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# A Legal Perspective on the Value of Scotland's EU Membership for Sustainable Fisheries

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# A Legal Perspective on the Value of Scotland's EU Membership for Sustainable Fisheries

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## 1 Introduction

In response to the call for evidence issued by the European and External Relations Committee of the Scottish Parliament, this submission provides a legal evaluation of the environmental dimension of the EU Common Fisheries Policy (CFP) and the possible implications of 'Brexit' for the sustainable exploitation of Scotland's living marine resources. The following analysis is based on the premise that the UK fishing industry is not a homogenous whole, but an amalgamation of a broad range of diverse — and potentially divergent — interests, which should be reflected in the outcome of any future negotiations with the EU. **The Scottish industry in particular has its own unique features** as regards the structure and characteristics of its fleet,<sup>1</sup> the fishing opportunities its vessels are engaged in,<sup>2</sup> the intensity of its dependence upon EU markets,<sup>3</sup> and the immense value of its aquaculture exports,<sup>4</sup> to name but a few. Against this background, this submission will show that **adherence to EU environmental legislation and fishery management principles and practices holds significant commercial potential for Scotland's fisheries (§2).**

Moreover, the recent history of the Scottish industry has seen efforts towards sector-building being undertaken simultaneously with efforts towards polity-building, with the transition

<sup>1</sup> S. Dixon (ed.) (2015) UK Sea Fisheries Statistics 2014, Marine Management Organisation, p. 11.

<sup>2</sup> Ibid, p. 12.

<sup>3</sup> D. Baldock et al. (2016) The potential policy and environmental consequences for the UK of a departure from **The place of useful learning**

### Key findings:

- Today's fisheries management is inevitably based on **supranational and transboundary arrangements**, including through global and regional fora in which the EU as the world's largest fisheries market exercises considerable power. It is uncertain whether the UK will be able to play a significant role in these fora outside the EU.
- The EU has a legal system based on **successive improvements to legally enforce ambitious international concepts** such as the precautionary principle and the ecosystem-based approach to fisheries management. In addition, EU law attempts to **synergistically implement its Common Fisheries Policy (CFP) and general environmental law**. Outside of the EU, Scottish experience and research related to sustainable fisheries would not contribute to further reforms of the EU Fisheries Policy.
- The UK shares most of its major fish stocks with neighbouring States. In the EU context, the political tensions inherent in any effort to regulate and distribute fishing quotas for such shared stocks are largely diffused through the application of the relative stability principle as well as the principle of equal access. Even though these principles are problematic, stock distribution and access to the fishing grounds of other Member States would be subject to various **spatial and quantitative restrictions** that will likely negatively impact the British fishing industry.
- Adherence to jointly set quantitative catch restrictions also has a considerable commercial value, as it is often a condition for **obtaining sustainability certification**.
- It is uncertain whether access to **EU funding** under the European Structural and Investment Funds, which is significant for the sustainable development of the fisheries and aquaculture sectors, and is increasingly relevant for Scotland's island communities, will still be available to Scottish fishing communities.

the European Union, Institute for European Environmental Policy, p. 89.

<sup>4</sup> Scottish Government, Scotland's National Marine Plan, para 7.7. Available online at: <http://bit.ly/2ci3Lw1>.

towards sustainable fishing practices being regarded as conditional upon the evolution of Scotland into a devolved or even an entirely independent nation.<sup>5</sup> Accordingly, this submission will focus on the trade-off that lies at the heart of the CFP, whereby supranationalism and the liberalisation of access to fishing grounds and fishery resources serve as the inescapable *quid pro quo* for the liberalization of trade in fisheries products.<sup>6</sup> By contextualising this trade-off within the broader framework laid down by international environmental law and the international law of the sea, this submission will show that **supranationalism and transboundary cooperation** are core elements of modern fisheries management (§3).

