounds and scopes will be described in the following section in greater detail.

2.1. The Common Fisheries Policy

In general terms, the CFP is concerned with the sustainable exploitation of living aquatic resources. This concern requires the EU to take a broad range of political and legislative actions in a range of policy areas. Measures can be grouped into three categories: fisheries management, structural policies, and market organization. To manage stocks sustainably, the EU in particular limits fishing opportunities and apportions the available resources among its Member States, who then allocate their share to their own fishing industry (Art. 20 (3) Reg. 2371/02). Regarding structural policies, the EU provides funding to support the fishing sector in adapting its production capacities to correspond to available resources, all the while promoting efficient production ((EC) No. 1198/06). To organize the market in fisheries products, the EU takes measures to match supply and demand as well as to stabilize markets to mitigate the effects of an unstable supply of fisheries resources ((EC) No. 104/2000; see also COM (2011) 416 final). All of these actions are based on the provisions on agriculture and fisheries in Arts. 38–44, and Art. 355 of the Treaty on the Functioning of the European Union (TFEU).² Based on this competence, the EU also supports the implementation of management, structural, and market measures by adopting a complex system of control and enforcement measures, and by negotiating and concluding international agreements. Overall, the TFEU assigns extensive legislative powers to the EU in the area of fisheries policy. The EU particularly holds an 'exclusive competence' to regulate the conservation of marine biological resources.³ Besides, although its legislative powers in the areas of structural policies and market organization are not exclusive (but shared), they are far reaching (see Art. 4(2)(d) TFEU; see also Markus, 2009: 37–38). While legislative powers of the EU are substantial, executive powers primarily lie with Member States,

who implement, control and enforce the CFP law (Long and Curran, 1998; see also Churchill and Owen, 2009; Markus, 2009).

Although the CFP is one of the longest-standing and most integrated, it is at the same time one of the most criticized of the EU's policies (Churchill and Owen, 2009). Despite continued efforts to improve the CFP, its failure to manage stocks at economically and environmentally sustainable levels has continued to threaten the functioning and legitimacy of EU fisheries legislation for almost three decades. In April of 2009, the Commission issued a Green Paper on the Reform of the CFP in which it once again assessed and evaluated the CFP's major governance challenges (COM (2009)163 final). The Commission identified five central structural failings: persistent overcapacities (too many vessels for too few fishes), imprecise policy objectives (no clear rules guiding the legislature management), flaws within the decision-making system (basically all management decisions are decided by the overly politicized Council), a lack of responsibility in the industry (lack of stakeholder involvement), and a persistent culture of non-compliance (particularly the weak control and enforcement by Member States) (COM (2009)163 final: p. 8; Markus and Salomon, 2012; Payne, 2000).

2.2. Marine Environmental Policy

Marine Environmental Policy is a relatively new regulatory field for the European Union. Despite the fast development of the EU's general environmental policy, the protection of the marine environment has long played a minor role. Respective measures had primarily been adopted in different sectoral policies and under varying institutional settings (with different legal bases, different competences, and different actors). These policies primarily include the CFP, the Common Agricultural Policy, the EU Transport Policy, the EU Fresh Water Policy and even the Internal Market (COM(2002) 539 final). To this day, a broad set of secondary legislation has been adopted under such policies. Measures have targeted marine pollution from land-based sources, waste discharges, shipment of radioactive substances, vessel source pollution, as well as the protection of marine ecosystems from fishing activities (Frank 2007; Markus et al., 2011). In contrast to the CFP, these measures are based on a set of different TFEU⁴ provisions.

However, the development of a Marine Environmental Policy has gained momentum since the adoption of the Marine Strategy Framework Directive (MSFD) which now constitutes the central legal instrument that integrates and develops existing marine environmental protection law.⁵ Its main goal is to establish a comprehensive framework within which 'Member States shall take the necessary measures to achieve or maintain good environmental status in the marine environment by the year 2020 at the latest' (MSFD, Art. 1(1)). To achieve its goals, a 'transparent and coherent legislative framework is required' which enables coordinated, consistent and properly integrated action with 'action under other Community legislation and international agreements' (Recital 9, MSFD).

¹ This is also recognized within the jurisdiction of the ECJ, see Case C-405/92, *Mondiet v. Armement Islais* [1993] I-6133, para. 24; for other policy areas see, Case 62/88 *Greece v. Council* [1990] ECR I-1527, paras. 5–23; Case C-336/00, *Huber* [2002] I-7699, paras. 29–37; see particularly Case C-164-165/97, *Parliament v. Council* [1999] ECR I-1139, paras. 8–20.

² Until the enactment of the Lisbon Treaty in December 2009, the relevant articles were Arts. 32–38 TFEU – particularly Art. 37(2), third paragraph as well as Art. 299(1) and (2).

³ See Arts 2 (1) and 3 (1) (d) TFEU; see also Case 804/79 *Commission v. United Kingdom* [1981] ECR 1045 para. 1; Case 141/78 *France v. United Kingdom* [1979] ECR 2923 para. 1 (summary); Case 405/92 *Mondiet* [1993] ECR I-6133 para 12.

⁴ According to the European Court of Justice (ECJ), the choice of the legal basis must be founded on objective elements and open for judicial review by the ECJ. Where a measure is adopted to pursue two or even more objectives, the ECJ refers to its "centre of gravity theory", i.e. Art. 192 is the correct legal base where the main emphasis of a measure lies on environmental protection. Where it lies on agriculture, fisheries or the free movement of goods, other TFEU provisions, legislative procedures and competence orders apply, see Case C 155/91 *Commission v. Council* [1993] ECR I-939, paras. 5–21; Case 165/87, *Commission v. Council* [1988] ECR 5545, para. 5; Case 176/03, *Commission v. Council* [2004] ECR I-11671, para. 51; Cases 188-190/80, *France, Italy and United Kingdom v. Commission* [1982], ECR 2545, para. 6.

⁵ It is the most developed part of the EU's emerging IMP and is widely referred to as its "environmental pillar", see MSFD, Recital 3; see also Markus et al. (2011) and Juda (2010).

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