From an environmental perspective, in the years that followed the adoption of the CFP, it became increasingly apparent that this policy was not only based on a number of false scientific premises as regards the availability and resilience of fish stocks,<sup>7</sup> but also contributed to the perpetuation and, in some cases, the aggravation of unsustainable fishing practices. On the other hand, **“the history of the EU’s fishing policy is one of criticism and improvement,”**<sup>8</sup> with every reform of the CFP succeeding in bolstering the policy’s environmental components.<sup>9</sup> This submission will attempt to map out the progress that has been made in this connection, while also highlighting the contribution of other EU environmental policies (§4) and of funding opportunities under the European Maritime and Fisheries Fund (EMFF) (§5) to the sustainable management of fishery resources. **The financial and regulatory incentives that are currently provided by the CFP, as well as the broader legal and institutional framework of the EU, appear very significant for supporting the role of Scottish fishermen as stewards of marine ecosystems.** The available options for preserving these incentives — or, alternatively, for creating equivalent mechanisms to substitute

them — should thus be one of the *foci* of the public discourse on Brexit in Scotland.

## 2 Allocation of fishery resources under EU Law

Since the modern CFP was launched in 1983,<sup>10</sup> fishing opportunities have been allocated among Member States on the basis of the ‘**relative stability principle**,’ which seeks to ensure that the position of the fishing industry of each individual Member State is maintained over time, irrespective of any changes that might occur in the availability of stocks.<sup>11</sup> When the relative stability principle was first introduced, it took into account historic catches, the loss of opportunities for some Member States as a result of the extension of national fishing zones to 200 nautical miles in the mid-1970’s, and the need to protect particular regions where local populations were especially reliant on the fishing industry. The latter element is reflected in the current CFP, which provides that the implementation of the relative stability principle should “safeguard and take full account of the particular needs of regions where local communities are especially dependent on fisheries and related activities.”<sup>12</sup> This provision embodies the so-called ‘Hague Preference,’ which was established in 1976<sup>13</sup> with a view to ensuring that **certain Member States would be entitled to increased quotas for a number of key stocks that support fishing-dependent communities — an arrangement that the UK, and in particular Scotland,**<sup>14</sup> has historically benefitted from.<sup>15</sup>

The relative stability principle was introduced in parallel with the concept of ‘total allowable catch’ (TAC), which represents the specific quantity that can be taken from a species or group of related species in a certain geographic region on a yearly basis. TACs are set at the EU

<sup>5</sup> C. Carter (2014) The transformation of Scottish fisheries: Sustainable interdependence from ‘net to plate’, *Marine Policy* 44, p. 132.

<sup>6</sup> R. R. Churchill (1987) *EEC Fisheries Law*, Dordrecht: Martinus Nijhoff, p. 132.

<sup>7</sup> D. Symes (1997) The European Community’s Common Fisheries Policy, *Ocean & Coastal Management* 35:2-3, p. 143.

<sup>8</sup> G. Carpenter, B. Stewart (2016) What has the EU done for UK fish? (Friends of the Earth, 1 April 2016). Available online at: <http://bit.ly/2cmV4Rz>.

<sup>9</sup> For an overview of the measures taken under the latest CFP reform to strengthen the policy’s environmental dimension see D. Baldock et al. (2016) *supra*, n. 3, p. 85.

<sup>10</sup> Regulation (EEC) No. 170/83.

<sup>11</sup> The relative stability principle is enshrined in Articles 16 and 17 of Regulation (EU) No. 1380/2013.

<sup>12</sup> Regulation (EU) No. 1380/2013, Preamble, paras 35-37.

<sup>13</sup> Council Resolution of 3 November 1976 on certain external aspects of the creation of a 200-mile fishing zone in the Community with effect from 1 January 1977.

<sup>14</sup> A. Wright (2004) *Who Governs Scotland?*, Routledge, p. 119.

<sup>15</sup> HM Government (2014) *Review of the Balance of Competences between the United Kingdom and the European Union*, Fisheries Report, p. 14.

level based on the scientific advice provided by the International Council for the Exploration of the Sea (ICES) and the Scientific, Technical and Economic Committee on Fisheries (STECF) with reference to the biological status and optimal catch limits of different commercial stocks as well as the predicted socioeconomic impact of different TAC packages. Having received this advice, the European Commission consults with Regional Advisory Councils (RACs) as well as with any third countries that have a vested interest in the regulated stocks, including Iceland, the Faroe Islands and Norway. The latter consultations are most often carried out under the auspices of the competent Regional Fisheries Management Organizations (RFMOs). The input received by the Commission through these processes is ultimately incorporated into a set of suggestions addressed to the Council of Fisheries Ministers of EU Member States, who have the power to decide on the legally binding TACs.<sup>16</sup> TACs are subsequently divided into national fishing quotas, with a different allocation percentage being applied per Member State for each stock (the so-called 'relative stability key'). National quotas are then distributed by each Member State based on "objective criteria," including those of socioeconomic and environmental nature.<sup>17</sup>

The fact that the final, legally binding decision on TACs emerges from what is a quintessentially political process among Fisheries Ministers has allowed Member States to argue for quotas that have systematically exceeded the levels suggested by the Commission.<sup>18</sup> The relative stability principle has been identified as a contributing factor in this phenomenon, as it forces Member States seeking a higher national quota to press for an increase of the overall Community TAC.<sup>19</sup> This might explain why excess TACs are mostly observed in areas where the relative stability principle puts pressure on States to maintain their historically high quotas: in terms of volume, Denmark, the UK and Spain

accounted for just under half of the Union's excess TACs between 2001 and 2015.<sup>20</sup> In terms of geographic representation, this trend has been primarily observed in Western Member States, and in particular those among them that have a claim in the major fishing areas of the Northeast Atlantic ecoregion.<sup>21</sup> For its part, **the EU is the provider of both the political platform that allows for these detrimental practices to occur and that develops the legal safeguards that can be used to curb them.** The latter include the application of the precautionary approach to fisheries management and the obligation to ensure that marine biological resources are exploited in such a manner, so as to allow for the restoration and maintenance of the populations of harvested species above levels that can produce maximum sustainable yield (MSY).<sup>22</sup>

There is a general consensus among commentators that, should the UK cease to be a Member of the EU, quotas would be maintained as the principal mechanism for allocating fishery resources.<sup>23</sup> Before exploring how quota allocation could be carried out after Brexit, it is worth noting that **adherence to quantitative catch limits can also have considerable commercial value, as it is often a crucial condition for obtaining sustainability certification.**<sup>24</sup> The 'mackerel wars' of recent years between the UK, Iceland and the Faroe Islands serve as a cautionary tale in this respect. The breakdown of TAC-setting and quota allocation arrangements eventually led to the suspension of the certification that had been awarded to the stock by the Marine Stewardship Council (MSC).<sup>25</sup><sup>26</sup> **This dimension of the quota system is bound to be exceptionally significant for Scotland's fisheries, since a remarkable 90% of the Scottish pelagic industry has already been certified by the MSC.**<sup>27</sup>

<sup>16</sup> G. Carpenter et al. (2016) Landing the blame: The influence of EU Member States on quota setting, *Marine Policy* 64, p. 10.

<sup>17</sup> Regulation (EU) No. 1380/2013, Articles 16 and 17.

<sup>18</sup> F. Franchino & A. J. Rahming (2003) Biased Ministers, Inefficiency, and Control in Distributive Policies: An Application to the EU Fisheries Policy, *European Union Politics* 4:1, pp. 11–36.

<sup>19</sup> COM (2009)163 final (22.4.2009), p. 16.

<sup>20</sup> G. Carpenter et al. (2016) *supra*, n. 16, p. 13.

<sup>21</sup> *Ibid*, p. 11.

<sup>22</sup> Regulation (EU) No. 1380/2013, Article 2(2).

<sup>23</sup> DEFRA Minister George Eustice, who was a firm supporter of the 'Vote Leave' campaign and a vocal critic of

the CFP, has stated that "while quotas are not perfect, they are the only system that works in a shared fishery with mobile species." To this effect, see G. Eustice, *The Fishing Industry and Brexit* (13 April 2016). Available online at: <http://bit.ly/2bXWsJB>.

<sup>24</sup> S. Walmsley (2016) Brexit: Where next for UK fisheries?, *ABP Mer*, p. 1.

<sup>25</sup> C. Davies, Britain prepares for mackerel war with Iceland and Faroe Islands (*The Guardian*, 22 August 2010). Available online at: <http://bit.ly/2bTxPyF>.

<sup>26</sup> Mackerel wins back its certified sustainable status (Marine Stewardship Council, May 11 2016). Available online at: <http://bit.ly/2c9EZkL>.

<sup>27</sup> C. Carter (2014) *supra*, n. 5, p. 131.

### 3 Allocation of fishing rights and the duty to cooperate under international law

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) provides that, within the Exclusive Economic Zone (EEZ), coastal States have “sovereign rights for the purpose of exploring and exploiting, conserving and managing” living natural resources.<sup>28</sup> In exercising these rights, the coastal State shall have due regard to the rights of other States.<sup>29</sup> Moreover, when granting other States access to its EEZ, the coastal State shall take into account, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned as well as the need to minimise economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.<sup>30</sup>

Where the same stock occurs within the EEZs of two or more coastal States, these States “shall seek, either directly or through appropriate subregional or regional organisations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks.”<sup>31</sup> Where a stock occurs within the EEZ as well as in an area beyond and adjacent to this zone, the coastal State is bound by an analogous duty to cooperate with the States fishing for the stock in the adjacent area.<sup>32</sup> Cooperation is also foreseen in the case of highly migratory species.<sup>33</sup>

The obligation of transboundary cooperation is thus a key component of the ecosystem-based approach,<sup>34</sup> which requires fisheries management to be carried out on an ecologically meaningful scale that follows the natural boundaries of environmental processes instead of the arbitrary boundaries of territorial borders. This management approach is enshrined in key instruments: the 1995 Code of Conduct for Responsible Fisheries of the Food and Agriculture Organization (FAO), the 1995 United Nations Fish Stocks Agreement (UNFSA),<sup>35</sup> and the Decisions adopted by the States Parties to the 1992 Convention on Biological Diversity (CBD).<sup>36</sup>

Due to the geographic position of the UK, most of its major fish stocks are shared with neighbouring States.<sup>37,38</sup> Within the context of the EU, the political tensions inherent in any effort to regulate and distribute such stocks are largely diffused through the application of the relative stability principle as well as the principle of ‘equal access’,<sup>39</sup> which requires Member States to ensure equal conditions of access to and use of the fishing grounds situated in the waters within their jurisdiction for all EU fishing vessels.<sup>40</sup> Small-scale British fishermen, who are largely unable to benefit from the fishing opportunities provided by the principle of equal access, maintain that the CFP forces them to compete with foreign fishermen for what they perceive to be a dwindling ‘national’ resource. The reality of the situation is that, **should the principles of equal access and relative stability cease to apply following the UK’s exit from the EU, the access of British vessels to the fishing grounds of other Member States**

<sup>28</sup> UNCLOS, Article 56(1)(a).

<sup>29</sup> UNCLOS, Article 56(2).

<sup>30</sup> UNCLOS, Article 62(3).

<sup>31</sup> UNCLOS, Article 63(1).

<sup>32</sup> UNCLOS, Article 63(2).

<sup>33</sup> UNCLOS, Article 64(1).

<sup>34</sup> Regulation (EU) No. 1380/2013, Article 2(3).

<sup>35</sup> UNFSA, Article 5(d) and (e).

<sup>36</sup> CBD, COP 7 Decision VII/11.

<sup>37</sup> In a research paper prepared for the House of Commons in 1996, Barclay predicted that, had the EU not existed or its legislation not extended to fishing, the proximity of the UK to other States would have forced it to set up some system of joint access even in areas within 200 nautical miles from the coast. To this effect, see C. Barclay (1996) *The EU Common Fisheries Policy*, Science and Environment Section, House of Commons Library, Research Paper No. 96/6, p. 15.

<sup>38</sup> V. M. Trenkel (2014) *Comparative ecology of widely distributed pelagic fish species in the North Atlantic: Implications for modelling climate and fisheries impacts*, *Progress in Oceanography* 129:B, pp. 219–243.

<sup>39</sup> As part of their accession agreements, the candidate countries negotiated a ten-year derogation from this principle that would allow them to restrict fishing in waters situated within a limit of 6 nautical miles calculated from the baselines of their coasts. To this effect, see Council Decision on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom (OJ L 73, 27.3.1972), Articles 100 and 101. This derogation, has since been extended to 12 nautical miles (except where Member States had historic access) and renewed a number of times, most recently until the end of 2022 by Article 5(2) of Regulation (EU) No. 1380/2013. It is worth mentioning that the role played by the right of establishment and the principles of proportionality and non-discrimination on grounds of nationality in the context of the EU fisheries policy was at the core of the seminal judgment of the European Court in Case C-221/89 *Factortame* [1991] ECR I-3905.

<sup>40</sup> Regulation (EEC) No. 2141/70, Preamble and Article 2.

would be subject to spatial and quantitative restrictions that will negatively impact on the British fishing industry.<sup>41</sup>

The example of Norway is pertinent in this regard, as the bilateral agreement concluded with the EEC in 1980 provided for a gradual reduction in the fishing rights allotted to the vessels of each Party with reference to the areas falling within the jurisdiction of the other, with a view to reaching a “mutually satisfactory balance in their reciprocal fisheries relations.”<sup>42</sup> Based on this ‘umbrella’ agreement, the EU and Norway have been renegotiating the framework governing the management of shared stocks and in particular the cooperative elaboration of the corresponding TACs on an annual basis. The main criterion for the allocation of TACs among the two parties is that of ‘zonal attachment,’ i.e. the spatial distribution of the stock over time and over its various life stages.<sup>43</sup> In the case of the UK, even though the criterion of zonal attachment would most probably be applied together with relevant economic indicators and historical fishing rights,<sup>44,45</sup> it might still lead to a less advantageous outcome for the British industry than the current arrangement based on the principles of the CFP.

Negotiations pertaining to the management of those stocks that are shared between the UK, the EU and third countries will most likely be carried out in the context of the competent RFMOs, of which the North East Atlantic Fisheries Commission (NEAFC) is the most prominent.<sup>46</sup> Since fisheries management is an exclusive competence of the Union,<sup>47</sup> it is often only the EU that has the right to become a member of these organisations. If, however, an RFMO has an environmental mandate that goes beyond fisheries management — and granted that environmental policy-making constitutes a shared competence between the Union and the

Member States<sup>48</sup> — both will become members and have the right to intervene based on a mutually agreed allocation of powers.<sup>49</sup> The Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR) is a characteristic example of such an RFMO, while similar arrangements govern participation in the fisheries advisory bodies that have been established under Article VI of the FAO Constitution.<sup>50</sup>

The UK is already playing a leading part in a number of RFMOs, albeit as a Member State of the EU. It may thus be expected that the UK will be required to **re-apply for membership**,<sup>51</sup> in which case it will enter into the obligations that are currently held by the EU, including as regards financial contributions to the budget of the corresponding organisation, the transposition of any recommendations it might issue, and the implementation of the conservation and management measures adopted under its auspices.<sup>52</sup> **On the other hand, the individual bargaining power of the UK will likely be limited, since the status of the EU as the world’s largest fisheries market gives it a decisive role in international fora.**<sup>53</sup> Scotland, which has contributed to the formulation of the EU’s fisheries policy from its position within the UK,<sup>54</sup> will inevitably be affected by this turn of events. The reality of modern fisheries management makes it so that the ability of States to make entirely sovereign decisions over fisheries and act unilaterally is generally limited. This would be true for Scotland regardless of whether it participated in the aforementioned fora through the UK or the EU. What would differ is arguably the amount of influence exerted by the political entity that would act as the mouthpiece of Scottish interests in each case.

<sup>41</sup> S. Walmsley (2016) *supra*, n. 24, p. 3.

<sup>42</sup> Agreement on Fisheries between the European Economic Community and the Kingdom of Norway, OJ L 226, 29.8.1980, pp. 48–50, Article 2(1)(b); Annex, paras 1 and 3.

<sup>43</sup> S. Walmsley (2016) *supra*, n. 24, p. 3.

<sup>44</sup> D. Baldock et al. (2016) *supra*, n. 3, p. 93.

<sup>45</sup> D. Dankel et al. (2015) Allocation of Fishing Rights in the NEA, Discussion Paper, TemaNord 2015:546, p. 65.

<sup>46</sup> I. Popescu (2016) Beyond the European seas: The external dimension of the Common Fisheries Policy, European Parliamentary Research Service (EPRS), p. 12. Other RFMOs that are active in the region and focus on specific species include the International Commission for the Conservation of Atlantic Tunas (ICCAT) and the North Atlantic Salmon Conservation Organisation (NASCO).

<sup>47</sup> TFEU, Article 3(1)(d).

<sup>48</sup> TFEU, Article 4(2)(e).

<sup>49</sup> E. Penas Lado (2016) *The Common Fisheries Policy: The Quest for Sustainability*, John Wiley & Sons, pp. 152 *et seq.*

<sup>50</sup> E. J. Molenaar (2003) Netherlands fisheries in a European and international legal context, *Netherlands Yearbook of International Law* 2002, pp. 159. See, e.g., the Fishery Committee for the Eastern Central Atlantic (CECAF), instituted by FAO Council Resolution 1/48 (June 1967); Western Central Atlantic Fishery Commission (WECAFC), instituted by FAO Council Resolution 4/61 (November 1973).

<sup>51</sup> D. Baldock et al. (2016) *supra*, n. 3, pp. 89–90.

<sup>52</sup> COM (1999) 613 final, 08.12.1999, p. 10.

<sup>53</sup> HM Government (2014) *supra*, n. 15, p. 43.

<sup>54</sup> HM Government (2014) *Scotland analysis: EU and international issues*, pp. 7 and 13.

## 4 Marine environmental protection under EU Law

The long-term environmental sustainability of fishing and aquaculture activities, and the conservation of marine biological resources have been elevated into explicit objectives of the CFP.<sup>55</sup> As regards the latter objective, it is worth noting that, even though fisheries constitute an area of shared competence between the EU and Member States,<sup>56</sup> the conservation of marine biological resources falls within the scope of the Union's exclusive competence.<sup>57</sup> The EU is thus authorized to adopt a broad range of conservation measures, including those aimed at adapting the fishing capacity of fishing vessels to available fishing opportunities; incentives to promote fishing methods that contribute to more selective and less impactful fishing; measures pertaining to the characteristics of fishing gears and the rules governing their use; and restrictions upon fishing activities within spatially and temporally demarcated boundaries with a view to protecting vulnerable marine resources.<sup>58</sup>

Due to the fact that the conservation of marine biological resources is an exclusive EU competence, Member States have often been unable to adopt the measures necessary for meeting their obligations under the Birds<sup>59</sup> and Habitats<sup>60</sup> Directives in the marine context. In Scotland, for instance, marine Special Areas of Conservation (SACs), i.e. protected areas designated under the Habitats Directive with reference to ecologically significant habitats or species, have been primarily targeted at marine species that are not involved in commercial fishing, such as the bottlenose dolphin, the common (Harbour) seal and the grey seal. Fish, on the other hand, have been 'incidentally' protected through SACs targeted at marine habitats, including coastal lagoons, estuaries, mudflats, reefs and sandbanks.<sup>61</sup> That being said, the reformed CFP has granted Member States some

much-needed leeway in adopting the conservation measures required by the Union's environmental legislation,<sup>62</sup> thus settling the "dilemma of competence" between Member States and the EU.<sup>63</sup> It should, however, be borne in mind that **fish stocks which are distributed over large areas (e.g. Atlantic cod) or are highly migratory (e.g. mackerel) cannot be effectively protected through the spatially restricted measures foreseen by the Birds and Habitats Directives.**<sup>64</sup>

In addition to the aforementioned Directives, the CFP coexists with a number of other policies that contribute to the protection of the marine environment, including the Marine Strategy Framework Directive, which creates a legal obligation for Member States to take the necessary measures to achieve or maintain the good environmental status of European marine waters by 2020;<sup>65</sup> the Water Framework Directive, which provides for the attainment of the good qualitative and quantitative status of all European water bodies;<sup>66</sup> the Maritime Spatial Planning Directive, which seeks to contribute to the concerted and sustainable development of various marine and maritime economic sectors as well as to the preservation, protection and improvement of the marine environment;<sup>67</sup> and, finally, the Environmental Impact Assessment Directive, which also provides for the Strategic Environmental Assessment of plans and programmes (EIA and SEA respectively).<sup>68</sup> In this connection, it is noteworthy that the CFP acknowledges the use of "impact assessments" as a good governance principle.<sup>69</sup> The relevant provision of the CFP should be understood to encompass not only EIAs and SEAs, but also the "appropriate assessment" laid down by the Habitats Directive, which applies to plans and projects that are not directly connected with or necessary for the management of the areas comprising the Natura 2000 network, but are likely to have a significant effect thereon.<sup>70</sup>

<sup>55</sup> Regulation (EU) No. 1380/2013, Article 2(1) and (2).

<sup>56</sup> TFEU, Article 3(1)(d).

<sup>57</sup> TFEU, Article 4(2)(d).

<sup>58</sup> Regulation (EU) No. 1380/2013, Article 7.

<sup>59</sup> Directive 2009/147/EC

<sup>60</sup> Directive 92/43/EEC.

<sup>61</sup> More information on Scottish marine SACs is available on the website of Scottish Natural Heritage: <http://bit.ly/2bXWWPN>.

<sup>62</sup> Regulation (EU) No. 1380/2013, Article 11(1).

<sup>63</sup> J. Leijen (2011) The Habitats and Birds Directives versus the Common Fisheries Policy: A Paradox, *Mercourios* (Utrecht Journal of International and European Law) 27:73, pp. 19-45.

<sup>64</sup> A. Kempf (2010) Ecosystem approach to fisheries in the European context – history and future challenges, *Journal of Applied Ichthyology* 26:1, p. 104.

<sup>65</sup> Directive 2008/56/EC.

<sup>66</sup> Directive 2000/60/EC.

<sup>67</sup> Directive 2014/89/EU.

<sup>68</sup> Directive 2001/42/EC.

<sup>69</sup> Regulation (EU) No. 1380/2013, Article 3(i).

<sup>70</sup> Council Directive 92/43/EEC, Article 6(3); Case C-127/02 *Waddenzee* [2004] ECR I-7405.

The synergistic implementation of the aforementioned policies and their infusion into the CFP is foreseen by the principle of environmental integration, which is enshrined in Article 11 TFEU. This principle serves an “enabling function,” which allows environmental measures to be adopted under non-environmental policies, as well as a “guidance function,” which allows environmental principles to be applied in a non-environmental context.<sup>71</sup> Even though the CFP is still in the process of integrating fisheries management and environmental conservation, the EU has “gradually managed to legally enforce environmental principles that are still merely an aspiration in international law,” including the precautionary principle and the ecosystem-based approach.<sup>72</sup> In exercising its devolved competences in the areas of the environment and fisheries, the Scottish Government has at times been inspired by EU law objectives to pursue policies that are more proactive than those adopted elsewhere in the UK.<sup>73</sup> **By distancing itself from any future efforts to reform the CFP — which, judging from the current track record, will likely set more ambitious objectives for sustainable fisheries management in light of lessons learnt in implementation and intervening international developments — Scotland may thus be deprived of a level of ambition and external accountability that may not be guaranteed at the national level.**

## 5 Funding

The EU provides financial support to the fishing industry primarily through the EMFF. The objectives of this Fund are meant to be pursued in line with the Union’s efforts to promote the preservation, protection and improvement of the quality of the environment, as set out in the provisions of Articles 11 and 191 TFEU.<sup>74</sup> More specifically, funding under the EMFF must contribute to the attainment of the Union’s priorities for the sustainable development of fisheries and aquaculture, including the reduction of the impact of fisheries on the marine environment; the protection

and restoration of aquatic biodiversity and ecosystems; and, perhaps most importantly, the achievement of a balance between fishing capacity and available fishing opportunities.<sup>75</sup> With respect to the latter element, the European Court of Auditors, however, has found that investments on board fishing vessels funded by the EMFF have in some cases increased the ability of individual vessels to catch fish, thus further exacerbating the problem of fleet overcapacity.<sup>76</sup>

Funding under the EMFF is allocated to Member States based on the size of their fishing industries. Each individual State proceeds to draw up an operational programme detailing how the funding will be spent. Once the operational programme is approved by the European Commission, it is up to the national authorities to decide which projects will be funded. Adopted on 3 December 2015, the UK’s Operational Programme for the period 2014-2020 entails a total budget of € 309,993,982, of which € 243,139,437 is provided by the EU (co-funding of 78.43%).<sup>77</sup> The funds allocated to Scotland, which amount to approximately €107,000,000, will focus on sustainable economic growth in the fisheries and aquaculture sectors, and assisting communities to deliver economic benefits during the transition phase of the CFP reform programme.<sup>78</sup> During the early stages of implementation, particular focus will be given to investment which supports, *inter alia*, the operationalization of the landing obligation; technical innovation, including for the purposes of improved selectivity; the development of the inshore sector; and access to markets for Scottish seafood products.<sup>79</sup>

**Following the UK’s exit from the EU, it remains to be seen if the British and Scottish Governments will undertake efforts to ensure that an analogous funding scheme is set up, as the cumulative effects of ‘disentangling’ the British fishing industry from the CFP are bound to have significant economic consequences.** These consequences will be particularly palpable in **Scotland’s island communities**, including those of the Shetland and

<sup>71</sup> J. H. Jans (2011) Stop the Integration Principle?, *Fordham International Law Journal* 33:5, pp. 1540-1541.

<sup>72</sup> D. Baldock et al. (2016) *supra*, n. 3, p. 86.

<sup>73</sup> T. Travers (2016) Implications of a Brexit for UK National Governance and Local Government: Report of the hearing held on 13th April, 2016, p. 10.

<sup>74</sup> Regulation (EU) No 1303/2013, Article 8.

<sup>75</sup> Regulation (EU) No 508/2014, Article 6.

<sup>76</sup> European Court of Auditors (2011) Have EU Measures Contributed to Adapting the Capacity of the Fishing

Fleets to Available Fishing Opportunities, Special Report No. 12, p. 26.

<sup>77</sup> European Maritime and Fisheries Fund - Operational Programme for the United Kingdom: <http://bit.ly/2bKoThZ>.

<sup>78</sup> Marine Scotland (2015) European Maritime and Fisheries Fund (EMFF), Topic Sheet No. 111 V3.

<sup>79</sup> More information can be found on the website of the Scottish government: <http://bit.ly/2c9GFKW>.



Orkney Islands and the Western Isles. These areas, which are characterized by “a number of socio-economic features combining peripherality, sparsity of population, insularity, [...] a narrow economic base, low wages, out-migration, isolated communities and limited opportunities to diversify the economic base,”<sup>80</sup> have benefitted considerably from the financial support provided by the European Structural and Investment Funds.<sup>81</sup>

It is worth noting that the special needs of islands have been acknowledged as one of the principal priorities of the Union’s economic, social and territorial cohesion policy.<sup>82</sup> A Resolution adopted by the European Parliament in February 2016 stressed the importance of cultivating synergies between the European Structural and Investment Funds and other Union instruments, “with a view to counterbalancing the handicaps of islands and enhancing their economic growth, job creation and sustainable development situation.”<sup>83</sup> The Resolution further affirmed that aquaculture, breeding and fisheries constitute an important element of local island economies, which are a source of supply for a significant part of the agro-industrial sector.<sup>84</sup> **As Scotland’s Minister for Transport and the Islands is preparing to table a draft Islands Bill which is expected to devolve more powers to the island councils, it is worth considering potential benefits for local communities from new opportunities under an ‘EU Strategic Framework for Islands.’**<sup>85</sup>

## 5 Conclusions

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The fisheries industry is highly reliant upon environmental health as a prerequisite for the abundance and resilience of fish stocks. In turn, the intrinsic characteristics of the marine environment, including the transboundary nature of many of its features and processes and the high degree of mobility exhibited by its living resources, render the elaboration of cooperative management strategies an absolute necessity. The EU is a platform for intergovernmental cooperation in and of itself, as well as a powerful international actor with a considerable amount of influence in the international fora where fisheries

governance is increasingly taking place. It is through this prism that Scotland’s future relationship with the EU must be regarded, in the context of the inevitably supranational and transboundary nature of today’s fisheries governance.

Ultimately, in order to determine whether the benefits of EU Membership for the Scottish fishing industry and marine environment outweigh the costs, it is necessary to approach the CFP as a living organism that is perpetually evolving in order to achieve a high level of environmental protection.<sup>86</sup> Today, following four decades of learning through trial and error, the CFP has overcome many of its initial shortfalls, becoming a considerably more comprehensive and environment-oriented policy. There is no reason to think that the next round of reforms will not introduce further improvements to the management mechanisms the CFP operates upon. By drawing from the rich experience gained by its fishing industry on the ground as well as the research carried out by its academic community, Scotland can make a valuable contribution to this process. Additional research within the Strathclyde Centre for Environmental Law and Governance (SCELG) will endeavour to contribute to this effort.

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<sup>80</sup> HIEP (date unknown), Response to the Consultation on the Future of Cohesion Policy, p. 2.

<sup>81</sup> Ibid.

<sup>82</sup> Article 174 TFEU.

<sup>83</sup> European Parliament resolution of 4 February 2016 on the special situation of islands (2015/3014(RSP)), para 12.

<sup>84</sup> Ibid, para I.

<sup>85</sup> Ibid, para 13.

<sup>86</sup> TFEU, Article 191(2).